Winter 1-1-2012

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Recommended Citation

Roger Coffin, *A Responsibility to Speak: Citizens United, Corporate Governance and Managing Risks*, 8 Hastings Bus. L.J. 103 (2012).
Available at: https://repository.uchastings.edu/hastings_business_law_journal/vol8/iss1/4

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A RESPONSIBILITY TO SPEAK: *CITIZENS UNITED*, CORPORATE GOVERNANCE AND MANAGING RISKS

Roger Coffin*

I. INTRODUCTION

The highly publicized ruling of the United States Supreme Court in *Citizens United v. Federal Election Commission*¹ removed a critical barrier to corporate spending in federal elections. The decision was controversial when decided, and remains so today.² This controversy stems in part from the tension between the role of the corporation as a public citizen, and the fear that corporate wealth and power will disrupt individual rights and the political process. Because corporations are separate legal entities,³ they have an interest in and obligation to protect and advance their individual economic interests. In the highly regulated environment in which most corporations compete, participating in the regulatory process may be necessary to franchise protection. One needs only to consider the health care or financial reform legislation of 2010 for examples of government programs with far-reaching ramifications for business. Thus, the reality for many corporations is that government action may have a significant effect on firm value. And, of course, to participate in the regulatory process involves participating in political discourse.

The empirical work presented in this article concludes that *Citizens United* and the right to corporate political speech will not damage stock

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1. *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

2. See Bradley Smith, *The Incumbent's Bane: Citizens United and the 2010 Election*, WALL ST. J., Jan. 25, 2011, at A15 (suggesting that *Citizens United* is a good decision because it opens the political system to change, and that the decision will likely have the effect of making congressional races more competitive in the future).

3. *Klein v. Bd. of Tax Supervisors*, 282 U.S. 19, 24 (1930).

prices, contrary to previous assumptions. The decision in *Citizens United* (and the ability to engage in corporate political speech) does not appear to negatively affect firm market value. This represents good news for both shareholders and public companies. This article creates an event study for the dates around the decision, dates close to the November 2010 mid-term election, and the election itself. Sampling various industry indexes, together with selected company stocks (which, based on public information, were known or likely to be perceived by the market as engaging in political speech), the research herein does not find support for concluding political spending is harmful to shareholders. Also selected were companies that, after the *Citizens United* decision, publicly pledged not to engage in corporate political speech. The market values of these stocks did not go up post-announcement, suggesting no market reward for foregoing a right to speak. Although subject to the limitations of exogeneity inherent in event studies, this research casts new light on the topic and adds to the body of academic literature by suggesting that *Citizens United* and corporate political speech is a nonfactor in the financial markets. These findings are consistent with the legal context of the case, which is, despite media coverage presenting *Citizens United* as drastic, more of an incremental advance than a major change in constitutional law as applied to corporations. Policy makers and reformers seeking additional restrictions on speech post-*Citizens United* should consider these findings in balancing free speech rights against perceived corporate governance issues relating to shareholder voting rights.

Moreover, in placing the First Amendment rights of corporations into a corporate governance framework, commentators have focused on the role of the shareholder.⁴ Specifically, the issue of protection of shareholder rights in the event a corporation takes a political position has been highlighted, with some academics and policymakers suggesting shareholders be given enhanced sovereignty rights through corporate governance mechanisms.⁵ These proposals include the ability to make binding shareholder resolutions, the right to prior approvals and control over budgeting, and the adoption of federal corporate governance codes which would explicitly vest political speech power in the hands of shareholders as opposed to the board or management.⁶

4. Lyman Johnson, *Law and the History of Corporate Responsibility* 13–14 (History of Corporate Responsibility Project, Working Paper No. 6, 2011), available at http://www.cebcglobal.org/uploaded_files/Corporate_Law_and_History_of_CR_-_Johnson_working_paper_-_final.pdf.

5. See generally Lucian Ayre Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833 (2005).

6. See Lucian Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech, Who Decides?*, 124 HARV. L. REV., 83, 97–111 (forthcoming 2011), available at <http://www.harvardlawreview.org/>

This article argues that these proposals are unnecessary, impractical and potentially damaging. As this article contends, and as others have likewise recognized, the modern era of corporate governance is characterized by an increase in shareholder rights.⁷ The ability of shareholders, acting individually or in groups, to influence the corporation is at its zenith. New mechanisms, including changes to the director nominating process, say-on-pay, elimination of broker voting, reduction of staggered boards and plurality voting, give the modern shareholder a louder voice than the shareholder of a generation ago.

Additionally, unlike categories of transactions in which the economic interests of a minority of shareholders may be damaged by the actions of the majority, corporate political speech is not undertaken on behalf of a certain group of shareholders versus another. It is made on behalf of the entire corporation. Corporate political spending, when undertaken by boards of directors properly discharging their fiduciary duties of care, loyalty and its associated element of good faith, should be directed at maximizing the long-term value of the firm, and thus be in alignment with shareholders' economic interests.

Nor does corporate political activity impinge upon a shareholder's ability to exercise his or her own political beliefs. Corporations are citizens in public life; their footprint is manifested to the public through the way the company presents itself in its advertising and branding, labor practices, employee relations and charitable contributions. Any and all of these activities may conflict with, offend or run contra to the personal beliefs and/or preferences of shareholders. None of these activities are illegal in and of themselves, and all are generally undertaken by the corporate form in good faith and with the corporate purpose in mind. In this sense, a shareholder's political beliefs are as unimportant to the primary goal of a corporation as are the shareholder's tastes in other personal items, such as art, movies or clothing. To believe otherwise opens the lid on shareholder and stakeholder derivative interests, none of which should assume, on balance, primacy over the First Amendment right of the corporation. Tying the corporate hands with these interests would be tantamount to stripping the right to speak from the firm, which *Citizens United* makes clear is prohibited by the Constitution. Corporate governance should not be allowed to do what direct legislation is prohibited from doing—suppress the right of an association of persons to speak.

media/pdf/vol_12401bechuk_jackson.pdf.

7. See John J. Madden, *The Shifting Landscape of Corporate Governance, and Four Steps Boards Should Take in an Era of Shareholder Ascendancy*, BNA, INC. CORP. GOVERNANCE REP., Feb. 7, 2011, at 1–2.

Nonetheless, concerns over whether corporate speech and shareholder beliefs should be in harmony raise governance questions, mainly around what should be done in the event that corporate speech and shareholder views conflict. *Citizens United* was decided, in part, on reliance upon the theory that protection of potentially dissenting shareholder rights could be addressed through corporate governance mechanisms. In so doing, the majority of the Court neglected to take into account certain realities inherent in the modern corporation. If it had, it would have recognized the fundamental agency problems inherent in a public corporation's ability to discern the political views of its existing shareholder base at any given point in time. This article argues that despite these agency issues (which prevent the corporation from discerning shareholder political views) shareholder political views are outweighed by the need for the corporation to pursue its purpose and welfare.

Consideration of the political speech rights of the modern corporation leads to another policy issue—the rights of corporations under *Citizens United* are incomplete. Corporations are economic actors, not political ones.⁸ And although there have historically been, and today are, a growing number of corporations that promote and advertise their adherence to socially responsible investing, they do so because the corporation believes pursuing those policies will benefit the long-term shareholder interest.⁹ By contrast, political candidates in federal elections do not run on pure economic platforms. Candidates stand for or against a diverse array of social, political and economic issues in the context of a campaign. Some of these issues may be of greater visibility than others due to a number of factors, including media coverage, current events or demographic trends. In arriving at a personal choice, a natural person must weigh, and ultimately balance, the entirety of the candidate's positions against the personal beliefs of that natural person. Factors which are highly personal, and unique, become a part of the process a natural person makes in arriving

8. For one of the best known articulations of this theory, see Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. TIMES, Sept. 13, 1970, § 6 (“there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits . . .”) (quoting MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133 (1962)). See also *Dodge v. Ford Motor Co.*, 170 N.W. 668, 685 (Mich. 1919) (standing for, accurately or not, the proposition that a business corporation is organized for the benefit of shareholders). Regardless if one is a stakeholder or shareholder-advocacy purist, it is hoped that given the choice, most would concede that the primary objective of a for-profit corporation is not to exist solely for political means. This view is apparently shared by most Americans. See, e.g., *Edelman Trust Barometer Survey*, EDELMAN.COM (2010) <http://www.edelman.com/trust/2010/> (finding that fifty-six percent of Americans agree with Friedman's quote that “the social responsibility of business is to increase its profits.”).

9. See Michael C. Jensen, *Value Maximization, Stakeholder Theory, and the Corporate Objective Function*, 14 J. APPLIED FIN. 8, 9 (2001) (suggesting that long-term value is the corporate goal, which is best achieved by rewarding all stakeholders appropriately).

at a decision to support a particular candidate. Corporations are not suited to engage in the deliberation of multiple factors in arriving at a political speech decision. They do not normally have a personal belief set akin to that of a natural person.¹⁰ Consequently, applying a purely economic focus to a multidimensional issue may cause unintended consequences for the corporation and may damage shareholder value.¹¹

It has also been argued that there exists a potential agency problem if the corporation's managers substitute their own personal beliefs for those of the corporation.¹² This risk is not unlike any other agency issue. To the degree that *Citizens United* has the potential to introduce an agency problem that diminishes firm value; share prices should reflect this and decline. The agency problem of the Chief Executive Officer ("CEO") substituting his or her own beliefs for the best interests of the firm would bias the results herein. The instant study, and the empirical results showing no harm to shareholders post-*Citizens United*, is solid even in the face of this problem. This is not to argue that the agency issue does not exist. Quite the contrary, this article argues that *Citizens United* must be evaluated in the context of the rise of the institutional shareholder armed with a new toolkit of governance mechanisms—all of which strengthen, rather than weaken, board and management accountability to shareholders.

These dangers, while real, are nonetheless outweighed by the corporations' interest and need to participate in political speech. Corporations are created by statutes. Governments, through statutes, regulate the business affairs of corporations in ways that can affect the strategy and economic success of the venture. In some industries, government regulation can be a primary driver in decisions relating to new products, markets and costs. Engaging in political speech is a risk, but a risk like any other facing the corporate body. Going forward, policy makers, such as Congress, state legislatures, and the judiciary should make it explicit that a board of directors, in compliance with applicable laws regarding independence and subject to an election process enhanced by a system of proxy access or reimbursement, have the authority, and duty, to manage political speech.

10. See *Citizens United*, 130 S. Ct. 876, 925–26 (2010) (Scalia, J., concurring).

11. See James Taranto, *Target Becomes One*, WALL ST. J., Aug. 6, 2010, available at <http://online.wsj.com/article/SB10001424052748703309704575413430222277828.html?KEYWORDS=Target+Becomes+One>.

12. See Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 312–13 (1976).

II. THE NEW SHAREHOLDER-CENTRIC ENVIRONMENT

Part II of this article describes the state of the modern corporate governance environment, which began to take form in the late 1980s and is still developing to this day.¹³ *Citizens United* must be evaluated within the framework in which it was decided, and not within the governance environment which existed twenty-five, fifty or one hundred years ago. The reality is that corporate governance is evolving at a rapid pace. Recent reforms, particularly those resulting from the Dodd-Frank legislation, are critical to an understanding of the post-1980s corporate governance playing field.

This section traces the development back to the late 1980s because it was at that time a number of forces came together to elevate the study of how corporations run themselves to matters of importance to investors, boards and regulators.¹⁴ Links were established between good corporate governance and firm performance.¹⁵ In addition, the increasing importance of financial intermediaries, and the ultimate dominance of the United States equity markets by institutional investors, changed the way shareholders related to the corporations in which they were invested. One important aspect of the institutional investor revolution is the existence of fiduciary duties, which include a requirement for money managers to participate in the proxy and annual election process.¹⁶ Contemporary institutional investors are active and significant participants in shareholder elections and in governance matters generally.¹⁷ After that, activists, governance reformers and academics began to focus on the composition of the board itself, and the openness of the election process. Independent directors and open elections became the primary means sought to restore board accountability to the shareholder in the 1990s and 2000s.¹⁸

13. See generally JAMES D. COX ET AL., CORPORATIONS § 9.3 (1997).

14. See Lucian A. Bebchuk et al., *What Matters in Corporate Governance?*, 22 REV. FIN. STUD. 783 (2009).

15. Lawrence D. Brown & Marcus L. Caylor, *Corporate Governance and Firm Performance* 1 (Ga. State Univ., Working Paper, 2004), available at <http://ssrn.com/abstract=586423>.

16. See COUNCIL OF INSTITUTIONAL INVESTORS, EVERYTHING YOU EVER WANTED TO KNOW ABOUT PROXY VOTING BUT WERE AFRAID TO ASK 4–5 (2010), available at <http://www.cii.org/UserFiles/file/resource%20center/publications/ProxyVotingPrimer-Jan2010.pdf>.

17. See Leo E. Strine, Jr., V.C. Del. Court of Chancery, Remarks at Stanford Law School: Lack of Short Term and Long Term Alignment in the Corporate Governance System (May 24, 2010) available at <http://rockcenter.stanford.edu/2010/05/24/lack-of-short-term-and-long-term-alignment-in-the-corporate-governance-system/> (indicating that large institutional investors have the clout and means to attain their political goals in governance reform).

18. See Charles M. Elson, *The Duty of Care, Compensation, and Stock Ownership*, 63 U. CIN. L.

In the aggregate, these influences led to something else: the politicization of corporate governance. As one well-known governance thinker said about proxy access—one of the flash points in corporate governance over the past decade—“[it] is not an abstract academic controversy over the optimal structure of corporate governance regimes. It is a knockdown, drag-out political brawl.”¹⁹ This observation applies to governance generally, the Dodd-Frank Act and the implementing rules of the United States Securities and Exchange Commission. *Citizens United* itself has become a partisan political issue, although it is in reality a freedom of speech case which transcends party dualism.²⁰

Of course, *Citizens United* is a product of its time and place. The modern era of corporate governance is, however, very different from the era which preceded it.²¹ The defining characteristic of the modern era is that stockholder rights have been elevated to a point higher than at any other time in history. The United States Supreme Court recognized this—and post-*Citizens United* policy makers should as well.

A. THE DODD-FRANK ACT

The Dodd-Frank Act of 2010²² was a major legislative effort, and much has been written about its implications for banks, financial markets and consumers. The impetus for the legislation was the perceived flaws and imperfections in the bank regulatory framework brought to light during and in the aftermath of the financial crisis of 2008.²³ Overall, the law is primarily a banking regulatory package—the majority of the law’s 2,319 pages and the most high-profile changes relate to financial markets and the regulatory structure.²⁴ The legislation was pulled together relatively quickly, and was a priority of the Obama administration. In spite of this, or

REV. 649, 651–53; 656–69; 694–96 (1995).

19. Joseph Grundfest, *The SEC’s Proposed Proxy Access Rules: Politics, Economics, and the Law*, 65 BUS. LAW. 361, 378 (2010).

20. See Kimberley A. Strassel, *The Biggest Election Myths of 2010*, WALL ST. J., Oct. 29, 2010, <http://online.wsj.com/article/SB10001424052702304173704575579073369144924.html>.

21. Prior to the modern governance era, there was little in the way of change in how corporations were overseen. Boards were largely advisory in nature, as opposed to active overseers of management. Many were subject to management capture, and shareholders exercised less influence in the governance of the corporate body than they do in the modern era.

22. Dodd-Frank Wall Street Act Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) [hereinafter Dodd-Frank Act].

23. See *id.* at Preamble. Whether corporate governance failures contributed to the financial meltdown is an interesting question. In a precursor to Dodd-Frank, Senator Charles Schumer declared “among the central causes of the financial and economic crises . . . has been a widespread failure of corporate governance.” Shareholder Bill of Rights Act of 2009, S. 1074, 111th Cong. § 2(1) (2009).

24. See, e.g., Dodd-Frank Act, §§ 111–23; 331–36; 341–78; 401–16; 601–28; 711–54; 761–74; 801–14; 901–19D; 931–39H; 961–68; 1011–29A.

perhaps because of it, Dodd-Frank's passage was characterized by partisan politics, last-minute deal making and regulatory turf fighting.²⁵ Consequently, some of Dodd-Frank's provisions have been criticized as unfair to business, overly burdensome and the product of hasty compromise.²⁶

Along with the thousands of pages on financial markets, Dodd-Frank contains several sections relating to corporate governance, shareholder elections and executive compensation.²⁷ How these provisions relate to the causes of the financial crisis are subject to debate; at least one work has suggested that corporate governance was not responsible for the financial meltdown of 2008.²⁸ Nonetheless, by extending its reach to all public companies, arguably the governance provisions will have a more far-reaching effect than the financial sections. Dodd-Frank may also be viewed as a continuation of a trend set in motion by another act of Congress also known for its Senate and House sponsors, the Sarbanes-Oxley Act of 2002.²⁹

Sarbanes-Oxley was important because of its reforms to financial reporting, the auditing profession, and the audit committee. It also represented the federal government's most significant substantive intrusion into traditional areas of state governance.³⁰ Its reforms, targeted at the financial reporting scandals of the late 1990s and early 2000s, constitute the first time the federal government directed board behavior by mandating compositional changes to the audit committee membership.³¹ A necessary

25. See, e.g., Stephen M. Bainbridge, *Dodd Frank: Quack Federal Corporate Governance Round II*, (Univ. of Cal., L.A., Sch. of Law, Working Paper No. 10-12, 2010), available at <http://ssrn.com/abstract=1673575>.

26. See, e.g., Lynn Hume, *Senate Banking Republicans Express Concern About Rushing Dodd-Frank*, THE BOND BUYER (Feb. 17, 2011), http://www.bondbuyer.com/issues/120_33/dodd_frank_changes-1023382-1.html (quoting a letter from Senator Richard Shelby, R-Ala, and nine other Republican members of the Senate Banking Committee to the SEC and other regulators implementing Dodd-Frank).

27. See Dodd-Frank Act, §§ 951-57; 971-72.

28. See Brian R. Cheffins, *Did Corporate Governance "Fail" During the 2008 Stock Market Meltdown? The Case of the S&P 500*, 65 BUS. LAW. 1, 1 (2009).

29. Sarbanes-Oxley Act of 2002, Pub. L. 107-204, 116 Stat. 745 (2002).

30. While historically the federal government, and primarily the SEC, provided regulations in the corporate realm, those regulations were largely disclosure oriented, and designed to enhance, rather than replace, state corporate law. The "one share one vote rule" was rejected by a federal court for being beyond the jurisdictional reach of the SEC. *Bus. See Roundtable v. SEC*, 905 F.2d 406 (D.C. Cir. 1990).

31. For a general discussion of the relative merits of rules based versus internal board incentives, see generally Charles M. Elson & Christopher J. Gyves, *In Re Caremark: Good Intentions, Unintended Consequences*, 39 WAKE FOREST L. REV. 691 (2004). In that article, Elson and Gyves argue that rules-based incentives on director behavior, such as those dictated by the Federal Sentencing Guidelines, or judicial mandates like those embodied in the foundational Delaware Court of Chancery opinion *In re Caremark*, 698 A.2d 959 (Del. Ch. 1996), can create an "empty triumph of form over substance." *Id.* at

consequence of federal rulemaking was that interpretation of the rules, their enforcement and ultimately their resolution of disputes concerning Sarbanes-Oxley requirements became a federal, rather than state, matter. The fiduciary responsibilities of directors, governed by state corporate law,³² did not disappear, but insofar as an audit committee member was concerned, Sarbanes-Oxley provided a new dimension to director roles and responsibilities.³³

Commentators have identified several similarities between Sarbanes Oxley and Dodd-Frank.³⁴ Like many congressional actions, these are the by-products of events or crises which resulted in a call to action. In governance terms, both Sarbanes-Oxley and Dodd-Frank share other common characteristics, including the adoption of a federalist approach to corporate law.³⁵ Federally directed corporate governance rules influenced by a variety of political actors, including shareholder groups, are the new normal state of affairs in governance.³⁶ It is a change in the process by which corporate governance and the law has been developed, and

692. It is better, they argue, to align board and shareholder interests through equity ownership so that boards will act as effective monitors of management for the right reasons—protection of shareholder interests—rather than to “check the box” and avoid liability. *Id.* Leaving aside for now the question of how, in the financial crisis of 2008, boards of certain financial institutions with significant equity ownership failed to oversee properly the risk taking activities of their companies, the argument postulated by Elson & Gyves translates into the Sarbanes-Oxley audit committee realm. A brief review of a typical audit committee charter reveals over twenty-five substantive duties, mostly financial reporting related, but also including discussing with management “guidelines and policies for assessing and managing the corporation’s exposure to risks, including reputational risk, the corporation’s major financial risk exposures and the steps management has taken to control such exposures.” JP Morgan Chase & Co., *Charter of the Audit Committee*, JPMORGANCHASE.COM, <http://www.jpmorganchase.com/corporate/About-JPMC/audit-committee-charter.htm>. The point here is not to criticize the JP Morgan Audit Committee, or its charter, which represent a typical example of an audit committee work plan. The relevant point being that this charter is largely the by-product of Sarbanes-Oxley, and by so doing, Sarbanes-Oxley has had a major, substantive effect on the business of the audit committee, whose conduct heretofore had been primarily, if not exclusively, governed by the law of a state—that is, Delaware.

32. See COX ET AL., *supra* note 13, at 179–80.

33. For a fascinating exposition of how state (Delaware) law coexists with the federal insider trading regime, see Pfeiffer v. Toll, 989 A.2d 683 (Del. Ch. 2010).

34. See Bainbridge, *supra* note 25, at 1; Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L. J. 1521, 1523 (2005).

35. See Bainbridge, *supra* note 25, at 17. Bainbridge identifies eight characteristics of what he and Professor Roberta Romano term “quack corporate governance:” (1) a law enacted in response to a major negative economic event; (2) a law enacted in a crisis environment; (3) a law in response to a populist backlash against corporations and/or markets; (4) a law adopted at the federal rather than the state level; (5) a law that transfers power from the states to the federal government; (6) a law which interest groups that are strong at the federal level but weak at the Delaware level support (institutional investors); (7) a law that is not novel, but represents a longstanding agenda item of some powerful interest group (again institutional investors); and (8) the empirical evidence cited in support of the proposal is, at best, mixed and may show the proposal to be unwise. *Id.*

36. See Bainbridge, *supra* note 25, at 41.

represents a shift from the state system to the federal process. The effects of these changes may not be evident until there is some period of time for the changes to take place and for a new equilibrium to be established.

Increased shareholder power from the federal level necessarily comes at the expense of state law. Here, Dodd-Frank clashes with existing state corporate governance more so than did Sarbanes-Oxley. Sarbanes-Oxley made compositional reforms to the audit committee. The mandates of Dodd-Frank implicate the compensation committee, director elections, and executive compensation. It takes the inroads made by Sarbanes-Oxley, and pushes them further down the line. Of course, the back and forth between the autonomy of the states to set corporate law and the authority of the federal government to usurp those provisions is an old issue. Indeed, the argument that Delaware, the cradle of corporate law, was under the influence of powerful corporate interests and the New York legal establishment was raised as early as the 1930s by Adolph Berle. Berle argued for strong director fiduciary duties to counter what he believed to be pro-management forces, to protect shareholder interests.³⁷

Later, in 1974, William Cary argued broadly that state economic interests drive state (Delaware) decision making; these interests precipitated what he famously called the “race to the bottom” or a pandering to management and boards.³⁸ More recently, some argue that Delaware’s corporate code is established by a small and insular bar, consisting of local attorneys whose careers (and the state’s economic fortunes) depend on the revenues generated by the corporate base.³⁹ Since the corporate base is a pro-management, pro-board primacy constituency, state laws tend to neglect shareholder concerns. Federal intervention, like Dodd-Frank, evens the playing field.

Dodd-Frank was not only a political response to the financial crisis, it was also shaped by populist pressure and anger directed at financial institutions.⁴⁰ Dodd-Frank is thus an example of a modern corporate governance phenomenon—politically driven, shaped by the influence of

37. Adolf A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365, 1371 (1932). See also Adolf A. Berle, Jr., *Corporate Powers As Powers In Trust*, 44 HARV. L. REV. 1049, 1049 (1931).

38. William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 668 (1974).

39. See *id.* at 669–70. See generally Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469 (1987); Mark J. Roe, *Washington and Delaware as Corporate Lawmakers*, 34 DEL. J. CORP. L. 1 (2009); Mark J. Roe, *Delaware’s Politics*, 118 HARV. L. REV. 2491 (2005).

40. See Christopher M. Bruner, *Corporate Governance Reform in a Time of Crisis*, 36 J. CORP. L. 309, 333 (2011).

institutional investors, and pro-shareholder interests.⁴¹ The inherent contradictions in a shareholder-centric solution to the financial crisis have been noted, as have the political savvy of those advancing the shareholder agenda.⁴² Whether these things are optimal governance solutions is open for debate. It is enough post-*Citizens United* to recognize the new order of a federally dictated, shareholder-centric governance environment shaped by partisan politics.⁴³ Analyze *Citizens United* through this lens and you see the rights and responsibilities within the corporation changing. Shareholder rights, perhaps historically subservient to board and management power, are in ascendency. The corporation itself has developed into a pervasive element of contemporary life. It employs us, creates research and development, and funds charities. It has helped globalize the world economy in ways that individuals or other associative forms have not. It is natural then, given the economic power of the global corporation and the damage caused by the financial crisis, to challenge traditional assumptions and to realign the roles of the shareholder and the board of directors.

B. THE PROXY ACCESS BATTLE

The debate over how much influence shareholders should have in the process by which directors are elected implicates the nature of the board-shareholder relationship and the respective roles and responsibilities of each. It is a fundamental truism of the corporate structure that directors, rather than shareholders, manage the daily business affairs of the corporation.⁴⁴ Shareholders are provided specific but limited rights under state law, including the right to vote at shareholder meetings.⁴⁵ Voting at an annual meeting of shareholders is a cornerstone of shareholder suffrage, and a tremendous amount of law and energy has been directed at getting the electoral process to work properly.⁴⁶ This is as it should be—unless shareholders can direct the board at some level, they are weak participants in a system using their money to take risks. If however, the election

41. Bruner, *supra* note 40, at 335.

42. Bruner, *supra* note 40, at 321–22 (citing Rudiger Fahlenbach & Rene M. Stulz, *Bank CEO Incentives and the Credit Crisis* 1–2 (Charles A. Dice Ctr., Working Paper No. 2009-13, 2009) (finding that banks with CEOs with high equity stakes fared worse in the crisis than those that did not, and suggesting the desire for equity market approval of risk taking was a major incentive).

43. Bruner, *supra* note 40, at 336.

44. See, e.g., DEL. CODE ANN. tit. 8, § 141(a) (West 2011) (The business of the corporation “shall be managed by or under the direction of a board of directors . . .”).

45. See *id.* § 211.

46. See, e.g., Securities Exchange Act of 1934, 15 U.S.C.A. § 78a-pp (2011); Shareholder Proposals, 17 C.F.R. § 240.14a-8 (2010).

process fails to function as intended, a critical mechanism for corporate accountability will be blunted. Without a meaningful and fair election process, the republic system of corporate governance that rests on board oversight of management subject to shareholder approval simply does not work.⁴⁷ Empirical evidence has demonstrated the flaws in the director election process.⁴⁸ Proposed solutions range from federal rulemaking to a state law system of expense reimbursement.⁴⁹

Proxy access is the shorthand phrase used to describe the proposals of the Securities Exchange Commission (“SEC”) to adopt a federally mandated system of director election rules that enable placement of director nominees on the corporate proxy. Proxy access has a history that precedes the passage of Dodd-Frank and is illustrative for defining the prism through which we should view corporate governance and the political speech of corporations under *Citizens United*.⁵⁰ The SEC’s new proxy access regime has two main elements. The first is Rule 14a-11, which requires companies, subject to shareholder eligibility and other limitations, to include shareholder nominees for director in their proxy materials at annual or special meetings at which directors are to be elected.⁵¹ Secondly, the SEC made amendments to Exchange Act Rule 14-8, permitting shareholder resolutions that would amend or request amendment to the company’s governing documents concerning nominating procedures for shareholder nominations, so long as the resolution does not conflict with Rule 14a-11.⁵² As amended, Rule 14a-8 would enable shareholders to include in a company’s proxy material bylaw amendments that would grant proxy access on conditions other than those contained in

47. See Leo E. Strine, *Toward Common Sense and Common Ground? Reflections on the Shared Interests of Managers and Labor in a More Rational System of Corporate Governance*, 33 J. CORP. L. 1, 12–13 (2007).

48. See, e.g., Lucian Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675, 677 (2007) (citing only eight contested elections from 1995-2005 in companies with a market capitalization greater than 200 million as evidence for a broken system). The root causes of the problem are manifold; chief among them, as Bebchuk notes, is that the costs of a proxy campaign in support of management are born by the corporate treasury, but a challenger must pay its own way. And then, those costs only produce nominal ability to alter corporate policy or strategy, given that one or two candidates at most can reasonably be expected to prevail. Imbalances exist at both ends of the process: A flawed election system fails to instill accountability at the director level, and the costs-versus-benefit calculation must serve to disincentivize challengers from mounting insurgent campaigns.

49. See Letter from John L. Weinberg Center for Corporate Governance, University of Delaware, to SEC, (Jan. 13, 2010), (on file with John L. Weinberg Center for Corporate Governance).

50. Compare Lucian A. Bebchuk & Scott Hirst, *Private Ordering and the Proxy Access Debate*, 65 BUS. LAW. 329, 329 (2010) (arguing that federally mandated proxy access should be the default setting with a right of opt out), with Grundfest, *supra* note 19, at 361 (arguing that companies should be permitted to opt in to a system of access to the company proxy through private ordering, or a company by company basis).

51. Shareholder Proposals, 17 C.F.R. § 240.14a-8.

52. *Id.*

14a-11, provided that the bylaws are more inclusive than 14a-11.⁵³

Proxy access will increase board-shareholder dialogue and may serve to increase board turnover, which together with CEO turnover has been on the rise.⁵⁴ Proxy access may not usher in a new era of boardroom change overnight, but together with forthcoming shareholder resolutions seeking bylaw amendments for more liberal access than granted by Rule 14a-11, and proxy reimbursement (permitted under Delaware law and the ABA Model Code), an increased shareholder-to-board dialogue is inevitable.⁵⁵ Communications by shareholders with the board in the context of director elections opens a forum for a broad-ranging discussion about the corporation, its strategy and its results. This is important because director elections implicate a broad range of corporate issues.

A dialogue over a proposed or sitting director is more enriched than a dialogue regarding a shareholder resolution. Shareholder resolutions often are single issue platforms, such as discrete issues of governance or a social policy matters. Directors, on the other hand, are stewards of the enterprise and once elected, owe a fiduciary duty to the corporation as an entity and to all shareholders as a group. To elect a director, therefore, is to elect an individual upon whom the shareholders will rely on to exercise proper business judgment. At the time of election, shareholders can make informed assessments about the candidates' background, qualifications and fitness for the company as the company stands currently, and what it may face in the foreseeable future.

By contrast, discussions over shareholder resolutions regarding discreet matters of corporate governance are fundamentally different. For example, one either favors majority voting or staggered boards, or one does not. Theoretically, one's view on these issues is the same for each corporation in his or her portfolio. The feedback loop between shareholder-to-board and shareholder-to-shareholder over a prospective director is a deeper conversation than one concerning a more abstract discussion of the merits of a staggered board. Corporate political speech is a natural agenda topic in this communication. In fact, expressions of shareholder views on corporate political speech provided to the corporation and its existing board, or potential new board members, within the broader overall discussion of corporate strategy and business operations is the

53. Shareholder Proposals, 17 C.F.R. § 240.14a-8. Prior to the effectiveness of the amendments, Rule 14a-8 permitted a company from including in its proxy materials a shareholder resolution that "relates to a nomination or an election for membership on the company's board of directors or analogous governing body or a procedure for such nomination or election." *Id.* at § 240.14a-8(i)(8).

54. Stephen Choi et al., *The Power of Proxy Advisers: Myth or Reality?*, 59 EMORY L. J. 869, 873 (2010).

55. Judy Warner, *Power to the Shareholder*, DIRECTORSHIP, Oct. 20, 2010, at 24.

appropriate and optimal venue for the discussion. This is positive and reflective of the policy goals sought to be advanced by the SEC rulemaking. Proxy access, and the resulting communications between shareholders and the board, will provide shareholders with an entirely new venue to engage the board on all issues facing the company, including speech. But it is unwise policy to expect or require the corporation to engage in a political discussion with shareholders on a real time, or issue specific, basis. This level of communication is not necessary for the other risks and decisions facing the enterprise—the same should hold true for speech.

C. SAY-ON-PAY AND COMPENSATION

Executive compensation has been called a window into the boardroom.⁵⁶ Together with selecting a CEO, setting an appropriate pay program is one of the most important responsibilities of the board. Executive compensation in the post-financial-crisis era has also become a focal point for investors, regulators and Congress. As a direct consequence, and responding to concerns about the role excessive compensation played in the financial crisis,⁵⁷ Dodd-Frank has enabled the contemporary investor with a tool kit beyond any existing state corporation statute.⁵⁸ Dodd-Frank alters the corporate governance playing field by adding two new compensation-focused disclosure requirements and three “say-on-pay” obligations.

Section 953 of Dodd-Frank requires all public companies to provide new public disclosure on the relationship between “executive compensation actually paid” and the company’s financial performance.⁵⁹ Section 953 also contains the requirement to disclose the median of the annual total compensation of all employees (the CEO excepted), the annual total compensation of the CEO, and a ratio comparing those two figures. The Dodd-Frank pay disclosures are likely to have an effect in changing corporate behavior, and in so doing, may lower executive compensation.⁶⁰

56. See Beverly Behan, *Shareholder Rights in the Corporate Boardroom*, BLOOMBERG BUSINESSWEEK: THE BOARDROOM, Sept. 28, 2008, available at http://www.businessweek.com/managing/content/sep2008/ca20080930_690695.htm (Beverly Behan interviewing John Wilcox).

57. See S. REP. NO. 111-176, at 133 (2010) (“The economic crisis revealed instances in which corporate executives received very high compensation despite the very poor performance by their firms.”).

58. See, e.g., DEL. CODE ANN. tit. 8, § 212 (2011); MODEL BUS. CORP. ACT §§ 7.01-7.05, 7.21, 7.22, 8.08.

59. Dodd-Frank Act, § 953.

60. See Bainbridge, *supra* note 25, at 18 (“Therapeutic disclosures are not intended to inform investors. Instead, they are intended to affect substantive corporate behavior.”).

Disclosure-related reforms seek to influence corporate conduct from the inside out.⁶¹

Section 951 of Dodd-Frank adds three say-on-pay requirements. First, at least once every three years, every public company must include in its proxy statement a separate resolution, subject to shareholder vote, to approve the compensation of the company's named executive officers.⁶² Second, at least once every six years, the proxy statement must include a separate resolution to determine whether the say-on-pay vote will occur every one, two, or three years.⁶³ Third, in any proxy material or other shareholder solicitation in which an approval of an "extraordinary transaction" is sought, a shareholder vote on compensation to be received by the named executive officers or "golden parachutes" must be held.⁶⁴ Like shareholder resolutions under Rule 14a-8 of the Exchange Act, each of these votes will be precatory, rather than mandatory. In deference to state corporate law, the Dodd-Frank Act specifies that, in addition to the advisory nature of the votes, such votes cannot overrule a decision made by a company or its board of directors, or create or change any existing state-defined fiduciary duties of the board.⁶⁵

As argued in Part II.B on proxy access, increased shareholder input into compensation practices gives shareholders the proverbial "hot line" to the CEO's office. It is natural to expect board-shareholder dialogue regarding compensation to entail an assessment of the risks facing the corporation. How a corporation's management sets and executes against risk tolerances is the meat and potatoes of a best practice compensation plan, which should align compensation with appropriate risk levels and long-term gain. Political risks are just one of the myriad risks facing the modern corporation.⁶⁶

61. It is interesting to note that in the years after the SEC's 1992 executive compensation disclosure rules, compensation among United States CEOs began a period of fantastic growth. This experience was similar to the result in Canada, which adopted executive compensation disclosure rules earlier.

62. Securities Exchange Act of 1934, 15 U.S.C.A. § 14A(a)(1) (2010).

63. *Id.* at § 14A(a)(2).

64. *Id.* at § 14A(b).

65. *See Id.* at § 14(c). This provision is an attempt to preserve state law principles governing director elections. In light of the mandatory nature of the SEC rules, it is unclear whether this clause constitutes form over substance.

66. *Spotlight on Corporate Governance—New Educational Video Series, Video 1: The Dodd-Frank Act of 2010 and New Federalism in the Boardroom*, (Oct. 26, 2010) (downloaded using iTunes), available at <http://www.delawarecorporategovernance-blog.com>.

III. THE DECISION AND THE LITERATURE

A. *CITIZENS UNITED* INCREMENTAL RATHER THAN TRANSFORMATIONAL

Despite media coverage describing it as a major change in law, the decision in *Citizens United* relaxed an important but not transformational section of United States campaign finance law.⁶⁷ In fact, evidence from the 2010 midterm elections, the first post-*Citizens United* test, does not indicate that a proverbial floodgate was opened or that corporate money overwhelmed the electoral process.⁶⁸ *Citizens United* is a decision that is fundamentally rooted in the First Amendment; corporate governance plays an important but secondary role in the decision. Just as the media reaction to the case overplayed the significance of the real world impact of *Citizens United*, proposals to modify existing corporate governance mechanisms are an overreaction to the decision's meaning. The decision is not a departure from long-standing precedent, but rather a reaffirmation of the rights of corporations which have existed and been recognized in the constitutional law of the United States for many years.

Allowing independent political expenditures in direct support of both candidates and issues, *Citizens United* permits corporations to explicitly state what they previously were allowed to do only in circumspect terms. Prior to the opinion, corporations could finance political speech in favor of or against specific causes, but were required to stop short of directly advocating support for a particular candidate.⁶⁹ This was an artificial distinction. Companies could approach a magic line in their political speech, but could not cross it by using the words "vote for (or against) candidate X." Thus, *Citizens United* only removed an artificial barrier.

The facts of the case are straightforward, but illustrate how illusory the line between permitted and illegal speech had become. In 2008, a nonprofit corporation called Citizens United, funded by both corporate and individual donations, released a movie called "Hillary: The Movie."⁷⁰ The

67. See Justin Levitt, *Confronting the Impact of Citizens United*, 29 YALE L. & POL'Y REV. 217, 219 (2010) (suggesting that *Citizens United* is incremental, "turning up the volume of speech already in the political marketplace.").

68. Smith, *supra* note 2, at ¶¶ 4–5 (citing Center for Responsive Politics statistics indicating that independent spending in the 2010 elections increased to \$294 million from \$69 million in 2006. Assuming that was all "*Citizens United*" money, the decision accounted for approximately eleven percent of total campaign spending, including national party and campaign spending in 2010).

69. See Bipartisan Campaign Reform Act of 2002, 2 U.S.C.A. § 441(b) (2002); *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 881 (2010).

70. *Citizens United*, 130 S. Ct. at 887.

film is a critical view of then-Senator Hillary Clinton, who at the time was a candidate for the Democratic presidential nomination.⁷¹ Citizens United intended to distribute the film via a video-on-demand service, which would have potentially subjected it to civil, and possibly criminal, liability under the Bipartisan Campaign Reform Act of 2002 (“BCRA”).⁷² Previously, these types of political communications were required to be funded through a Political Action Committee (“PAC”), and any entity which funded this type of political speech (PAC, union or corporation) was subject to reporting and disclaimer provisions.⁷³ To forestall potential problems, Citizens United filed an action against the Federal Election Commission (“FEC”) for declaratory and injunctive relief in order to have the relevant provisions of the BCRA declared unconstitutional.⁷⁴ A lower federal court, finding itself bound by precedents set in at least two prior United States Supreme Court decisions (primarily *McConnell v. Federal Election Commission*⁷⁵ and *Austin v. Michigan Chamber of Commerce*),⁷⁶ ruled in favor of the FEC.⁷⁷ Citizens United petitioned for *certiorari* to the Supreme Court, which heard the case in March of 2009. The Supreme Court, on its own motion, then requested additional briefs from the parties on the topic of whether *McConnell* and *Austin* should be overruled.⁷⁸ This was an unusual step, and it sent a strong signal to the capital markets that *Citizens United* might change the political finance law landscape. The date of this announcement was selected as a data point in this event study, discussed *infra*. The second argument took place in September of 2009.

At the center of the suit was Citizen United’s challenge to the sections of the BCRA regulating so-called “electioneering communications” by corporations;⁷⁹ the BCRA prohibited all for-profit and most nonprofit corporations and unions from using general treasury funds to engage in electioneering communications.⁸⁰ Since 2007, the term “electioneering communication” had been interpreted to mean only those communications

71. *Citizens United*, 130 S. Ct. at 887.

72. Bipartisan Campaign Reform Act of 2002, § 441b(b)(2).

73. Bipartisan Campaign Reform Act of 2002, § 441d, 441f.

74. *See Citizens United*, 130 S. Ct. at 893.

75. 540 U.S. 93 (2003).

76. 494 U.S. 652 (1990).

77. *Citizens United*, 130 S. Ct. at 889.

78. *Id.*

79. *Id.*

80. *See* Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 434(f)(3)(A)(i) (defining “electioneering communication” as “any broadcast, cable, or satellite communication” that “refers to a clearly identified candidate for Federal office” and which is disseminated within thirty days of a primary or sixty days of a general election). The BCRA required these communications to be funded by a “separately segregated fund” or PAC supported by donations (presumably voluntary) from employees, shareholders, or union members. *Id.* at § 441(b)(2).

expressly advocating the election or defeat of a particular candidate. As noted above, this drew a fairly thin line, one that Citizens United was concerned that it had crossed.⁸¹ Prior to the decision, a for-profit corporation could expend general treasury funds on an electioneering communication (such as an advertisement or website) that expressly took a position for or against a particular issue in a federal election, even if that communication mentioned the candidate's name. It was up to the public and potential voters to figure out which candidate the advertisement or website was advocating.⁸² So long as a direct expression of "vote for/against" or their "functional equivalent" was avoided, a for-profit corporation was well within the law and its First Amendment rights to communicate its views through issue-based communications in specific federal elections.⁸³

In deciding the case, the Court issued five separate opinions. Justice Kennedy wrote the five-Justice majority opinion and Justice Stevens wrote the four-Justice dissent.⁸⁴ From a First Amendment perspective however, a large majority of the Court recognized that government restrictions or prohibitions on corporate speech would require strict judicial scrutiny.⁸⁵ With near unanimity in opinion on that issue, the question before the Court was whether the government possessed sufficient interests to justify restricting corporate speech.

The majority opinion makes it clear that the nature of the political process requires voters and the public to receive information from a variety of sources, including corporations, which have First Amendment rights.⁸⁶ Explicitly the Court had, in the view of Justice Kennedy, extended these rights to political speech.⁸⁷ Quoting *First Nat'l Bank of Boston v. Bellotti*,⁸⁸ Justice Kennedy asserted that political speech does not lose its protection "simply because its source is a corporation."⁸⁹ Moreover, under *Bellotti*, "the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public

81. *FEC v. Wis. Right to Life Inc.*, 551 U.S. 449, 481 (2007).

82. Levitt, *supra* note 67, at 220.

83. *Wis. Right to Life*, 551 U.S. at 476–77, 481–82.

84. Justice Stevens' dissenting opinion runs ninety pages long compared to the majority's fifty-seven page opinion. *Compare* *Citizens United*, 130 S. Ct. at 929 (Stevens, J., dissenting), *with Id.* at 880.

85. *Compare id.* at 900 (Kennedy arguing that "political speech does not lose First Amendment protections 'simply because its source is a corporation'"), *with id.* at 945 (Stevens stating that any law that "burden[s] political speech . . . is always a serious matter, demanding careful scrutiny").

86. *Citizens United*, 130 S. Ct. at 899–900. In support of this proposition, the Court cited twenty-two Supreme Court precedents.

87. *See id.* at 900.

88. 435 U.S. 765 (1978).

89. *Bellotti*, 435 U.S. at 784.

issue.”⁹⁰ The reasoning and holding of *Bellotti* rests on the principle that “the Government lacks the power to ban corporations from speaking.”⁹¹

Even prior to *Bellotti*, the Court in *Buckley v. Valeo* struck down those sections of the Federal Election Campaign Act of 1971⁹² that capped expenditures to influence elections (while upholding the limits on contributions).⁹³ It was the potential for *quid pro quo* corruption that distinguished independent expenditures from direct contributions, with the former raising insufficient dangers of corrupting the political process and the latter (presumably invoking the proverbial briefcase stuffed with cash) being sufficient to support a constitutionally crafted restriction.⁹⁴ Read together, *Buckley* and *Bellotti* present a clear and linear line of reasoning and precedent for the recognition of a corporate right to engage the political process in the electioneering stage and on presumably the same terms and conditions as individuals.

In order to place a restriction on a First Amendment right, the government must have a compelling interest, which must survive a test of strict judicial scrutiny.⁹⁵ The question of what government interest might meet that test was raised in the 1990 case of *Austin v. Michigan Chamber of Commerce*.⁹⁶ The *Austin* case disrupts the precedential line of *Buckley* and *Bellotti* by permitting restrictions on the rights of associations of persons, including corporations, to speak.

In *Austin*, the Michigan Chamber of Commerce intended to use treasury funds to run a newspaper ad in contravention of a state criminal law which would have made it a felony for a corporation to make independent expenditures in support of or against a specific candidate.⁹⁷ The *Austin* Court was able to bypass precedent (*Buckley* and *Bellotti*) by, as Justice Kennedy observed:

[I]dentif[ying] a new government interest in limiting political speech: an anti-distortion interest. *Austin* found a compelling government interest in preventing the ‘corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideals.’⁹⁸

90. *Bellotti*, 435 U.S. at 784–785 (quoting *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 96 (1972)).

91. *Bellotti*, 435 U.S. at 784–785.

92. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1971) (codified as amended at 2 U.S.C. § 431 et seq.).

93. *Buckley v. Valeo*, 424 U.S. 1, 58–59 (1976).

94. See *Citizens United*, 130 S. Ct. at 901–02.

95. *United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4 (1938).

96. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990).

97. See *id.* 656.

98. *Citizens United*, 130 S. Ct. at 903 (quoting *Austin*, 494 U.S. at 660).

The *Austin* case, noted Justice Kennedy, was the outlier, allowing restrictions based on the inherent nature of the corporate form because the corporate form could harness aggregated wealth and direct it at speech.⁹⁹ Importantly, even before *Austin* was decided in 1990, and under that case, corporations possessed recognizable First Amendment rights.

In *Citizens United*, the government's rationale for restrictions were the *Austin* theory (aggregation of wealth is dangerous and can be regulated),¹⁰⁰ together with two other interests—the potentials of *quid pro quo* corruption or bribery,¹⁰¹ and the protection of those shareholders or union members whose internal, personal political beliefs may not be in harmony with the corporation's speech.¹⁰² This last interest lies at the intersection of corporate political speech and corporate governance. In addressing these arguments, *Citizens United* analyzes the corporate nature of speech in terms of fundamental fairness. If the government can restrict or prevent free speech because it was funded by a wealthy source, the government could also pick and choose who may or may not speak based on other categories or characteristics. This cannot be reconciled with the "premise that the First Amendment generally prohibits the suppression of political speech based on the speaker's identity."¹⁰³ Identity and wealth are interwoven for these purposes, and such an argument would cover individuals with significant resources. The majority expressly rejected the nature of the corporation versus the natural person as a basis for distinction, instead focusing on what the First Amendment was designed to protect: the speech itself.¹⁰⁴

That the right to political speech cannot be premised on the identity of the speaker is further drawn out in the case of media corporations. As the majority suggests, media corporations have the same fundamental characteristics as non-media corporations, and can accumulate as much wealth as any other for-profit corporation. Insofar as this is true, the BCRA's restrictions would apply to media corporations, but for the fact that the BCRA expressly exempts them.¹⁰⁵ And therein is the difficulty

99. *Citizens United*, 130 S. Ct. at 903 (quoting *Austin*, 494 U.S. at 660).

100. *Id.*

101. *Citizens United*, 130 S. Ct. at 903 (quoting *Austin*, 494 U.S. at 660). The government's interest in preventing *quid pro quo* corruption was rejected by the Court along several grounds. First, the type of corruption envisioned in a *quid pro quo* scheme would be covered by other anti-bribery or criminal laws, and second, that type of influence makes its place felt in the context of direct contributions to candidates where a "trade" can be made. *See id.* at 908–11. This is less likely in the case of an independent expenditure at the center of *Citizens United*, in which the public, rather than the elected official, is the ultimate decision maker (to vote for or against). *See Id.* at 903.

102. *Id.* at 911.

103. *Id.* at 905.

104. *Id.* at 911.

105. Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 441b(c)(2) (2206).

with *Austin* and the thought process that leads to the conclusion that corporate interests are different, special and somehow deleterious to the marketplace of ideas. By exempting media corporations, the BCRA and the antidistortion argument “exempt[s] some corporations but cover[s] others, even though both have the need [and] the motive to communicate their views.”¹⁰⁶ The effect of a prohibition on corporate speech would prevent “small and nonprofit corporations . . . from presenting both facts and opinions to the public.”¹⁰⁷ Of course, the majority of the thousands of public companies in the United States do not possess massive aggregations of wealth that could be deployed to advance a political agenda. Likewise, why would it be acceptable for a newspaper publisher to speak, but not a financial services firm which issues opinions on the markets, political events or macroeconomic trends?

The issue of shareholder rights is a different one, more linked to governance than the First Amendment. Do shareholders in a public corporation possess some rights that require protection in the event the corporation expressed political speech whose content offends the shareholder? The *Citizens United* majority opinion contains a discussion which discusses this point, but does not explicitly recognize such a shareholder right.¹⁰⁸ If such a right existed, the argument could be advanced that the government would be within its rights to restrict the free speech of any public company at any time, because the possibility will always exist of a dissenting minority shareholder. Taking the case of the newspaper publisher again, the government could limit media speech under this aegis. Here the Court was clear—the Constitution does not allow this.¹⁰⁹

In discussing the dissenting shareholder, the Court found that the procedures of corporate democracy serve as adequate protections for this problem.¹¹⁰ This reasoning, unfortunately for the Court, may have been based on the false assumption that a public company of any size would be able to discern the political views of its shareholders. As discussed later in this article, these potential shortcomings are far from fatal. Nonetheless, the majority of the Court opined that other mechanisms existed to protect whatever interests or rights shareholders may have in governing the free speech of the corporation.¹¹¹

Moreover, the Court noted that the offending provisions of the BCRA

106. *Citizens United*, 130 S. Ct. at 906.

107. *Id.*

108. *Id.* at 911.

109. *Id.*

110. *Id.*

111. *Id.*

are both “underinclusive and overinclusive” because, by its terms, the BCRA applied only to communications within thirty or sixty days of an election. If the goal was to protect the interests of shareholders from speech, the prohibition should have applied to corporate political speech disseminated at any time during the calendar year.¹¹² By targeting a relatively narrow preelection window, the BCRA had the effect of telling corporations that they could say whatever they wanted, but only when the government told them it was appropriate. You may speak, in other words, when we say it is okay. Congress was attempting to craft a rule which bore a justifiable relation to the perceived problem—the danger to the electoral process of allowing corporations to express a view on a particular candidate running for office. Congress, it can be assumed, was wary of the constitutionality of a law containing an outright ban on political speech, whenever made, and thus chose time frames (thirty and sixty days before an election) to provide a rational nexus to the speech and the vote.

The BCRA was overinclusive because it swept in all corporations—nonprofits and for-profits alike, of all sizes and ownership structures.¹¹³ The majority opinion does not elaborate on this point, but it can be argued that the Court assumes that corporations have some responsibility to the political sensibilities of their shareholders. If that obligation exists, the Court assumed that shareholders of public corporations with a single or a relatively discrete group of owners could ensure themselves that corporate political speech was aligned with their own. This is a slippery slope, and although pointing to the right conclusion in *Citizens United*, tees up opportunities for post-*Citizens United* reforms, and fails to accord this purported shareholder interest secondary standing to the primary right of the corporation itself.

By contrast, the dissenting opinion viewed the special characteristics of corporations as significant and a basis for a distinction from natural persons.¹¹⁴ Corporations have perpetual life, separation of ownership and control, and the ability to accumulate “resources . . . [that] ‘are not an indication of popular support for the corporation’s political ideas.’”¹¹⁵ Even though the dissent looked at the corporate form in a different way than did the majority, the dissent recognized what is essential to the

112. It appears that Congress was concerned with suppressing the First Amendment rights of corporations in this design. The First Amendment tends to work in absolute terms—corporations either have a right to speak or they do not. If they do, they are entitled to the entire package of protections afforded by the First Amendment’s umbrella. There are not two First Amendments, one for natural persons and one for corporations.

113. *Citizens United*, 130 S. Ct. at 911.

114. *Id.* at 945–49.

115. *Id.* at 971 (quoting *Austin*, 494 U.S. at 659).

corporate right and responsibility to engage in political speech: corporations “engage the political process in instrumental terms” to enable them to “maximize shareholder value.”¹¹⁶ Corporations do not necessarily, the dissent states, engage for the purposes of advancing “any broader notion of the public good.”¹¹⁷ What the dissent did not add to this statement, but what is a necessary corollary for governance purposes, is corporations may act in furtherance of other goals and stakeholders (in addition to the maximization of shareholder value) provided there is a nexus to the long term best interests of the corporation.¹¹⁸ This convergence is essential to the understanding of the strong interest in franchise protection which may require corporations to exercise their rights to political speech.

Justice Stevens’ opinion argues it is legitimate for the government to protect the right of individuals who have paid money into a corporation from being forced to support political candidates they may otherwise oppose.¹¹⁹ According to the dissent, the rights of shareholders are virtually “nonexistent” and would not rise to the level of enabling a shareholder to protect his or her interests.¹²⁰ Critically, as Justice Stevens observed, most Americans own stocks through intermediaries, “which makes it more difficult both to monitor and to alter particular holdings.”¹²¹ Addressing the use of treasury funds in the lobbying and charitable contexts, the dissent distinguished electioneering communications by stating the selection of public officials is the “area in which ‘the interests of unwilling . . . corporate shareholders [in not being] forced to subsidize that speech are at

116. *Citizens United*, 130 S. Ct. at 965.

117. *Id.* As an aside, it could be noted that natural persons do not always act for the greater good either.

118. See *Revlon Inc. v. MacAndrew & Forbes Holdings*, 506 A.2d 173, 182 (Del. 1986). Delaware courts have long permitted boards to consider factors other than shareholder interests if there is a nexus to the corporate purpose. See *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955 (Del. 1986); Leo E. Strine Jr., *The Social Responsibility of Boards of Directors and Stockholders in Change of Control Transactions: Is There Any “There” There?*, 75 S. CAL. L. REV. 1169, 1177–85 (2002). Several states have adopted so-called stakeholder statutes as part of their corporation laws to make it clear that boards of directors may consider the interests of stakeholders other than the shareholders, such as the community at large, employees and suppliers when making corporate decisions. See generally Miriam A. Cherry & Judd F. Snierston, *Beyond Profit: Rethinking Corporate Social Responsibility and Greenwashing After the BP Oil Disaster*, 85 TULANE L. REV. 983 (2011). Thus, United States corporations, while guided by economic motives first and foremost, can and do act with other interests in mind. See Charles Elson, *Five Reasons to Support Shareholder Primacy*, DIRECTORSHIP, Apr. 15, 2010, at 63–65.

119. See *Citizens United*, 130 S. Ct. at 978 (quoting *Nation’s Right to Work Comm.*, 459 U.S. at 207–08).

120. *Id.* (citing Margaret Blair & Lynn Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 320 (1999)).

121. *Id.*

their zenith.”¹²² The dissent then acknowledged that shareholder protection was not “an adequate or independent” interest to sustain a suppression of the First Amendment, and that it would take more to restrict corporate speech.

Citizens United provides two very different takes on the United States system of corporate governance. The Supreme Court Justices in the minority on *Citizens United* would take a paternalistic view. These Justices, implicitly at least, do not think very much of shareholder democracy as an accountability mechanism or as a means of allocating roles and responsibilities in governance. They did not explicitly acknowledge the ascendancy of the modern shareholder, instead referencing “nonexistent” shareholder rights. The minority view may be more indicative of a pre-Dodd-Frank governance era. That sitting Justices of the Supreme Court should have this view may be symptomatic of the general sentiment in policy today with regards to the shareholder board dynamic, and which may partially explain how shareholder advanced initiatives continue to hit their mark. They may, in other words, be referencing a governance landscape that has changed, and is no longer tilted in favor of management and the board of directors.

B. SHAREHOLDER-DIRECTED POLITICAL SPEECH

Political speech, similar in many ways to charitable contributions or lobbying efforts, has been nonetheless portrayed by some commentators as fundamentally different. One possible response to this perceived difference is to assign more shareholder rights to overseeing political speech. This is the tack taken by those who favor a high degree of shareholder involvement in the ordinary business affairs of the corporation. Decisions made in the ordinary course of business are generally within the purview of the management as overseen by the board of directors. Shareholders, it is asserted, ordinarily have no direct role, either in a preapproval or an ex post facto review context, in the decision-making process.¹²³ Some reformers would change this system for political speech purposes. They note that, absent special circumstances, shareholders have limited corporate governance options—the option to sue (often in a derivative context alleging a breach of fiduciary duties), to assert a precatory shareholder resolution, utilize the corporate democracy process to elect a new board, or

122. See *Citizens United*, 130 S. Ct. at 978.

123. See generally DEL. CODE ANN. tit. 8, § 141(a) (stating that the business affairs of the corporation are managed by a board of directors). See also *Spiegel v. Buntrock*, 571 A.2d 767, 774 (Del. 1990); *Aaronson v. Lewis*, 473A.2d 805 (Del. 1984).

divest their ownership interests. These have been the remedies available to shareholders under the United States system of governance for over one hundred years (in the case of shareholder resolutions under Exchange Act Rule 14a-8, over seventy years).¹²⁴ Like the minority of justices on the Court, reformers do not believe these rights are adequate or sufficient, particularly for corporate political speech.

What makes the constitutionally-protected right to engage in political speech different from the dozens of other actions taken by management and overseen by the board? How is political speech different in kind from commercial speech, charitable contributions, or even direct lobbying? There are at least three main issues with political speech articulated by those who would assert additional shareholder sovereignty over corporate expression. These are: (1) the potential for the divergence of interests between the corporation and some, all or a minority of shareholders; (2) the expenditure of significant corporate resources; and (3) the rights of shareholders not to be forced to associate with views they do not support or may in fact oppose.

A proponent of increased shareholder sovereignty is Lucien Bebchuk, one of the major voices in corporate law and governance in academia, who together with Robert Jackson, asserts that a new paradigm is required post-*Citizens United*.¹²⁵ They argue, in part, that there is “no role for shareholders . . . no mandatory role for independent directors . . . and no mandatory disclosure to directors” of corporate political speech.¹²⁶ Assessing the state law of fiduciary duties and board powers, they conclude boards are free to delegate matters of political speech to management or to take action themselves unilaterally.¹²⁷ Arguing that there exists a “significant likelihood” that the political motivations of directors and executives will diverge from shareholders, Bebchuk and Jackson propose a

124. Recently, the staff of the SEC recognized that a proposed shareholder proposal requesting a report on lobbying expenses fell within the ordinary business exemption of the rule and could be excluded. See Letter from SEC to Amy L. Goodman, Gibson, Dunn & Crutcher LLP, (Feb. 17, 2009) (on file with Westlaw). See also Letter from SEC to Martin P. Dunn, O'Melveny & Meyers LLP, (March 5, 2010) (on file with Westlaw) (allowing corporation to exclude shareholder resolution requesting a report on political contributions and payments used for grassroots lobbying).

125. See generally Bebchuk & Jackson, *supra* note 6.

126. *Id.* at 87.

127. *Id.* at 88 (citing BRUCE FREED & JAMIE CARROLL, OPEN WINDOWS: HOW CODES OF CONDUCT REGULATE CORPORATE POLITICAL SPENDING AND A MODEL CODE TO PROTECT COMPANY INTERESTS AND SHAREHOLDER VALUE 15 & n.18 (2007), for the proposition that of one hundred large public companies, thirty-four require board level approval of political expenditures). It should be noted that board approval in this context is likely to mean explicit board approval prior to each expenditure. It does not taken into account the board is responsible for overseeing all of management's activities under state fiduciary duty principles, including risk management. See *In re Citigroup Derivative Litig.*, 964 A.2d 106 (Del. Ch. 2009).

default mandatory law allowing shareholders a veto over the overall amount of funds spent on political speech.¹²⁸ They argue such a rule should cover direct independent expenditures as well as payments made to intermediaries.¹²⁹ Further, they argue for a change in the structure of corporate resolution process, advocating shareholders be allowed to adopt resolutions that are binding on the board and the corporation in which shareholders could “direct that the corporation may not spend funds for certain types of political purposes (such as judicial campaigns or the election of a particular candidate)” so that not only the amount of funds used in speech but the intended subjects of the speech would be subject to binding shareholder resolution.¹³⁰ The nature of the board’s role would also change under their proposed shareholder primacy approach. Bebchuk and Jackson argue for the adoption (at the federal level) of rules mandating that corporate speech decisions be approved or overseen by a committee of independent directors. In order to ensure the constitutionality of this regime, the proposed laws would be default settings, with opt out by shareholder vote.¹³¹

This proposal is at first attractive, and has the linear appeal of ceding ultimate decision-making authority with the residual owners of the enterprise. This approach starts with the view that taking a position on a candidate is fundamentally different from plant openings and closings, expansion into or retreat from geographical markets or product lines, and decisions regarding outsourcing, human resources or employee rights. Assuming that an expression of support for a congressional candidate is a higher impact decision than a decision to close or merge a business line, shareholder reformers then seek to add protections around the internal decision making process of the corporation.

Interestingly, the argument is made that there is a significant likelihood that the views of directors and management may diverge from those of shareholders. For this purpose, we may consider three major spheres of influence relevant to the corporate welfare. Sphere one would encompass the business strategy and affairs of the corporation, its products, services and ordinary activities. Sphere two would consist of the rules governing the corporation itself, governance, shareholder rights, voting, and procedures. The third and final sphere would be the political beliefs of the directors, executives and shareholders, as individuals, and concerning any of the issues inherent in being a citizen in the public realm.

128. Bebchuk & Jackson, *supra* note 6, at 89–90.

129. Bebchuk & Jackson, *supra* note 6, at 98.

130. Bebchuk & Jackson, *supra* note 6, at 99.

131. *Id.* at 92.

When a corporation, its management and board operate within sphere one, they are, absent breaches of fiduciary duty or *ultra vires* acts, within the parameters of the business judgment rule. The rationale underlying the business judgment rule includes that by shielding decision making from undue judicial review, the directors, as opposed to the shareholders, manage the corporation.¹³² Centralized decision making, without unwarranted interference by shareholders preserves the corporate structure of a board elected by shareholders for the purpose of overseeing management. In fact, it has been stated that the business judgment rule, as a lynch pin of the corporate governance structure itself, “ultimately serves the more important function of protecting stockholders from themselves.”¹³³ Shareholder-directed reformers essentially posit the question—is corporate support of a federal candidate for office enough of a deviation from the corporate function to justify a change in the basic allocation of power between boards and shareholders itself? They answer “yes,” and thus the reforms suggested would have the effect of re-allocating the responsibilities of the board and shareholders.

It is submitted that the debate over whether political speech shareholder resolutions should remain precatory or should be made mandatory involves so many variables, and would require the input and agreement of numerous constituencies as to render the practical possibilities of such a change occurring as all but theoretical, and not a valid policy suggestion. Long-standing issues of federal and state allocation of law are similarly implicated and would similarly be displaced.¹³⁴ The hurdles to be jumped for the reform approach to take place are many and high.¹³⁵ If political speech resolutions were mandatory,

132. DENNIS J. BLOCK ET AL., *THE BUSINESS JUDGMENT RULE - FIDUCIARY DUTIES OF CORPORATE DIRECTORS* 17–18, 3rd ed. 1989.

133. Michael P. Dooley & E. Norman Veasey, *The Role of the Board in Derivative Litigation: Delaware Law and the Current ALI Proposals Compared*, 44 BUS. LAW. 503, 522 (1989).

134. See *CA, Inc. v. AFSCME Employees Pension Plan*, 953 A.2d 227 (Del. 2008). In that case, the Delaware Supreme Court invalidated a shareholder initiated bylaw which would require the board of directors to reimburse all candidates in proxy ballot director elections out of corporate funds. The Delaware Supreme Court held that the bylaw had the effect of violating Delaware state law because it would remove the ability of the board of directors to exercise fiduciary duties by requiring reimbursement in all circumstances. *Id.* The case may be read as standing for the proposition that under Delaware corporate law, even shareholder-driven bylaws may not supplant the province of the board of directors to use their judgment in the exercise of their fiduciary duties.

135. See Larry E. Ribstein, *The First Amendment and Corporate Governance*, (Ill. Program in Law, Behavior and Social Science, Working Paper No. LBSS11-05, 2011) available at <http://ssrn.com/abstract=1739264>. Professor Ribstein’s work is complementary to the approach of this article. He recognizes that the Court left open the possibility for other forms of regulation of corporate speech, but concludes that a methodology based on corporate governance processes would be ineffective and possibly unconstitutional. A corporate governance-based restriction, argues Ribstein, would protect certain shareholders, but may infringe the rights of other stakeholders. *Id.* at 26. In addition, such an

the reasoning would apply to all categories of shareholder initiatives. It is unclear, at best, if shareholders as a group would even want this level of influence. It is clear that shareholders do not possess these rights under contemporary American jurisprudence.

Finally, the adoption of some or all of these reforms would not ensure that shareholder political preferences would be protected. The important factor is that it is the speech itself that matters. Policies designed to ring fence the speech by counting votes on the one hand or directing its funding on the other are doomed to fail. Assume, as is the case in the United Kingdom, shareholders are given the authority to vote by proxy on a proposed budget. Assume further that shareholders possess sufficient information about the nature and costs of political speech to make an informed vote. If Company X conducts a proxy vote which results in an authorization of a corporate spending budget of \$100,000 per annum,¹³⁶ can there be any degree of confidence that a budget will prevent the resulting speech from offending any shareholders? A \$100 expenditure can convey the same message as a \$100,000 one. The mythical shareholder's personal views could be offended by a posting on a website (which costs relatively nothing) just as they could be offended by a multimillion-dollar ad campaign. In the information age, it is difficult to tell the former from the latter. And, from that shareholder's perspective, it really does not matter. That's what makes speech unique.

It is argued that budgets serve another purpose, that is, to limit the funds spent so as to prevent waste or similar misuse of corporate assets. However, in the age of the internet, where a cheaply made video can "go viral" on YouTube and be seen by millions of viewers in a matter of hours, or a Facebook post or a Twitter "tweet" can reach a global audience in a matter of minutes, does Company X's annual budget of \$100,000 have any relation at all to the impact its speech may have? Budgets therefore do not go to the ultimate problem the reformers seek to address—prevention of shareholder political disagreements with the corporation. Because it is the speech itself that matters, not how much it costs or who paid for it, giving

approach may prove to be unconstitutional under the *Citizens United* "listeners' rights" rationale. *Id.* Ribstein concludes that any corporate governance reforms aimed at shareholders would require a balancing against the frustration of the speech generally, and the expressive rights of other shareholders and stakeholders. *Id.* He further cautions that what he terms the "listeners' rights" rationale of *Citizens United*—that the marketplace of ideas has a right to hear speech and decide for itself the merit of that speech, may raise additional questions concerning the constitutionality of securities laws that have the effect of constraining speech, including those concerning speech under Regulation FD. *Id.* The better course, he argues, is to "err on the side of free speech." *Id.* at 38.

136. Some have argued for the adoption of the United Kingdom approach to corporate governance as it applies to political speech. The fact that the United Kingdom does not have the United States Constitution and the First Amendment thereto makes a direct analogy difficult.

shareholders the power of the purse is of limited utility in protecting them from a statement with which they disagree.

In order to accept the notion of the shareholder-directed speech reform package, one must first accept that corporate political speech is unmanageable within the existing corporate structure. Then, even if that were the case, one must consider whether putting the decision in the hands of the many—the shareholders—makes the agency problem better, or worse. Organization and decision-making theory would point to the conclusion that corporate political speech directed by a large, decentralized group comprised of many different constituencies would be more difficult to manage than if directed by a concentrated group with clear fiduciary roles and responsibilities. Unless, the real goal of the governance reform is not to further the best interests of the corporation and its shareholders, but to suppress the speech—which the Constitution forbids.

C. BOARDS OF DIRECTORS AS RISK MONITORS

As noted above, boards of directors have the primary responsibility for corporate oversight in the history of American corporate law—but the concept as it has been applied to practice has evolved as corporations became larger, more complex, and subject to increased government oversight and regulation. The board's responsibility to monitor management, at least insofar as providing a backstop against fraud and illegal or unethical conduct however, is a relatively new concept in corporate law and has been articulated only in the last twenty years. A board's duties to watch over management to prevent illegality arose in two distinct contexts and together frame the duty to oversee political speech as a risk management function.

The duty to monitor management, and more precisely to ensure that the corporation established policies, processes and controls to detect fraud and illegal conduct were articulated in the seminal decision *In re Caremark*.¹³⁷ Prior to this decision, United States corporations were in an unusual position of being subject to state fiduciary duties which were out of synch with the requirements imposed upon them by federal rules and regulations, including the Federal Sentencing Guidelines. This conflict was resolved in the *Caremark* case, which served to break the law of Delaware from the less-demanding duties set forth in the 1963 decision of the Delaware Supreme Court *Graham v. Allis Chalmers*.¹³⁸ In *Graham*, the

137. 698 A.2d 959 (Del. Ch. 1996). The approach taken in *Caremark* was later adopted in *Stone v. Ritter*, 119 A.2d 362 (2006).

138. 188 A.2d 125 (Del. 1963).

Delaware Supreme Court famously noted that directors “are entitled to rely on the honesty and integrity of their subordinates until something occurs to put them” on notice that something is wrong.¹³⁹ Until that point of notice, the pre-1996 director of a Delaware corporation had “no duty to . . . install and operate a corporate system of espionage to ferret out wrongdoing” at the corporation.¹⁴⁰

Caremark changed that policy, with the articulation of the well-established duty to adopt an information and reporting system that is reasonably designed to provide “timely, accurate information to allow management and the board . . . to reach informed judgments concerning both the corporation’s compliance with law and its business performance.”¹⁴¹ The articulation of this duty served at least two policy interests: to “catch up” the Delaware law of director fiduciary duty with the federal expectation—if not a duty—contained in the United States Federal Sentencing Guidelines for corporations to establish policies and procedures designed to detect illegal conduct; and to recognize that corporations were subject to an increasing body of regulations and criminal laws designed specifically with corporations in mind.

That a board of director’s fiduciary duty to oversee the business activities of a corporation extends beyond the obligation to monitor compliance with laws and regulations was implicit in the original *Caremark* opinion. The Delaware Court of Chancery (and later blessed by the Delaware Supreme Court) defines the oversight duty scope as “both the corporation’s compliance with law and its business performance.”¹⁴² The Court correctly recognized that an informed director must understand the business performance of the corporation—and to understand business performance; a director must understand its products, services, marketplace, the regulatory environment in which it operates, and the risks inherent in the business.¹⁴³ Risk management may be seen as an organic duty, a component of the duties of care and loyalty (and good faith).¹⁴⁴

Risk management responsibilities and expectations derive from at least two other sources. Increasingly they are explicitly regulatory expectations.¹⁴⁵ The United States and international regulators have consistently required corporations subject to applicable rules to understand

139. *Graham*, 188 A.2d at 130.

140. *Graham*, 188 A.2d at 130.

141. *Caremark*, 698 A.2d at 965.

142. *Id.*

143. See A.B.A. COMM. ON CORP. LAWS, CORPORATE DIRECTOR’S GUIDEBOOK 27–28 (5th ed. 2007) (describing obligations of the board for both compliance and risk management).

144. See *Guttman v. Huang*, 823 A.2d 492 (Del. Ch. 2003) (explaining that the director duty of oversight is part of the duty to act in good faith).

145. See, e.g., Bank Holding Company Act, 12 C.F.R. § 225.175 (2005).

and monitor risk in several ways. First, there must be a “tone from the top” of the board and the most senior management of the organization, which sets the organizational appetite for risk, defines its limits and monitors the risk profile across the organization. The tone from the top must be driven into the organization through a system of policies, procedures and controls that capture monitor and assess risks.¹⁴⁶ The COSO ERM framework notes that the board of directors has a “key role” in the oversight of enterprise risk management, and should be appraised on a timely basis of material risks, management’s assessment of those risks, and the planned organizational response.¹⁴⁷ Under this guidance, the board must reach a level of comfort that appropriate processes are in place and that management is positioned to not only identify, assess and respond to risk, but to bring relevant information to the board on a timely basis.¹⁴⁸

Dodd-Frank itself explicitly requires certain financial institutions and other systemically important nonfinancial institutions to create a risk management committee which would include at least one risk management expert with experience in managing risk at large companies.¹⁴⁹ Risk management committees under Dodd-Frank have responsibility for a broad array of risk identification and management. These requirements were outgrowths of concerns that the financial crisis of 2008 was, at least in part, caused by a failure of risk management—that institutions did not understand the full scope and nature of the risks of the financial instruments and derivative products they were buying, selling or holding.

The SEC has adopted disclosure requirements to the company proxy requiring all companies, financial and nonfinancial, to discuss the leadership structure of the board and the board’s role in risk management. Public companies are required to disclose the nature of the board’s role in overseeing risk, such as how the board administers its oversight function, the effect that risk oversight has on the board’s process, and whether and how the board or board committee monitors risk. The requirements identify the board of directors as the proper body to oversee the risk management policies, procedures and controls of the company. Modern boards should assess all material risks and opportunities facing the firm. Political or regulatory risks and opportunities can be as immediate, and as

146. See Comm. of Sponsoring Orgs. of the Treadway Comm’n, *Enterprise Risk Management – Integrated Framework* (2004), http://www.coso.org/documents/COSO_ERM_ExecutiveSummary.pdf [hereinafter *ERM Framework*]. The COSO Enterprise Risk Management (“ERM”) approach involves the component elements of the Internal Environment (a role of the board of directors); Objective Setting; Event Identification; Risk Assessment; Risk Response; Control Activities; Information and Communication; and Monitoring.

147. See *Enterprise Risk Management – Integrated Framework*, *supra* note 146, at 6.

148. *Id.*

149. Dodd-Frank Act § 162, 124 STAT. 1376, 60, 66.

significant, as market or credit risks. They should be managed in a similar fashion.

IV. A CORPORATE RESPONSIBILITY TO SPEAK

A. NEW EMPIRICAL EVIDENCE

Previous attempts to measure the potential effect of political speech may have on public companies have concluded that the effect, to the extent it is measurable, is a negative one. For example, looking at data from 1998 to 2004, a 2010 study found that pro-shareholder governance was negatively related to observable political activity, and that political activity was strongly negatively related to firm value.¹⁵⁰ This study, although comprehensive in its approach and use of data, did not capture the effect of the *Citizens United* decision in its data sample. The author of the study, Professor Coates, rightly pointed out that disclosure practices varied and were inconsistent across public companies. Measuring corporate political speech was difficult. However, Coates reasoned that what was observable was probably the tip of the iceberg in terms of observable activity. Any negative implications of political speech, he reasons, would tend to be understated by the data.¹⁵¹ The study concluded that the analysis “[did] not definitively prove that political activity harm[ed] shareholders,” but argued that definitive proof may never be forthcoming, requiring policy to be built on a “combination of theory and suggestive evidence.”¹⁵² This combination suggests that laws replacing restrictions that were removed by *Citizens United* should be replaced, and that such laws or protections would be valuable to shareholders.¹⁵³

The empirical analysis contained in this article reaches a different conclusion and concludes with good news for both corporations and their shareholders. The research herein assesses data from the time of the *Citizens United* decision until the midterm elections of 2010. The ultimate finding of this assessment is that the decision in *Citizens United* did not adversely affect the stock prices of a portfolio of companies known (or likely) to have exercised their First Amendment rights. Moreover, the stock prices of those companies which publicly declared that they would not use corporate treasury funds in political speech did not fare better than

150. John C. Coates, IV, *Corporate Governance and Corporate Political Activity: What Effect Will Citizens United Have on Shareholder Wealth?*, 1 (Harvard Law & Economics, Discussion Paper No. 684, 2010).

151. *Id.*

152. *Id.* at 16.

153. *Id.*

those that did not. *Citizens United*, it appears, and the concomitant right to free speech, is unrelated to stock price, or the market's perception of value.

The following section discusses three hypotheses and provides analysis, data and conclusions. The Appendices contain the supporting data in chart format.

1. Hypotheses

The first hypothesis begins with the straw man argument that political speech by corporations, either because of agency issues or other effects, is detrimental to firm value. This is the implication of prior work, is a reason why laws were passed restricting corporate speech, and is why reformers seek to scale back *Citizens United*. According to this logic, if *Citizens United* was harmful to public companies, the share prices of companies who engaged in permissible pre-*Citizens United* political speech, and who would likely engage in even more speech post-*Citizens United*, would be diminished or penalized by the market.¹⁵⁴

Hypothesis One tests for a market reaction against firms who engage in political speech. If corporate political speech has a negative effect on firm value, the stock prices of companies known or likely to engage in corporate political speech should decline after the decision was announced in January of 2010. A portfolio of forty-three securities was selected, based on publicly available information concerning history and disclosures of political activity. On the flip side, several public corporations, either at the request of a third party or on their own accord, have publicly pledged not to use corporate treasury funds to make political contributions. It can be inferred that companies, by making their pledge public knowledge, were looking to obtain some benefit and enhance their market value. Hypothesis Two explores whether or not the share prices of corporations who made an "anti-*Citizens United*" public pledge did, in fact, increase.

H1: If public firms engage in corporate political speech, firms' abnormal returns, around the event of the decision of *Citizens United*, would be significantly *lower* than the S&P 500 Index.

H2: Abnormal returns for firms that have pledged not to use corporate treasury funds to make political contributions should *exceed* those of the

154. As to the question of the intention of a firm to so speak, and whether that intention was or is known by the market, we can make assumptions based on public information, past tendencies and incentives. While no event study of this type can accurately discern whether a corporation intends to do or not do something, it is worth considering that market reactions, particularly in and around significant events like the decision, are based on the expectations of the markets themselves, and not the actual company practices. If the markets believe Company X is engaging in a practice for which the market would assess a discount, the market will likely react to the perception.

S&P 500 Index.

To test the effects of *Citizens United* on market value at a broader level, United States equity indices were also examined. The indices selected are industry specific. Already regulated industries, such as banks and health care, were facing the prospect of further material legislation during the 2009 and 2010 period around the time of the decision in *Citizens United*. It was logical to assume that companies in these industries/indices had a high interest to engage in political speech. Press reports, particularly linked to the financial services industry, noted how banks spent considerable amounts of time, political capital and energy to educate and influence lawmakers in the run up to the Dodd-Frank legislation. Similarly, health care companies faced the prospect of historic reform affecting virtually all aspects of the business. These industries were engaging in lobbying, political discourse through PACs and other permitted pre-*Citizens United* channels. In the face of historic legislation, firms in these industries (while not the only industries) had a high incentive to take advantage of all means available to them. Thus, in order to add perspective to the firm-specific findings from Hypotheses One and Two, indexes from financial services and health care were selected to compare with S&P 500 returns. Other industries, not facing the prospect of material legislation, were also analyzed and their returns also compared to broad market returns.

H3: Abnormal index returns of industries involved in pending government regulation in 2009 and 2010, and therefore likely to engage in corporate political speech, are *lower* than cumulative returns of the S&P 500.

All three hypotheses are constructed as “one-tailed,”¹⁵⁵ the following analysis of each hypothesis examines and assesses differences positive or negative. Thus, the empirical work that follows is for “two-tailed”¹⁵⁶ hypotheses tests because the presence, or absence, of statistically significant abnormal returns is what the hypotheses seek to explore. Therefore, the tests conducted examined whether stock prices for the sample increased or decreased.

155. In statistics, when testing a hypothesis, a one-tailed test refers to only assessing significance in one direction of interest. For a symmetrical, normal probability plot of outcomes, this involves detecting an effect in one direction by not testing the effect in the other direction. A one-tailed analysis allows for more power in detecting an effect; however, it may result in an incomplete analysis by missing significant effects in the other direction.

156. In contrast to a one-tailed test, a two-tailed analysis tests significance in both directions, that is whether a mean is significantly greater than x or whether the mean is significantly less than x . This analysis is more robust than a one-tailed test and allows for testing the possibility of a relationship in both directions, regardless of the hypothesized relationship. See figure of normal probability plot.

2. Methodology

a. Data Collection: List of Companies

A list of forty-three firms was generated containing public companies which were known to make or had made political contributions with either corporate treasury funds, through PACS or through intermediaries such as the United States Chamber of Commerce.¹⁵⁷ These companies, it may be reasoned, would be the most likely candidates to amplify their political speech using the new freedoms granted by *Citizens United*.

During January of 2010, certain United States industries were facing the possibility of increased reform and legislation regarding their business practices. Examples of such political activities during that month included the debate about financial reform, the Dodd-Frank Act and the creation of a national health insurance plan. These proposed reforms would have had a significant impact on firms in the fields of financial services, healthcare, pharmaceuticals and biotechnology. Thus, firms in these industries had incentive to make political contributions in order to support certain political opinions regarding these issues.

In the months leading up to the 2010 election, certain companies signed the New York City Public Advocate's pledge not to use corporate treasury funds to make political contributions.¹⁵⁸ These firms were added to the test list (several are in the financial services industry index as well), and the dates they announced their acceptance of the pledge were also analyzed. It is important to note that these firms have pledged *only* not to use corporate treasury funds to make political contributions; they may have donated through PACs or intermediaries.¹⁵⁹ Furthermore, this list of firms does not include many of the firms publicly reported as having provisions in their codes of conduct prohibiting political contributions made with corporate funds.¹⁶⁰ Published in 2007, the Open Windows data cites Allegheny Technologies, Avon Products, Black & Decker, Colgate-

157. Dan Eggen, *PACs linked to foreign companies legally donate millions to U.S. campaigns*, WASH. POST, Oct. 17, 2010; Eric Lipton et al., *Top Corporations Aid U.S. Chamber of Commerce Campaign*, N.Y. TIMES, Oct. 21, 2010; Megan R. Wilson, *Not Just News Corp.: Media Companies Have Long Made Political Donations*, OPENSECRETS.ORG, Aug. 23, 2010; Top Overall Donors, OPENSECRETS.ORG, <http://www.opensecrets.org/overview/topcontribs.php?cycle=2004> (last visited Mar. 3, 2011).

158. See *Where do the largest corporations in the United States stand on corporate spending in our elections?*, BILL DE BLAISO, PUBLIC ADVOCATE FOR THE CITY OF NEW YORK, <http://advocate.nyc.gov/corporate-spending> (last visited Mar. 15, 2011).

159. Eamon Javers, *Morgan Stanley to Curb Corporate Campaign Donations*, CNBC, Sept. 27, 2010.

160. FREED & CARROLL, *supra* note 127, at 15.

Palmolive, IBM, Lucent Technologies, OfficeMax, RadioShack, Sara Lee and Schlumberger Ltd. as having language in their codes of conduct prohibiting political contributions with corporate funds.¹⁶¹ Wells Fargo is also cited as prohibiting corporate political contributions on their website, but not in their code of conduct.¹⁶²

This study uses only those firms who made public pledges in 2010 in response to *Citizens United*. Interestingly, only three of the firms in the Open Windows data signed the New York City Public Advocate's pledge in 2010: Colgate-Palmolive, IBM and Wells Fargo. The other firms who had signed the pledge include: Citigroup, Dell, General Electric, Goldman Sachs, JPMorgan Chase & Co., Morgan Stanley, Microsoft and Xerox.¹⁶³

The complete list of companies included in the data set is:

1. Aflac	23. Honeywell
2. AstraZeneca	24. IBM
3. Boeing	25. JPMorgan Chase
4. Bank of America	26. Lilly
5. Best Buy	27. Altria
6. Bristol Myers Squibb	28. Merck
7. BP	29. Morgan Stanley
8. Citigroup	30. Microsoft
9. Caterpillar	31. Novartis
10. Colgate Palmolive	32. NewsCorp
11. Comcast Corp	33. Pfizer
12. Credit Suisse	34. Polaris
13. Chevron Texaco	35. Prudential Financial
14. Dell	36. AT&T
15. Walt Disney	37. Target
16. Dow Chemical	38. Time Warner
17. FedEx	39. UPS
18. General Electric	40. Viacom
19. Gilead	41. Wells Fargo
20. Goldman Sachs	42. WalMart
21. GlaxoSmithKline	43. Xerox
22. Home Depot	

b. Data Collection: Market Indices

This study examines market indices to assess the effects of political speech on broader market index returns. In addition to the S&P 500 Index (which was used for calculating abnormal returns), specific industry indices were examined, particularly those of industries facing the prospect of material legislation. These indices include the Dow Jones U.S. Banks

161. FREED & CARROLL, *supra* note 127, at 12.

162. *Id.* at 12–13.

163. See *Where do the largest corporations in the United States stand on corporate spending in our elections?*, *supra* note 158.

Index, the Financial Services Index, the Financials Index, the Health Care Equipment & Services Index, the Health Care Index, the Insurance Index and the Pharmaceuticals & Biotechnology Index. This study also examined indices of industries not facing the prospect of pending material legislation to determine how these indexes performed in relation to the S&P 500 Index. These indices include the Broadcasting & Entertainment Index, the Construction & Materials Index, the Dow Jones U.S. Aerospace & Defense Index, the Food & Beverage Index, the Household Goods & Home Construction Index, the Industrial Goods & Services Index, the Industrials Index, the Media Index, the Mining Index, the Oil & Gas Index, the Personal & Household Goods Index, the Real Estate Index, the Real Estate Investment & Services Index, the Retail Index, the Software & Computer Services Index, the Technology Index and the Telecommunications Index.

c. Data Collection: Dates Analyzed in Sample

As part of using the -1, 0, and +1 event data study method, both equity and index prices were obtained for the days surrounding the date the Supreme Court made it publicly known that it was likely *Citizens United* was going to be overruled (June 29, 2009), the release of *Citizens United* (January 21, 2010), sixty days before the 2010 elections (September 2, 2010), thirty days before the 2010 elections (October 1, 2010), and the days at the 2010 elections (November 2, 2010). The dates were selected due to their relationship to the decision. For example, as the decision in *Citizens United* overturned certain provisions of the BCRA, including the issue of the prohibition of electioneering communications that are made within “60 days before a general, special, or runoff election . . . or 30 days before a primary or preference election, or a convention or caucus . . .,”¹⁶⁴ these dates (sixty days before the 2010 elections and thirty days before the 2010 elections) were captured as data points in the event study.

d. Data Collection: Historical Price Data & Returns

All daily historical closing prices (not dividend or stock split adjusted closing prices) for the specific dates aforementioned were found for each company and index using Bloomberg. For each time period, three abnormal holding period returns were calculated (using a -1, 0, +1 event study method) by subtracting S&P 500 Index returns from the equity return for each company. In addition, abnormal returns for industry-specific market indices were found by subtracting S&P 500 Index returns from the

164. Bipartisan Campaign Reform Act of 2002, 2 U.S.C.A. §201.

industry specific indices.

To test the significance of the holding period abnormal returns, *t*-statistics¹⁶⁵ were calculated given by: $t = (\mu - 0) / ((SE) * (\sqrt{n}))$, where Standard Error of abnormal returns is estimated using daily time-series return data (for the period June 29, 2009 through November 3, 2010) on each firm and index. *n* is equal to the number of data points used in calculating the *t*-statistic; here it is equal to the three holding period returns (-1, 0, +1) that are aggregated and averaged for each date being examined. The significance of the *t*-statistics was assessed using standard *z*-distribution¹⁶⁶ critical values: 1.64, 1.96 and 2.58 for 10%, 5% and 1% levels of significance, respectively.

e. Contemporary News Events for Analysis

In addition to using cumulative broad market returns (for the S&P 500 Index) to calculate firm abnormal returns (in order to isolate the effects of *Citizens United* from contemporaneous market events), this study examined press reports for evidence of news that was considered to have influenced the United States equity markets at the sample dates. These reports provide context and reason for the broad market fluctuations that occurred during the dates analyzed. For example, on June 29, 2009, the date the Supreme Court signaled to the marketplace a potential overturn of *Citizens United*, stocks rose despite low trading volume as a result of investor optimism on economic recovery. Financial stocks were particularly up on news that the Department of Education revealed details about pricing terms for student loan servicing contracts.¹⁶⁷ On January 21, 2010, the date the *Citizens United* decision was released, President Obama proposed the Volcker Rule and was quoted saying “Banks will no longer be allowed to own, invest, or sponsor hedge funds, private equity funds, or proprietary trading operations for their own profit, unrelated to serving their customers.”¹⁶⁸ The Volcker Rule, it was reported, could “potentially disrupt their [the banks] business

165. A *t*-statistic is a measure for how extreme a statistical value is. For *t*-statistics greater than benchmark critical values, one can conclude that the variable in question (here, the effects of engaging in political speech and the decision in *Citizens United*), has a significant effect on the dependent variable (here, corporation's market values/stock prices).

166. *z* distribution refers to the normal, symmetrical, continuous probability distribution of event outcomes. Even though this paper calculates *t*-statistics, using the *z* distribution (in contrast to a *t* distribution) is valid due to the large sample size of data (forty-three firms).

167. *Stocks Rise on Low Volume As Investors Bet on Recovery*, WALL ST. J. BLOG (Jun. 29, 2009, 4:41 PM), <http://blogs.wsj.com/marketbeat/2009/06/29/stocks-rise-on-low-volume-as-investors-bet-on-recover/>.

168. Matt Phillips, *Obama Goes Long Volcker*, WALL ST. J. BLOG (Jan. 21, 2010, 3:20 PM), <http://blogs.wsj.com/marketbeat/2010/01/21/obama-goes-long-volcker/>.

models and hurt revenue.”¹⁶⁹ In early November 2010, markets showed optimism in anticipation of the Federal Reserve’s second phase of the Quantitative Easing plan.¹⁷⁰ Exogenous events are important because while they affected the broad market, they may also have had a greater effect on individual firms in certain industries (such as financials), resulting in positive or negative firm abnormal returns.

3. *Analysis of Hypothesis 1*

H1: If public firms engage in corporate political speech, firms’ abnormal returns, particularly around the event of the passage of Citizens United, would be significantly *lower* than cumulative returns of market indices.

To determine if the abnormal returns for firms who engage in corporate political speech are significantly lower than the cumulative returns of market indices, t-statistics for each of the five event dates were examined. The significance findings are presented on the following page in Exhibit 1 (see Appendix 1 for actual t-statistics and Appendix 2 for detailed daily abnormal returns).

169. Mark Gongloff, *Bank CDS Spreads Widen for JP Morgan, Goldman*, WALL ST. J. BLOG (Jan. 21, 2010, 4:27 PM), <http://blogs.wsj.com/marketbeat/2010/01/21/bank-cds-spreads-widen-for-jpmorgan-goldman/>.

170. Dave Kansas, *Markets Cautious, Await Fed Move*, WALL ST. J. BLOG (Nov. 3, 2010 6:45 AM), <http://blogs.wsj.com/marketbeat/2010/11/03/markets-react-cautiously-positive-to-elections-await-fed/>.

Exhibit 1: CAR Three-Day Holding Period Returns for All Firms

	Supreme Court	Citizens United	60 Days	30 Days	Election
Aflac	-2.511%	-0.699%	2.477%	0.447%	0.188%
AstraZeneca	-1.843%	2.044%	-1.552%	0.070%	-1.469%
Boeing	0.053%	0.350%	0.455%	1.222%	-3.662%
Bank of America	6.860%**	-3.660%	3.024%	0.993%	-0.610%
Best Buy	-1.534%	0.105%	4.035%	0.387%	-1.751%
Bristol Myers Squibb	-2.695%	1.022%	-3.272%	-1.669%	-2.164%
BP	0.634%	-2.147%	2.124%	2.796%	2.576%
Citigroup	-1.891%	-3.194%	0.172%	3.552%	-0.756%
Caterpillar	-4.075%	-6.195%**	2.228%	-2.767%	0.383%
Colgate Palmolive	-0.880%	5.353%***	-3.811%*	-1.755%	0.491%
Comcast Corp	0.800%	-0.642%	1.262%	-2.051%	-1.017%
Credit Suisse	5.133%*	-8.347%***	0.911%	-1.392%	0.511%
Chevron Texaco	-0.813%	-1.360%	0.047%	0.717%	-1.102%
Dell	0.692%	-2.931%	1.634%	-0.018%	-0.646%
Walt Disney	-0.828%	1.831%	1.235%	1.068%	-0.781%
Dow Chemical	1.725%	-4.615%	3.239%	0.985%	1.084%
FedEX	-1.090%	-1.506%	0.764%	-0.419%	-1.543%
General Electric	-1.088%	2.579%	1.013%	-0.914%	-0.985%
Gilead	-2.092%	4.740%*	1.576%	-0.752%	-0.867%
Goldman Sachs	2.194%	-2.594%	2.273%	2.174%	-0.308%
GlaxoSmithKline	-0.406%	1.912%	-0.179%	0.850%	-0.670%
Home Depot	0.360%	1.110%	1.952%	0.232%	0.593%
Honeywell	-1.290%	-1.910%	4.171%***	-0.302%	-0.533%
IBM	-1.454%	-1.404%	-1.585%	0.512%	-0.841%
JPMorgan Chase	0.022%	-4.548%**	2.375%	2.090%	-0.969%
Lilly	-1.869%	0.050%	-2.023%	0.041%	-0.186%
Altria	-0.814%	1.854%	-2.557%	-1.067%	0.106%
Merck	5.256%	0.843%	-3.951%*	-0.954%	-0.684%
Morgan Stanley	2.435%	-5.993%**	2.614%	1.626%	0.924%
Microsoft	0.052%	-1.866%	-1.697%	-1.748%	0.149%
Novartis	-0.803%	4.927%***	-4.011%**	-0.941%	-0.076%
NewsCorp	0.295%	-1.631%	1.514%	-0.883%	0.925%
Pfizer	-2.062%	-0.097%	-1.752%	-2.223%	-0.224%
Polaris	4.111%	-0.457%	2.561%	-1.608%	-1.273%
Prudential Financial	0.685%	-2.636%	3.352%	-6.515%	1.655%
AT&T	0.078%	2.046%	-3.668%	1.195%	0.644%
Target	-1.993%	3.564%*	-1.943%	0.446%	2.642%
Time Warner	-0.823%	-0.236%	0.521%	-1.061%	-2.594%
UPS	1.354%	-0.561%	0.745%	-0.261%	0.670%
Viacom	1.197%	1.447%	-1.258%	0.303%	-0.514%
Wells Fargo	2.053%	1.546%	4.265%	2.037%	0.304%
WalMart	-1.353%	3.146%*	-1.432%	1.083%	0.123%
Xerox	-2.472%	4.774%	2.299%	2.131%	-1.222%

***, **, * indicate significance at 1%, 5% and 10% levels, respectively, two-tailed tests.

4. Hypothesis I Conclusions

On June 29, 2009, the date the Supreme Court made it publicly known that they were likely to overrule precedent regarding individual corporations' ability to make political contributions, only two of the abnormal returns for any of the forty-three firms in the sample were statistically significant. Both stocks were large banks (Credit Suisse and Bank of America) indicating a sector specific, or firm specific event. In each case, the stock prices went up, not down. Other financial services companies (Goldman Sachs and JP Morgan Chase) were up or flat. At the second date examined, the date the decision was announced (January 21, 2010), thirty-four of the forty-three firms examined in the sample had abnormal returns that were not statistically significant. Of the nine that had a statistically significant effect, three of the decliners were large banks, subject to the potential disruption to be caused by the imposition of the Volker Rule, announced by the President the same day. Five of the other statistically significant returns were positive. At the third date examined, sixty days before the 2010 election, thirty-nine of the forty-three firms examined in the sample had abnormal returns that were not statistically significant. The remaining four firms were mixed—with one positive return and three negative returns. At the fourth date examined, thirty days before the 2010 election, none of the forty-three firms examined in the sample had statistically significant abnormal returns. At the last date examined, the 2010 election, again, none of the abnormal returns for any of the forty-three firms were statistically significant.

The empirical work above allows for the rejection of Hypothesis 1. For firms who engaged in corporate political speech, their abnormal returns were *not* statistically significantly lower than cumulative returns of market indices, and in fact several of the firms realized significantly *positive* abnormal returns at some of the dates examined.

Furthermore, if the forty-three firms in the sample are thought of as an equally weighted single portfolio, the significance of the portfolio's average abnormal returns at the five event dates provides another perspective on the effects of the decision. The findings are presented on the following page in Exhibit 2. The average abnormal return for the portfolio of 43 companies was found for each day during the time period (June 26, 2009, through November 2, 2010). The standard deviation of all of these daily average abnormal returns was used in the *t*-statistic calculation. The *t*-statistics to assess significance were based on the same three-day holding period as above for each of the five event dates, using the average across three days of the portfolio average abnormal returns. These results on the following page show no material significance.

Exhibit 2: CAR Three-Day Holding Period for Equally-Weighted Portfolio

		Supreme Court	Citizens United	60 Days	30 Days	Election
(-1,1)	N=43	-0.016%	-0.325%	0.469%	-0.054%	-0.314%

Examining the data relating to average daily returns of individual stocks or the overall portfolio (Exhibit 3), there is a similar lack of significance. For example, the average daily holding period return for the entire continuous period June 26, 2009, through November 3, 2010, for the portfolio is greater than the average daily broader market return during the same period. In fact, 24 of the 43 firms in the portfolio realized average returns greater than the S&P 500 Index, and all but three firms experienced positive holding period returns during this continuous period (one of these firms was BP, who at the time as receiving extraordinarily bad press for an offshore drilling disaster in the Gulf of Mexico). This reinforces the statistical findings above, which shows that firms who engage in corporate political speech do *not* realize abnormal returns statistically significantly lower than cumulative returns of market indices.

Exhibit 3 below summarizes the portfolio analogy findings. The S&P 500 Index daily average return over the period was 0.083%. The daily average return for the portfolio of forty-three stocks (the average of the averages of each different stock) was 0.097%.

Exhibit 3: Average Daily Holding Period Returns (June 26, 2009 through November 3, 2010)

	Avg. Cum. Daily Return
S&P 500 Index	0.083%
Aflac	0.195%
AstraZeneca	0.042%
Boeing	0.159%
Bank of America	0.010%
Best Buy	0.087%
Bristol Myers Squibb	0.078%
BP	-0.002%

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Citigroup	0.140%
Caterpillar	0.271%
Colgate Palmolive	0.033%
Comcast Corp	0.123%
Credit Suisse	0.021%
Chevron Texaco	0.070%
Dell	0.040%
Walt Disney	0.139%
Dow Chemical	0.236%
FedEX	0.148%
General Electric	0.108%
Gilead	-0.040%
Goldman Sachs	0.054%
GlaxoSmithKline	0.037%
Home Depot	0.095%
Honeywell	0.130%
IBM	0.096%
JPMorgan Chase	0.050%
Lilly	0.008%
Atria	0.134%
Merck	0.103%
Morgan Stanley	-0.002%
Microsoft	0.048%
Novartis	0.109%
NewsCorp	0.149%
Pfizer	0.050%
Polaris	0.271%
Prudential Financial	0.143%
AT&T	0.051%
Target	0.095%
Time Warner	0.102%
UPS	0.107%
Viacom	0.187%
Wells Fargo	0.057%
WalMart	0.036%
Xerox	0.192%
Portfolio Avg.	0.097%

5. Analysis of Hypothesis 2

H2: Abnormal returns for firms that have pledged not to use corporate treasury funds to make political contributions should *exceed* those of the S&P 500.

The second hypothesis whether abnormal returns for firms that pledged not to use corporate treasury funds to make political contributions exceed those of the broader market. Before exploring the significance of abnormal returns, holding period returns were found for the day that each firm announced acceptance of the New York City Public Advocate's Pledge. Although eleven companies signed the New York City Public Advocate's pledge letter, the exact date for only three of the firms could be ascertained. These were Goldman Sachs, JPMorgan Chase & Co., and Morgan Stanley. The firms signed on August 2, 2010, September 17, 2010, and September 27, 2010, respectively.¹⁷¹ It is unclear when the New York City Public Advocate updated its website with news of the other companies' pledges.

	Day Before Signing	Day Of Signing	Day After Signing
Goldman Sachs	\$150.82	\$152.74	\$153.19
JPMorgan Chase & Co.	\$40.99	\$40.06	\$41.19
Morgan Stanley	\$25.15	\$24.87	\$24.50

The table above illustrates that only Goldman Sachs saw an increase in market value on the day they announced their pledge signature. This spike in share price may, however, be attributed to firm-specific events on August 2, 2010. Positive firm-specific market news included a story calling Goldman Sachs' CEO Lloyd Blankfein the "Most Beloved CEO on Wall Street," together with reports highlighting the company's defense of its collateral pricing practices with AIG, which were at issue in regulatory investigations.¹⁷²

Likewise, the drops in share prices of JPMorgan Chase & Co. and Morgan Stanley may be attributed to firm-specific events on their pledge dates. On September 17, 2010, JPMorgan Chase & Co. was included in the SEC's list of firms accused of window dressing (a bank practice of increasing risk exposure and then removing the exposure at the quarter's

171. Javier Hernandez, *Political Ads Off Limits, Goldman Promises*, N.Y. TIMES, Aug. 2, 2010; Javers, *supra* note 159; Jia Yang, *JPMorgan Chase pledges not to spend cash on election ads*, WASH. POST VOICES (Sept. 17, 2010, 1:10 PM), http://voices.washingtonpost.com/company-beat/2010/09/jpmorgan_chase_pledges_not_to.html.

172. Douglas McIntyre, *Lloyd Blankfein—The Most Beloved CEO On Wall St.*, 24/7 WALL ST. J., Aug. 2, 2010; *Goldman Defends Its Collateral Calls to AIG*, REUTERS, Aug. 2, 2010.

end).¹⁷³ The SEC also announced a unanimous vote to propose new rules that would require public companies to disclose how much risk they carry during the quarter.¹⁷⁴ On September 27, 2010, Morgan Stanley announced that the firm would be implementing a hiring freeze for the remainder of 2010 as a result of weaker than expected company profits for the third quarter, caused by “painfully slow” trading volume.¹⁷⁵

The data for the twelve firms who signed the New York City Public Advocate’s pledge illustrates that the pledge and market reaction did not offset exogenous events, despite negative company-specific events. Exhibit 4 below shows the abnormal holding period returns for the eleven firms that signed the New York City Public Advocate’s Pledge and their significance (see Appendix 3 for actual t-statistics).

Exhibit 4: CAR Three-Day Holding Period Returns for Firms That Pledged Not to Make Political Contributions with Corporate Treasury Funds

	60 Days	30 Days	Election
Citigroup	0.172%	3.552%	-0.756%
Colgate Palmolive	-3.811%*	-1.755%	0.491%
Dell	1.634%	-0.018%	-0.646%
General Electric	1.013%	-0.914%	-0.985%
Gilead	1.576%	-0.752%	-0.867%
Goldman Sachs	2.273%	2.174%	-0.308%
IBM	-1.585%	0.512%	-0.841%
JPMorgan Chase	2.375%	2.090%	-0.969%
Morgan Stanley	2.614%	1.626%	0.924%
Microsoft	-1.697%	-1.748%	0.149%
Wells Fargo	4.265%	2.037%	0.304%
Xerox	2.299%	2.131%	-1.222%

***, **, * indicate significance at 1%, 5% and 10% levels, respectively, two-tailed tests.

Note: Goldman Sachs signed the New York City Public Advocate’s pledge in August 2010; JPMorgan Chase and Morgan Stanley signed in September 2010. The distinction between those that pledged and those that did not can only be made and analyzed at the later dates (post-*Citizens United*) analyzed in this paper.

173. David Weidner, *SEC tries on ‘window dressing’ and gets a fit*, WALL ST. J., Sept. 17, 2010 available at <http://www.marketwatch.com/story/sec-moves-fast-on-bank-window-dressing-2010-09-17>.

174. *Id.*

175. *Morgan Stanley Imposes Hiring Freeze, Which Could Lead to Layoffs*, STREET INSIDER, Sept. 27, 2010, <http://www.streetinsider.com/Insiders+Blog/Morgan+Stanley+Imposes+Hiring+Freeze+%2C+Which+Could+Lead+to+Layoffs/5999408.html>.

6. *Hypothesis 2 Conclusions*

As shown above, none of the pledge signers realized a significantly positive abnormal return on any of the dates examined in this article. Any positive returns were not statistically significant and did not carry forward, and indeed returns diminished as the election drew nearer. The findings in the table above lead to the rejection of Hypothesis 2. The market did not appear to react in any positively significant way to the news of firms signing the New York City Public Advocate's pledge. In addition, all firms who did not sign the pledge did not realize significantly lower abnormal returns (shown in Appendix 4), indicating that their performance was *not* worse than the broad market, while the performance of those who signed the pledge was no better.

7. *Analysis of Hypothesis 3*

H3: Abnormal index returns of industries involved in pending government regulation in 2009 and 2010, and therefore likely to engage in corporate political speech, are *lower* than cumulative returns of the broad market.

The third hypothesis explored the performance of industry-specific indices that were involved in pending government regulation in 2009 and 2010. These indices were examined in relation to the S&P 500 Index and indices of industries not involved in pending government regulation during the time period. Industries facing imminent and extensive government regulation have a high incentive for, and probability to, engage in political speech.¹⁷⁶ The indices examined are presented on the following page.

176. See Martin H. Redish & Howard M. Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235, 235 (1998) ("[W]hatever the government does will inescapably have an immeasurable impact on the health and welfare of the private corporation or the world and vice versa.").

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Industries Involved in Pending Regulation	Other Industries
Dow Jones U.S. Banks Index	Dow Jones U.S. Aerospace & Defense Index
Dow Jones U.S. Financial Services Index	Dow Jones U.S. Broadcasting & Entertainment Index
Dow Jones U.S. Financials Index	Dow Jones U.S. Construction & Materials Index
Dow Jones U.S. Health Care Index	Dow Jones U.S. Oil & Gas Index
Dow Jones U.S. Insurance Index	Dow Jones U.S. Food & Beverage Index
Dow Jones U.S. Health Care Equipment & Services Index	Dow Jones U.S. Household Goods & Home Construction Index
Dow Jones U.S. Pharmaceuticals & Biotechnology Index	Dow Jones U.S. Industrial Goods & Services Index
	Dow Jones U.S. Industrials Index
	Dow Jones U.S. Media Index
	Dow Jones U.S. Mining Index
	Dow Jones U.S. Personal & Household Goods Index
	Dow Jones U.S. Real Estate Index
	Dow Jones U.S. Real Estate Investment & Services Index
	Dow Jones U.S. Retail Index
	Dow Jones U.S. Software & Computer Services Index
	Dow Jones U.S. Technology Index
	Dow Jones U.S. Telecommunications Index

In order to determine the significance of the abnormal industry index returns, *t*-statistics were calculated for all of the indices. The significance results are shown below in Exhibit 5. Appendix 5 shows actual *t*-statistics for all indices. Appendices 6 and 7 show abnormal holding period returns for specific firms in the financial services industry and for specific firms in the pharmaceuticals & biotechnology industry, respectively.

Exhibit 5: CAR Three-Day Holding Period Returns for All Indices

	Supreme Court	Citizens United	60 Days	30 Days	Election
Aerospace & Defense Index	-0.555%	0.192%	0.584%	-0.768%	-0.928%
Broadcasting & Entertainment Index	0.416%	0.103%	0.824%	-0.078%	-0.372%
Banks Index	1.590%	-0.014%	2.309%	1.630%	-0.510%
Construction & Materials Index	-0.943%	-0.355%	0.645%	0.094%	-0.131%
Oil & Gas Index	-0.283%	-0.671%	0.348%	0.751%	0.552%
Food & Beverage Index	0.273%	1.767%	-2.748%**	0.475%	-1.458%
Financial Services Index	0.561%	-1.573%	1.781%	-0.203%	0.272%
Financials Index	0.966%	-0.499%	1.483%	0.852%	-0.031%
Health Care Index	0.068%	1.407%	-1.177%	-0.472%	-0.254%
Household Goods & Home Construction Index	-0.961%	2.090%*	-2.506%**	0.371%	-0.468%
Industrial Goods & Services Index	-0.174%	0.055%	1.622%**	-0.592%	-0.148%
Industrials Index	-0.226%	0.031%	1.563%**	-0.547%	-0.148%
Insurance Index	-0.066%	0.579%	0.402%	-0.138%	0.386%
Health Care Equipment & Services Index	0.175%	1.134%	-0.051%	-0.371%	0.606%
Media Index	0.273%	0.401%	1.005%	-0.090%	-0.285%
Mining Index	-4.030%	-4.882%*	-1.784%	-0.284%	-1.462%
Personal & Household Goods Index	-0.140%	1.485%*	-1.234%	-0.214%	-0.456%
Pharmaceuticals & Biotechnology Index	0.015%	1.567%	-1.799%	-0.530%	-0.745%
Real Estate Index	1.682%	0.733%	-4.165%	3.479%	1.755%
Real Estate Investment & Services Index	1.761%	-0.500%	2.366%	0.712%	1.098%
Retail Index	-0.049%	2.352%***	0.736%	-0.257%	0.210%
Software & Computer Services Index	-0.141%	-0.972%	-0.773%	-0.638%	-0.593%
Technology Index	0.059%	-1.138%	0.119%	-1.123%	0.485%
Telecommunications Index	-0.325%	1.601%	-2.764%**	1.140%	0.435%

***, **, * indicate significance at 1%, 5% and 10% levels, respectively, two-tailed tests.

8. *Hypothesis III Conclusions*

The data above show that at any date only three of the indices (mining, telecom, and food & beverages) realized abnormal returns significantly lower than the S&P 500 Index. The majority of the *t-statistics* failed to show significance. Of the nine events showing a statistical significance, six of those were positive. This allows for the rejection of Hypothesis 3. Industries involved in pending regulation (such as Banks, Financial Services, Health Care, etc.) did *not* realize significantly lower abnormal returns than the broader market and in fact received some significantly positive abnormal returns. In addition, industries not involved in pending regulation did not realize significantly higher abnormal returns than the broader market across the dates. If these firms were engaging in political speech, they were not penalized for it. Moreover, they do not appear to have been adversely affected by the use of PACs or lobbyists.

9. *Empirical Conclusions*

The empirical work presented herein provides conclusive evidence for the rejection of all three of the following hypotheses:

If public firms engage in corporate political speech, their abnormal returns are *not* significantly lower than the broad market. Abnormal returns are in fact significantly *greater* than the broad market at some dates examined.

Abnormal returns for firms that have pledged not to use corporate treasury funds to make political contributions do *not* exceed broad market returns. Abnormal returns for companies who have not made a pledge to do so are not significantly lower than broad market returns. Thus, abnormal returns for firms who have pledged are not greater than abnormal returns of firms who have not.

Abnormal index returns of industries more likely to engage in corporate political speech are *not* lower than broad market indices. Abnormal index returns of industries less likely to engage in corporate political speech are *not* greater than broad market indices. Thus, abnormal index returns for industries involved in pending government regulation, and therefore more likely to engage in corporate political speech, are not lower than those of industries not involved in pending government regulation.

B. CITIZENS UNITED DECONSTRUCTED: THE CONDITIONS RELIED ON BY
THE MAJORITY MAY NOT EXIST

The empirical evidence demonstrates no consistent evidence between *Citizens United* and lower firm value. What, then, of the policy ramifications of the decision? What if one of the fundamental conditions relied upon by the majority of the Court does not exist? The question is particularly relevant for the corporate governance inquiry. In arguing *Citizens United*, the government and amici set forth the interest of shareholders broadly as justification for restrictions on corporate First Amendment rights.¹⁷⁷ They argued that shareholders should not be compelled to fund speech with which they do not agree.¹⁷⁸ The opinion by Justice Kennedy does not discuss this argument at much length, dismissing the theory by giving two reasons in a single paragraph.

The first reason cited by the Court was that a shareholder protection interest would allow a ban on the political speech of even media companies, and other corporations formed, at least in part, expressly for advocacy purposes.¹⁷⁹ The Court unequivocally stated “The First Amendment does not allow that power.”¹⁸⁰ But what of other corporations? For these, the Court reasons that “there is little evidence of abuse that cannot be corrected by shareholders ‘through the procedures of corporate democracy.’”¹⁸¹ The majority opinion does not specify exactly what it was referring to by reference to corporate democracy, although it can be assumed that the Court makes reference to traditional shareholder rights to vote at annual elections, including director elections, to make shareholder resolutions, to seek redress in judicial forums for breaches of fiduciary duties, and to pursue any other protections and rights (including the right to sell) available to the shareholder.

The dissenting opinion expands on this topic at more length, skeptically stating:

By “corporate democracy,” presumably the Court means the rights of shareholders to vote and to bring derivative suits for breach of fiduciary duty. In practice, however, many corporate lawyers will tell you that “these rights are so limited as to be almost nonexistent,” given the internal authority wielded by boards and managers and the expansive protections afforded by the business judgment rule.¹⁸²

177. *Citizens United*, 130 S. Ct. at 905–11.

178. *Id.*

179. *Citizens United*, 130 S. Ct. at 911.

180. *Id.*

181. *Id.* (quoting *Bellotti*, 435 U.S. at 794).

182. *Id.* at 978 (Stevens J., dissenting).

Further, stated the minority of Justices:

[T]he problem of dissenting shareholders shows that even if electioneering expenditures can advance the political views of some members of a corporation, they will often compromise the views of others Second, it provides an additional reason, beyond the distinctive legal attributes of the corporate form, for doubting that these “expenditures reflect actual public support for the political ideas being espoused.”¹⁸³

Taken together, all the Justices make reference to the general system of corporate democracy—all of the rights possessed by shareholders to vote and communicate with each other and with the board via resolutions. All of the Justices saw relevance in referring to corporate governance processes as a means of handling a potential shareholder dissent issue. The divergence on the Court was over whether governance protections are effective. This article does not suggest that they are not. Contrary to the view expressed by Justice Stevens in the minority opinion, shareholder rights are far from nonexistent. There is, however, a difference in the general processes of corporate governance, and a public company’s ability to monitor shareholder sentiment on a candidate by candidate basis.

The protections afforded shareholders in a public corporation have never included the specific, targeted ability of the corporation to capture, monitor and use as an input the political beliefs of shareholders. There are several reasons for this. First, corporations have not had cause to consider the issue, let alone attempt to develop methodologies to capture shareholder sentiment along political lines. Even assuming that technologies, systems and processes exist to enable shareholder dialogue on political issues, the issue of participation in the system presents substantial policy challenges. In the context of proxy voting, for example, individual shareholder participation in the proxy process remains low.¹⁸⁴ There is no assurance that any system would capture the views of the majority of shareholders. Without such assurance, the risk exists that a minority of motivated or “noisy” shareholders could dominate the process. This could disturb the outcome, and lead to the same type of agency problems the reforms seek to prevent.

More significant is the widely-recognized fact about modern corporate ownership—institutional investors control almost seventy percent of United States publicly traded companies.¹⁸⁵ These institutions are primarily acting

183. *Citizens United*, 130 S. Ct. at 979 (citing *Austin*, 494 U.S. at 660, 663).

184. See Concept Release on the U.S. Proxy System, Exchange Act Release No. 34-62495, File No. S7-14-10 at 78–86 (discussing retail participation in the proxy process).

185. See John C. Bogle, *Restoring Faith in Financial Markets*, WALL ST. J., Jan. 19, 2010, at A25. See also Press Release, The Conference Board, U.S. Institutional Investors Continue to Boost Ownership of U.S. Corporations (Jan. 22, 2007), available at <http://www.conference->

on behalf of the beneficial owners who have economic interest in the fortunes of the stock. Empirical evidence of turnover statistics, or the amount by which a fund's portfolio holdings are changed over the course of a year, indicates that the two predominant categories of institutional investors in the United States (hedge funds and mutual funds) turn over their portfolios frequently. One estimate of hedge fund turnover is that the portfolio turns over three times per year, or a 300% ratio.¹⁸⁶ At actively managed mutual funds, the turnover statistics are less, but still robust: average turnover is as high as 100% per year.¹⁸⁷ Pension funds, too, trade with frequency.¹⁸⁸ It appears that the shareholders of public companies in the United States changes completely on almost an annual basis.¹⁸⁹

These challenges undermine the policy recommendations of those who would seek to install laws requiring corporations to measure shareholder political sentiment. Both challenges go to whose political beliefs are relevant, and whose interests should processes of corporate democracy seek to protect. The institutional shareholders of record? Or the thousands, and in some cases millions, of individual beneficial owners known not to the corporation but to the institutional intermediary? It would be unworkable, extremely costly, and ultimately pointless to attempt to discern the political beliefs of a class of beneficial owners in a state of flux. Whatever the wisdom of such an approach, it is safe to say that large public corporations do not, nor do they have the capacity to, engage in an exercise to discern shareholder beliefs to enable them to know when the beliefs may diverge from other shareholders, the board or senior management.

Further, in light of the high degree of institutional ownership of equity in the securities markets, the corporation does not have the ability to directly communicate with large segments of its investor base. Institutional investors sit in between as record holders of stock.¹⁹⁰ Suggestions that the corporation engage in a process to gain shareholder approval in advance of

board.org/UTILITIES/pressDetail.cfm?press_ID=3046 (indicating that institutional investors held over sixty-one percent of United States equities in 2005). Most estimates assume these numbers will continue to rise.

186. HENNESSEE GROUP LLC, COMMENTS OF THE HENNESSEE GROUP LLC FOR THE U.S. SECURITIES AND EXCHANGE COMMISSION ROUNDTABLE ON HEDGE FUNDS (2003), available at <http://sec.gov/spotlight/hedgefunds/hedge-gradante.pdf>.

187. See Brian Reid & Kimberlee Millar, *Mutual Funds and Portfolio Turnover*, RESEARCH COMMENTARY (Inv. Co. Inst., Nov. 17, 2004, at 2, available at http://www.ici.org/stats/res/rc_v/n2.pdf).

188. See LAWRENCE E. MITCHELL, THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW 279, 303 (Doreen McBarnett ed. 2007) (pension funds turn over their entire portfolios once a year).

189. See Marcel Kahan & Edward Rock, *The Hanging Chads of Corporate Voting*, 96 GEO. L.J. 1227, 1232 (2008) (citing New York Stock Exchange (NYSE) statistics, and concluding "[w]ith annual turnover of shares in a public company around 99%, the shareholder base is constantly in flux.").

190. Kahan & Rock, *supra* note 189, at 1233.

political speech would require significant changes to the manner in which securities are held and processed. At a minimum, the institutional investor community would be required to develop, install and maintain a system to allow for the beneficial owners to vote on political issues. In this sense, it may be fairly said that Justice Kennedy and his brethren in the majority were, at least implicitly, relying on underlying conditions which do not exist.

Utilization of the existing proxy system has been suggested.¹⁹¹ This approach, while appealing in its directness and simplicity, is difficult to envision meeting the asserted objectives and would impose agency and transactional costs. The nature of the annual proxy would make anything but a broad expression of direction all but impossible. First, if a shareholder resolution to the effect that shareholders do not favor the use of corporate treasury funds in political elections were to be put to a vote and carry by a majority, the result would remain precatory and non-binding on the board.¹⁹² Second, a bylaw purporting to prevent corporate spending might face a similar fate as the bylaw mandating expense reimbursement in the *CA v. AFSCME*¹⁹³ decision. In that case, the Delaware Supreme Court ruled that a bylaw was in contravention of state corporate law because it would have removed the ability of the board to exercise its judgment and thus its fiduciary duty.¹⁹⁴

To rebut this principal of state law, reformers would propose laws, ideally on a federal level, which would override these core state law principals. To date, this is something the United States Congress has been reluctant to do. In fact, in passing the Dodd-Frank Act, deliberate care was taken by the Congress to make it clear that the authority granted to the SEC to adopt rules regarding mandatory shareholder access to the company proxy for director elections did not interfere with or diminish any rights under state corporate law.¹⁹⁵ To overturn over a century of carefully balanced federal-state relations in furtherance of policy which would make corporate political speech—a First Amendment right—more costly and potentially more difficult is hard to justify on both constitutional and corporate law and governance grounds.

191. See Bebhuk & Jackson, *supra* note 6, at 20.

192. See generally Securities Exchange Act of 1934, 17 C.F.R. § 240.14a-8 (2010).

193. See *AFSCME Employees Pension Plan*, 953 A.2d at 227.

194. See *id.* at 240.

195. See Dodd-Frank Act, §§ 1041-1048; SEC. EXCH. COMM'N, FACILITATING SHAREHOLDER DIRECTOR NOMINATIONS, RELEASE NO. 33-9136; (2010), available at <http://www.sec.gov/rules/final/2010/33-9136.pdf>.

C. IRRELEVANCE OF PERSONAL POLITICAL BELIEFS OF SHAREHOLDERS

Even assuming it is theoretically possible to know the political beliefs of the corporate shareholder base, of what value is this information? How would the very personal beliefs and internal balancing thought process an individual undergoes when casting a vote in a federal election have any relevance to the interest of the corporation or to shareholder value? When a person makes a decision to invest in the equity of a particular company, he or she is making an economic decision. In most cases, absent other motives, investments are made with the hope and expectation that the value of the investment will rise, and that income will flow in the form of dividends. The corporation has the same or similar goals to increase firm value and create income. This is a fundamental purpose of the firm.¹⁹⁶ As guardians of the corporate welfare, the board of directors has a legally enforceable fiduciary duty to pursue this interest, as does corporate management. When the corporation acts in the public realm as a corporation, it does, or should, act with the long-term economic interests of shareholders in mind.¹⁹⁷

But what of the political realm, and how do natural persons make decisions on how and which candidate for whom to vote? Not surprisingly, we the people tend to engage in a more elaborate and nuanced decision-making process than what is in the long term best interests of our equity portfolios. One study concluded that natural persons base a voting decision on the appearance of a candidate's face.¹⁹⁸ The study found that a rapid appraisal of the "relative competence" of a candidates face was enough to predict the winner in approximately seventy percent of the elections for United States Senate and state governors in 2006.¹⁹⁹

Psychologists, academics, economists and political journalists have long explored the complicated reasons that motivate individuals to vote in political elections. Some argue that voting is an irrational act since one person's vote has little impact over election outcomes.²⁰⁰ Despite the irrationality, evolutionary psychologists note several factors influencing the voting behaviors of individuals. Some vote because it is their civic duty to show up at the polls in the first place, but once there, individuals choose

196. See ROBERT CHARLES CLARK, CORPORATE LAW 677-680 (1986).

197. See, e.g., COUNCIL OF INSTITUTIONAL INVESTORS, CORPORATE GOVERNANCE POLICIES (2009).

198. News Release, Princeton Univ., To Determine Election Outcomes, Study Says Snap Judgments are Sufficient (Oct. 22, 2007), <http://www.princeton.edu/main/news/archive/S19/28/30C37/index.xml?section=newsreleases>.

199. See News Release, *supra* note 198.

200. Satoshi Kanazawa, *Why Do People Vote? I*, PSYCHOLOGYTODAY.COM (Nov. 8, 2009) <http://www.psychologytoday.com/blog/the-scientific-fundamentalist/200911/why-do-people-vote-i>.

their favorite candidate in an attempt to influence the election outcome even though their one vote is unable to influence the overall election outcome.²⁰¹ Evolutionary psychologists have postulated that the majority of the voting population is backward-looking, adaptive learners who vote in future elections based on the outcomes of their votes in past elections. One formula for the view was expressed as:

In most Presidential elections, roughly half the people vote for the winning candidate, and roughly the other half vote for the losing candidate. In other words, about half of the voters have their voting reinforced in any given election, and the other half have their voting punished . . . So it does appear that people may be backward-looking adaptive learners (who respond to the past reinforcement contingencies and become more likely to repeat the reinforced response and less likely to repeat the punished response), rather than forward-looking utility maximizers (who engage in rational behavior designed to bring about the desired outcome in the future). It's not the prospect of influencing the future electoral outcome that affects their likelihood of voting; it's the association of their behavior with the desired outcome in the past.²⁰²

Further, some political academics agree with the notion that classical rational choice explanations of voter participation are inadequate and that voting is indeed an irrational act.²⁰³ These academics posit that based on social psychology and sociology, individuals vote because of the importance, or lack thereof, given to voting by an individual's informal social network.

By contrast, some economists argue that voting is in fact a rational decision and that voters are utility maximizers who vote based on their individual social preferences.²⁰⁴ They show that individuals have both selfish and social ideas which impact their voting behavior; however, it is social preferences and the ideal of improving the well-being of others that dominates voting patterns.²⁰⁵

Regardless of whether voting is irrational or not, it is evident that individuals consider a variety of factors when deciding which candidate to choose in an election. This complex balancing act of assessing the importance of various factors is different for each individual. According to a 2008 Voting Behavior project conducted by researchers at the University

201. See Kanazawa, *supra* note 200.

202. *Id.*

203. Samuel Abrams et al., *Informal Social Networks and Rational Voting*, BRIT. J. POL. SCI., Dec. 2010.

204. Aaron S. Edlin et al., *Voting as a Rational Choice: Why and How People Vote to Improve the Well-Being of Others* (Nat'l Bureau of Econ. Research, Working Paper No. 13562, 2007).

205. Edlin et al., *supra* note 204

of Michigan, individuals weigh a variety of factors before making decisions. Besides individual political party identification and general ideological dispositions, voters also examine their personal orientations on public policy issues, their assessments of current government performance, and their evaluations of candidates' personal traits.²⁰⁶

Some people consider their personal feelings and emotions—such as anger and inspiration—when choosing a political candidate.²⁰⁷ Others vote strategically to achieve a political result that they view as being beneficial to them.²⁰⁸ Some people vote to protest current government performance while some weight their civic obligation to vote in their decision.²⁰⁹ However, some vote for candidates they find physically attractive.²¹⁰ In addition to physical beauty and gender biases, individuals consider politicians' own personalities and tend to vote for politicians who have similar personalities to them.²¹¹ Regardless of different viewpoints toward what motivates individuals to vote, it is clear that individuals vote in complicated ways for a variety of reasons. Individuals factor in many elements when electing a political candidate to office and their decision is rarely—if ever—based on only one factor.

How natural persons arrive at political decisions is an alchemical process, under which many factors are balanced in arriving at a conclusion. Public corporations, at the corporate level, cannot engage in this balance. On the other hand, the individual directors of a company may, as can the managers over which the directors have oversight responsibilities. However, these political beliefs are the personal ones of the individual, not of the corporation. One Court succinctly put it: “[w]hile corporate democracy is a pertinent concept, a corporation is not a New England town meeting; directors, not shareholders, have responsibilities to manage the business and affairs of the corporation, subject however to a fiduciary obligation.”²¹²

Why would the political beliefs of an individual shareholder as to the death penalty, abortion, foreign policy or any of the dozens of issues at play in the political arena be of any relevance to the corporation's primary

206. Charles Prysby and Carmine Scavo, *Voting Behavior*, VOTING BEHAVIOR: THE 2008 ELECTION, <http://www.icpsr.umich.edu/icpsrweb/SETUPS2008/voting.jsp> (last visited Mar. 4, 2011).

207. John Feehery, *Why people vote*, THE HILL (March 4, 2011) <http://thehill.com/blogs/pundits-blog/campaign/126971-why-people-vote>.

208. *Id.*

209. *See id.*

210. *See* News Release, *supra* note 198.

211. G. V. Caprara et al., *When Likeness Goes with Liking: The Case of Political Preference*, 28 POL. PSYCH. 609, 627 (2007).

212. *TW Servs., Inc. v. SWT Acquisition Corp.*, CIV. A. NOS. 10427, 10298, 1989 WL 20290, at n.14 (Del. Ch. Mar. 2, 1989).

purpose of long-term growth? In short, historically they have not been, and nothing in the Court's decision in *Citizens United* or extant policy factors should alter this fact. What is important to consider is that corporate political speech in no way suppresses or prevents the individual expression of political speech. Investment in the United States equity markets in no way chills the right to expression of the individual. Unlike corporate waste, in which the assets of the corporation are frittered away to the financial detriment of the residual claimants, speech is just that, speech.

Indeed, the associative interests of individuals are remote. It is a leap of faith to believe that the position taken by a corporation in political speech could rationally be attributed to a minority shareholder. This associative risk is made more diffuse due to the existence of the institutional intermediary as shareholder of record positioned between the corporation and the beneficial owner. If a shareholder is conflicted by political speech, they are free to take the money they make from the stock and start a PAC in opposition to the cause. Given the choice between a successful growing company supporting a candidate with whom the shareholder has a disagreement and a company whose stock is sinking but one who may back the same candidate, the rational investor would choose the company whose stock is on the rise. This is where the corporate duty ends and where the investors' interests, as an investor in the equity capital markets, ends as well.

If existing duties of care, loyalty and its by-product good faith are not sufficient to prevent a director from ignoring his or her fiduciary responsibilities to the corporation and its shareholders in the political speech context, then we cannot rely on those duties to protect corporate and shareholder interests in any of the other myriad situations in which public companies act. Were this to be the case, the corporate form would be unworkable, inefficient and dysfunctional. If the shareholders interest does not end at the point of economic advancement, then the corporate form is hostage to a myriad of individual special interests. Not only would this stifle speech, but corporate risk taking would suffer in its wake.

D. WHAT A CONSTITUTIONAL RESTRICTION ON CORPORATE POLITICAL SPEECH MIGHT LOOK LIKE

After the decision in *Citizens United*, at least two separate bills in Congress and a number of state legislative acts were introduced seeking to reign in the freedoms recognized by the Supreme Court.²¹³ The

213. THE CONFERENCE BOARD, HANDBOOK ON CORPORATE POLITICAL ACTIVITY: EMERGING CORPORATE GOVERNANCE ISSUES 4 (2010).

DISCLOSE Act²¹⁴ passed the House of Representatives, but not the Senate. It would add to the disclosure requirements of the BCRA by requiring that the head of an organization engaging in political speech, the CEO for example, to appear in the advertisement and expressly support its message, in the manner of political advertisements.²¹⁵ In addition, the Shareholder Protection Act of 2010²¹⁶ would purport to require express shareholder approval prior to corporate political expenditures.²¹⁷

Even though the prospect for legislative action is uncertain, and maybe even remote, they demonstrate a degree of mistrust in corporate speech. The rationale set forth in *Citizens United* hints at how future proposals might look. These possibilities include: removing the existing limits on direct contributions to political candidates; redrawing the prohibition against political speech to apply only to for-profit corporations (perhaps only of a certain size) and not nonprofits; adding additional disclosure requirements; and making certain government benefits conditional upon a corporation not making political expenditures.²¹⁸

A narrowly crafted prohibition applying only to public companies of a certain size may present the Court with a factual scenario under which *Citizens United* could be distinguished. That constitutional challenges would remain is a given; the broad rationale of the Court in *Citizens United* may leave reformers little room in which to work. If we look at corporate political speech as speech itself, we focus on the importance of the ideas expressed in the speech, and not who expressed those ideas. Further, by separating out the nature and identity of the speaker (corporation versus natural person) as the Court itself did, and by further viewing the nature of the speech (political) as either not a negative interest for the analysis or more likely an area requiring heightened protection, political speech becomes like a metaphorical bullet, shot into the marketplace, striking whatever it may. Its effect is completely independent of the person firing the gun—the bullet hits or misses in the same manner whether it was fired by the local sheriff or the black-hatted outlaw. And so it is with speech.

214. Democracy is Strengthened by Casting Light on Spending in Elections Act, H.R. 5175, 111th Cong. (2010).

215. See *Id.* These legislative efforts took place prior to the November 2010 elections, in which the House of Representatives switched from a Democratic to a Republican majority, and the Democratic majority in the Senate was narrowed but not overturned. What effect these changes, if any, may have on these and any further legislation would be speculative, but in general, the prospects for a bill rolling back *Citizens United* may have been diminished in a Republican-controlled House of Representatives given that the DISCLOSE Act passed the House in a 219-206 vote, largely along party lines. See Office of the Clerk, United States House of Representatives, Final Vote Results for Roll Call 391 (Jun. 24, 2010), <http://clerk.house.gov/evs/2010/roll391.xml>.

216. Shareholder Protection Act of 2010, H.R. 4790, 111th Cong. (2010).

217. *Id.* at § 2(4).

218. Kathleen Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 167 (2010).

The idea either hits or misses its target without regard for the identity of the creator. This theory is a roadblock to a distinction based on differentiation of public companies, but might not be insurmountable. This depends on the extent to which the importance of corporate governance was to the majority opinion.

This article has argued that the way the Court placed reliance on the protections of shareholder democracy as a means to specifically address the interests of dissenting or minority shareholders was based on the (faulty) assumption that those shareholder political beliefs can be measured. If we remove that pillar of the Court's theory as a compelling government interest, can we envision a law which would protect minority shareholders and corporations alike? Perhaps. It is doubtful that any law which completely eliminates the right of corporations to speak can be squared with *Citizens United*, and, it seems unlikely the Court would choose to overrule *Citizens United* given the current composition of the Supreme Court.

A constitutionally acceptable prohibition would have to be one fashioned differently. Suppose, then, a new BCRA restriction against independent political expenditures within thirty days of a primary and sixty days of a general election that by its terms does not apply to: (1) nonprofit institutions whose primary purpose is advocacy; (2) media companies; (3) limited liability companies established for advocacy purposes; and (4) for-profit public companies with over a certain amount of registered shareholders (a target number like 500 is consistent with SEC registration rules under the Securities Exchange Act of 1933). Would such a law survive a constitutional challenge like the one faced in *Citizens United* and in the aftermath of that holding?

This hypothetical law starts with the theory that protecting the political interests of all, some or a majority of shareholders in a public corporation is a compelling state interest upon which a restraint on free speech could be based. If so, carving out public companies based on certain characteristics serves to meet that interest. The law could be drafted in such a way as to allow even larger corporations to apply for an exemption from the absolute prohibition upon applying to the FEC and demonstrating that sufficient internal policies, procedures and controls exist to allow the corporation to understand the preferences of its shareholders by resolution or proxy vote. Investors in the types of corporations exempt from the rule under this approach would either invest in the corporation with the understanding that political speech was an element of the business model or could in theory make their preferences known in the normal

course of board-shareholder communications. The Supreme Court has drawn similar distinctions before.²¹⁹ There would, under this proposal, be no need to reform the corporate governance model itself.

However, to the extent that the Court did not look at the capture and accommodation of shareholder political preferences to be a compelling interest, laws designed along the lines of the proposed rule making have a less chance of passing the *Citizens United* test. On the one hand, if the Court has signaled that the First Amendment truly protects the speech itself, regardless of the nature of the speaker, then prohibitions based on classification are on unsteady ground. Reformers would have to search for classifications not based on the corporate form, but on other policy grounds justifying a ban which would encompass corporate speech. Indeed, a prohibition against foreign corporate speech would be suspect under the aegis of the nonclassification doctrine. Classifications based on other characteristics of the corporate form, such as the aggregate of wealth, could very well cover natural persons in addition to corporations. Any restriction on the free speech rights of natural persons to express opinions in political contests would be among the hardest constitutional challenges to meet. And on the other, it is unclear whether the majority of the Supreme Court would, if put to the test, consider the personal political beliefs of a shareholder in a modern for-profit corporation to be a compelling interest balanced against freedom of speech.

V. THE CORPORATE RIGHT TO SPEAK OUTWEIGHS DERIVATIVE SHAREHOLDER INTERESTS

A. SHAREHOLDER POLITICAL BELIEFS OUTWEIGHED BY NEED FOR CORPORATE POLITICAL SPEECH

Whatever rights a shareholder has to his or her own political beliefs, those beliefs are personal to the individual. The fact that a corporation in which he or she has invested also has political rights does not in any way diminish or restrict the free expression of those rights. Another more significant problem is the one of entanglement. Given the right to speak, and the legitimate interest a corporation has in furthering its economic interests in engaging in electioneering political speech, how can the government, let alone a diffuse and ever-shifting collection of beneficial shareholders, distinguish between corporate speech which serves an

219. See *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 263–264 (1986) (nonprofit corporations organized to disseminate ideas given special treatment); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (for-profit media corporations similar).

economic purpose and corporate speech which may not? If the First Amendment is about anything, it is about allowing a speaker free expression, regardless of the popularity, content or nature of the views expressed. The government is restricted from placing itself in the role of arbiter, serving as a gatekeeper, allowing some expression but not others. The nature of the shareholder in a public for-profit corporation, likely to be an intermediary holding a position for many beneficial owners, prevents such an exercise from being possible, were it even to be desired. It is not desirable for the very reason the corporate form was designed, and the reason the corporate structure had worked so well—shareholders are not in a position to know the nonpublic details of the corporation and have rightly delegated the daily affairs of the corporation to management, as overseen by a board of directors. For that reason, the actors best suited to make the determination of what speech is appropriate for the corporation to make are the same actors charged with the overall job of wealth building—management and the board. Whose interests will be served if corporations are prevented from acting in what they believe to be their best economic interests by a shareholder acting on noneconomic, and probably personal, beliefs?

And further, the compelling shareholder argument is based on the proposition that shareholders, even a minority of shareholders at that, “own” the corporate treasury. They do not. Shareholders own shares of stock in the corporation, which ownership entitles the shareholders to specific rights enumerated in state corporate law statutes and judicial opinions. These rights are akin to ownership rights, but share ownership by itself does not entitle the security holder to all of the rights (and obligations, like unlimited liability) of full legal ownership. Shareholders are not entitled to seize assets of the corporation, without judicial or other contractual permission, and use the assets for their own purposes. The corporation, while not a natural person, remains a legal entity for the purposes of property ownership rights, legal liability and the First Amendment. The corporation, in its own capacity, then owns the corporate treasury. Shareholders are not “compelled to fund corporate political speech”²²⁰ in any direct sense. While it is true that funds in the corporate treasury are available to be distributed to shareholders in the form of dividends, decision making with respect to dividends is not a normal minority shareholder right.

220. *Citizens United*, 130 S. Ct. 876, 911 (2010).

B. IF THE CONDITIONS CITED BY THE COURT DO NOT EXIST,
DODD-FRANK, SEC RULEMAKING AND ENVIRONMENTAL FACTORS
SUFFICIENTLY PROTECT SHAREHOLDERS

We are in the midst of the shareholder rights era.²²¹ The “significantly increased ability of shareholders to influence corporate conduct”²²² is a new dynamic in the allocation of roles and responsibilities among the board, management and shareholders. When we examine *Citizens United*, we observe the recognition of a corporate right bestowed in the environment of this shareholder assentation.

We are light years from the world in which the rights of shareholders are “practically nonexistent.” CEO and board turnover are increasing. Executive compensation schemes are being revised with direct shareholder input. Shareholder access to the company proxy, authorized by Congress and enabled by an SEC rule (currently subject to a court challenge), will, if adopted, authorize a new, direct channel by which shareholders can dialogue directly with other shareholders and the board. The cumulative effect of these changes has made corporations and boards more responsive to their shareholders. All of these conditions, not cited by the majority of the Supreme Court in the *Citizens United* opinion, serve to significantly increase the protection of shareholder rights generally more than at any time in our history. Regarding specific protections targeted at political speech, this article has argued for the irrelevance of individual shareholder political preferences to the corporate purpose, the agency and expense barriers to implementing such a system, and the questionable benefits of such an approach given the nature of communication in the wireless, internet age.

C. BOARDS, INCENTIVES AND MANAGING RISK

The existence of a powerful class of institutional intermediaries as investors, equipped with an increasingly potent and varied tool box with which to exert their ownership interests provides significant support for the policy decision underlying *Citizens United*. At the same time, compositional changes in the boards of directors of public companies have increased the independence of the board from the CEO and management, and have facilitated the ability of a board to act as an effective monitor on behalf shareholders. Beginning with Sarbanes-Oxley and audit

221. See Strine, *supra* note 17.

222. REPORT OF THE NEW YORK STOCK EXCHANGE COMMISSION ON CORPORATE GOVERNANCE (2010), available at <http://www.nyse.com/pdfs/CCGReport.pdf>.

committees, the listing standards of the securities exchanges, and Dodd-Frank mandates for the independence of the compensation committee, the number of inside directors on public company boards is shrinking.²²³ The independence of directors from management, together with the proper incentives and alignment of interests with shareholders through director equity ownership, is a hallmark of sound corporate governance.²²⁴

Coupled with these compositional and environmental changes is the growing expectation, and in many instances a regulatory requirement, for the board to assume direct oversight of risk management policies and practices. Political, or reputational, risk may be one of the more potent risks a board must guard against. Companies including BP, Goldman Sachs, and Toyota have seen not only their stock prices, but the franchise itself, damaged by reputational, regulatory and political harms. In the case of Goldman Sachs, the company settled a fraud case with the SEC regarding the structuring of mortgage derivatives for a record \$550 million after months of maintaining their innocence in the press and in testimony before Congress.²²⁵ After the settlement, Goldman Sachs issued a lengthy business practices report²²⁶ in which the firm set forth to disclose numerous changes to organizational structure, business practices and disclosure designed to provide more transparency and in the hopes of reclaiming lost confidence from their clients, the regulators, investors and the markets.²²⁷ Even after this, Goldman Sachs was considered to have stumbled when they were forced to cancel United States investor participation in the widely reported private placement of Facebook.²²⁸

The solution to proper oversight of the political speech of the corporation is not to divest the board of its power and turn direct responsibility to shareholders—it is to empower the board of directors. The board of a public company, in compliance with the listing standards of

223. See Vidhan Goyal, *Corporate Board Structures*, Q FINANCE (2010), available at <http://www.qfinance.com/contentFiles/QF02/g1xtn5q6/12/4/corporate-board-structures.pdf>.

224. See Sanjai Bhagat et al., *Director Ownership, Corporate Performance, and Management Turnover*, 54 BUS. LAW. 885, 887–88 (1999).

225. See Press Release, SEC, Goldman Sachs to Pay Record \$550 Million to Settle SEC Charges Related to Subprime Mortgage CDO (July 15, 2010), available at <http://www.sec.gov/news/press/2010/2010-123.htm>.

226. GOLDMAN SACHS, REPORT OF THE BUSINESS STANDARDS COMMITTEE (2011), available at <http://online.wsj.com/public/resources/documents/GoldmanBSC.pdf>.

227. In its report, Goldman Sachs stresses its dedication to “complying fully with the letter and spirit of the laws, rules and ethical principles that govern [it],” and outlines its intentions to do so by improving “spanning client service, conflicts and business selection, structured products, transparency and disclosure, committee governance, training and professional development and employee evaluation and incentives.” REPORT OF THE BUSINESS STANDARDS COMMITTEE, *supra* note 226, at 1.

228. See Liz Rappaport, *Goldman Limits Facebook Deal to Non-US Investors*, WALL ST. J., Jan. 18, 2011, <http://online.wsj.com/article/SB10001424052748703396604576087941210274036.html>.

the exchange on which the firm's stock is registered, and whose members are comprised of a substantial majority of independent directors, have the necessary objectivity and the incentive to exercise that independence to oversee the political speech of the corporation. Whether a separate committee would be established, or whether the process is overseen by an existing risk, audit or nominating and governance committee is a matter for internal firm tailoring and private ordering. Likewise, the nature and level of discourse and communication made to shareholders through the company proxy or other means would be determined by the standards set by the disclosure rules of the federal government through SEC and FEC rules and through marketplace and shareholder expectations and demands. An independent board of directors, subject to the expanded oversight powers of the modern shareholder should have the explicit authority, subject to state law fiduciary duties, to exercise the corporate First Amendment right to speech in the political electoral context.

VI. CONCLUSION

Whether corporations have all of the same constitutional rights, and in the same degree, as natural persons is an unsettled question. In *Citizens United*, the Supreme Court made it clear that corporations are entitled to the protections of the First Amendment. Using an event study methodology, this article has analyzed whether the political speech rights enabled by the decision have a negative effect on firm values. The good news for public corporations and their shareholders is that the data reflected no negative effect upon a firm's engagement in political speech. On the other hand, there is no observable benefit to or effect on those firms that have publicly declared not to use corporate funds to engage in political speech. Corporate political speech must be analyzed in the context of the environment in which the corporation exists, and by the guiding principle of long-term shareholder wealth.

In the post-Dodd-Frank era of heightened shareholder empowerment, the modern corporation and its board of directors is on the proverbial shareholder's speed dial. Proxy access, the use of majority voting and the elimination of broker votes in uncontested shareholder elections have further increased the importance of the voting process and the influence of the shareholder. Concurrently, the regulatory environment in which corporations must compete is complex, costly and burdensome. Armed with the right to speak, and to possibly influence the political environment from which regulations flow, corporations have a responsibility to consider political speech as a legitimate means to advance their economic goals. Considerations of the personal political beliefs of shareholders (and other

stakeholders like customers) are largely irrelevant for the corporate welfare, and so long as the corporation is pursuing its legitimate goals in good faith, those interests must be outweighed by the interests of the corporation.

Finally, shareholders should not be given explicit authority to vote on or approve corporate speech. Given the empirical findings herein, there is no evidence warranting a large scale revision to the corporate governance model that such a reform would entail. Instead, policy makers, including judges, state corporate law and model codes, should clarify that the independent members of a board of directors who are subject to an open election process should have the responsibility to oversee corporate political speech in the same manner and with the fiduciary responsibilities with which boards oversee other variations of corporate risk.

Appendix 1: T-Statistics for All Firm Abnormal Returns (Three Day Holding Period)

Appendix 1: T-Statistics for All Firm Abnormal Returns (Three Day Holding Period)

	Supreme Court	Citizens United	60 Days	30 Days	Election
Aflac	-0.960	-0.267	0.947	0.171	0.072
AstraZeneca	-0.887	0.984	-0.747	0.034	-0.707
Boeing	0.023	0.151	0.197	0.528	-1.583
Bank of America	2.180**	-1.163	0.961	0.315	-0.194
Best Buy	-0.566	0.039	1.488	0.143	-0.646
Bristol Myers Squibb	-1.307	0.495	-1.586	-0.809	-1.049
BP	0.169	-0.573	0.566	0.746	0.687
Citigroup	-0.421	-0.711	0.038	0.791	-0.168
Caterpillar	-1.560	-2.372**	0.853	-1.059	0.146
Colgate Palmolive	-0.433	2.635***	-1.876*	-0.864	0.242
Comcast Corp	0.323	-0.259	0.509	-0.827	-0.410
Credit Suisse	1.740*	-2.829***	0.309	-0.472	0.173
Chevron Texaco	-0.692	-1.157	0.040	0.610	-0.937
Dell	0.231	-0.977	0.545	-0.006	-0.215
Walt Disney	-0.486	1.074	0.725	0.627	-0.458
Dow Chemical	0.511	-1.367	0.959	0.292	0.321
FedEX	-0.448	-0.619	0.314	-0.172	-0.635
General Electric	-0.474	1.123	0.441	-0.398	-0.429
Gilead	-0.844	1.912*	0.636	-0.303	-0.350
Goldman Sachs	0.827	-0.978	0.857	0.819	-0.116
GlaxoSmithKline	-0.228	1.072	-0.101	0.477	-0.376
Home Depot	0.208	0.642	1.130	0.134	0.343
Honeywell	-0.872	-1.291	2.819***	-0.204	-0.360
IBM	-0.997	-0.963	-1.087	0.351	-0.576
JPMorgan Chase	0.009	-1.971**	1.029	0.906	-0.420
Lilly	-0.986	0.026	-1.067	0.022	-0.098
Altria	-0.513	1.169	-1.613	-0.673	0.067
Merck	2.426**	0.389	-1.824*	-0.440	-0.316
Morgan Stanley	0.874	-2.151**	0.938	0.583	0.332
Microsoft	0.026	-0.948	-0.863	-0.888	0.076
Novartis	-0.499	3.062***	-2.493**	-0.585	-0.047
NewsCorp	0.141	-0.777	0.721	-0.421	0.441
Pfizer	-1.106	-0.052	-0.940	-1.193	-0.120
Polaris	1.324	-0.147	0.825	-0.518	-0.410
Prudential Financial	0.231	-0.889	1.131	-2.198	0.558
AT&T	0.047	1.215	-2.178	0.710	0.382
Target	-1.023	1.828*	-0.997	0.229	1.356
Time Warner	-0.435	-0.125	0.275	-0.560	-1.370
UPS	0.818	-0.339	0.450	-0.158	0.405
Viacom	0.685	0.828	-0.720	0.173	-0.294
Wells Fargo	0.730	0.550	1.517	0.724	0.108
WalMart	-0.722	1.680*	-0.765	0.579	0.066
Xerox	-0.782	1.511	0.727	0.674	-0.387

***, **, * indicate significance at 1%, 5% and 10% levels, respectively, two-tailed tests.

Appendix 2: Abnormal Holding Period Returns for All Firms

Appendix 2: Abnormal Holding Period Returns for All Firms

	Supreme Court			Week of Citizens United		
	6/26/2009	6/29/2009	6/30/2009	1/20/2010	1/21/2010	1/22/2010
Aflac	-0.165%	-0.812%	-1.533%	-0.764%	0.565%	-0.500%
AstraZeneca	-0.297%	-0.773%	-0.774%	0.643%	0.579%	0.821%
Boeing	-1.381%	0.932%	0.501%	0.318%	0.233%	-0.201%
Bank of America	3.387%	2.544%	0.929%	2.101%	-4.291%	-1.470%
Best Buy	-1.233%	0.404%	-0.705%	0.216%	0.347%	-0.458%
BristolMyers Squibb	0.483%	-2.767%	-0.411%	0.319%	-0.109%	0.811%
BP	-0.253%	0.618%	0.269%	-0.962%	-0.546%	-0.640%
Citigroup	0.148%	-1.237%	-0.803%	-1.200%	-3.597%	1.602%
Caterpillar	0.351%	-0.386%	-4.040%	-0.860%	-2.975%	-2.359%
Colgate Palmolive	0.596%	-0.934%	-0.541%	-0.653%	1.718%	4.288%
Comcast Corp	-0.827%	0.078%	1.549%	-0.665%	-1.253%	1.277%
Credit Suisse	3.251%	0.855%	1.028%	-2.254%	-1.959%	-4.135%
Chevron Texaco	-1.228%	0.504%	-0.089%	-0.860%	-0.550%	0.050%
Dell	0.368%	0.409%	-0.085%	-0.966%	1.067%	-3.033%
Walt Disney	-0.362%	0.075%	-0.542%	1.640%	0.035%	0.156%
Dow Chemical	1.218%	-0.782%	1.289%	0.017%	-3.672%	-0.960%
FedEX	-1.416%	-0.509%	0.835%	-1.082%	-1.032%	0.609%
General Electric	-0.780%	-0.821%	0.513%	0.818%	-1.015%	2.776%
Gilead	-0.604%	-1.222%	-0.266%	0.563%	1.308%	2.869%
Goldman Sachs	1.747%	0.879%	-0.432%	1.617%	-2.230%	-1.982%
GlaxoSmithKline	0.936%	-1.828%	0.487%	0.917%	0.634%	0.360%
Home Depot	0.317%	0.195%	-0.152%	0.298%	1.266%	-0.454%
Honeywell	-0.103%	0.384%	-1.571%	-0.084%	-1.953%	0.127%
IBM	-0.211%	-0.765%	-0.479%	-1.840%	0.935%	-0.499%
JPMorgan Chase	1.056%	-0.471%	-0.563%	1.337%	-4.695%	-1.190%
Lilly	0.006%	-1.615%	-0.260%	0.766%	-1.296%	0.580%
Altria	-0.215%	-0.785%	0.186%	0.814%	-0.270%	1.309%
Merck	1.766%	2.242%	1.248%	2.069%	-0.421%	-0.805%
Morgan Stanley	2.839%	0.771%	-1.174%	-0.641%	-2.317%	-3.035%
Microsoft	-1.702%	1.278%	0.476%	-0.596%	0.014%	-1.285%
Novartis	0.585%	-1.318%	-0.070%	0.743%	1.801%	2.382%
NewsCorp	-0.042%	0.328%	0.009%	-0.967%	0.020%	-0.684%
Pfizer	-0.765%	-0.446%	-0.851%	0.760%	-1.616%	0.759%
Polaris	4.289%	2.076%	-2.254%	0.261%	0.776%	-1.495%
Prudential Financial	-0.582%	1.896%	-0.629%	0.026%	-1.891%	-0.771%
AT&T	0.027%	0.705%	-0.654%	-0.352%	1.275%	1.123%
Target	-1.688%	-0.704%	0.399%	0.122%	0.909%	2.533%
Time Warner	-1.739%	0.616%	0.300%	0.677%	-0.062%	-0.851%
UPS	1.140%	0.016%	0.197%	-0.691%	-0.493%	0.623%
Viacom	-0.189%	3.487%	-2.101%	1.091%	0.634%	-0.277%
Wells Fargo	0.442%	1.858%	-0.248%	-0.567%	2.542%	-0.429%
WalMart	-0.910%	-0.639%	0.197%	0.745%	0.149%	2.252%
Xerox	-0.153%	-1.057%	-1.262%	-0.381%	6.281%	-1.126%

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	60 Days Before Election			30 Days Before Election		
	9/1/2010	9/2/2010	9/3/2010	9/30/2010	10/1/2010	10/4/2010
Aflac	1.960%	0.000%	0.517%	0.580%	0.233%	-0.368%
AstraZeneca	-0.806%	-0.809%	0.063%	-0.707%	0.130%	0.647%
Boeing	-1.053%	0.858%	0.650%	1.172%	-0.006%	0.053%
Bank of America	3.049%	-0.359%	0.333%	0.251%	1.066%	-0.324%
Best Buy	1.095%	1.541%	1.398%	1.448%	-0.613%	-0.448%
Bristol Myers Squibb	-1.685%	-0.832%	-0.754%	-0.642%	0.183%	-1.213%
BP	0.868%	0.226%	1.030%	3.233%	1.453%	-1.890%
Citigroup	0.784%	-0.063%	-0.549%	0.053%	4.162%	-0.663%
Caterpillar	1.654%	-0.351%	0.925%	-1.329%	-1.026%	-0.411%
Colgate Palmolive	-1.488%	-1.028%	-1.293%	-1.543%	-0.819%	0.608%
Comcast Corp	1.990%	-0.123%	-0.603%	-0.077%	-1.907%	-0.067%
Credit Suisse	-0.216%	-0.376%	1.302%	-2.611%	1.156%	0.063%
Chevron Texaco	0.681%	-0.022%	-0.612%	0.023%	0.669%	0.023%
Dell	0.023%	1.072%	0.539%	0.154%	0.079%	-0.251%
Walt Disney	0.030%	0.286%	0.919%	0.581%	0.283%	0.204%
Dow Chemical	2.056%	0.223%	0.958%	0.564%	1.088%	-0.667%
FedEX	1.303%	-0.478%	-0.061%	-0.699%	-0.278%	0.558%
General Electric	0.710%	0.023%	0.279%	-0.364%	0.233%	-0.786%
Gilead	0.788%	-0.514%	1.303%	-0.416%	-0.020%	-0.315%
Goldman Sachs	-0.898%	-0.879%	4.051%	0.419%	1.716%	0.038%
GlaxoSmithKline	0.739%	-0.470%	-0.449%	-0.193%	0.242%	0.803%
Home Depot	0.105%	1.673%	0.174%	-0.100%	0.000%	0.332%
Honeywell	1.709%	1.856%	0.606%	0.081%	0.036%	-0.420%
IBM	-0.806%	-1.489%	0.709%	-0.681%	0.677%	0.516%
JPMorgan Chase	0.845%	0.203%	1.323%	-0.603%	1.529%	1.164%
Lilly	-1.134%	-0.586%	-0.302%	0.308%	-0.414%	0.147%
Altria	-1.427%	-0.334%	-0.793%	-0.640%	-1.441%	1.014%
Merck	-1.642%	-1.666%	-0.643%	-0.527%	-1.012%	0.583%
Morgan Stanley	-0.034%	0.154%	2.494%	1.123%	0.936%	-0.436%
Microsoft	-1.097%	-0.741%	0.140%	0.268%	-0.891%	-1.124%
Novartis	-1.407%	-1.471%	-1.133%	-0.226%	-1.378%	0.663%
NewsCorp	1.308%	0.521%	-0.313%	-1.131%	0.886%	-0.638%
Pfizer	-0.625%	-0.171%	-0.956%	-1.013%	-0.383%	-0.826%
Polaris	1.906%	1.488%	-0.833%	-0.816%	0.250%	-1.042%
Prudential Financial	1.378%	0.456%	1.519%	-3.849%	-2.490%	-0.176%
AT&T	-1.767%	-0.723%	-1.176%	-0.073%	0.293%	0.977%
Target	-0.839%	-0.313%	-0.789%	0.122%	-0.386%	0.710%
Time Warner	-0.349%	1.173%	-0.303%	0.178%	-0.572%	-0.667%
UPS	0.796%	0.497%	-0.547%	0.233%	-0.817%	0.322%
Viacom	-1.546%	1.474%	-1.187%	0.159%	0.257%	-0.113%
Wells Fargo	1.763%	0.876%	1.626%	0.608%	1.330%	0.099%
WalMart	-0.836%	0.186%	-0.781%	0.627%	-0.741%	1.197%
Xerox	1.478%	0.351%	0.470%	0.891%	1.008%	0.232%

	Election		
	11/1/2010	11/2/2010	11/3/2010
Aflac	-0.041%	0.082%	0.146%
AstraZeneca	-1.105%	-0.175%	-0.189%
Boeing	-0.321%	-1.769%	-1.572%
Bank of America	0.351%	-1.645%	0.685%
Best Buy	-1.979%	0.315%	-0.086%
Bristol Myers Squibb	0.537%	-1.404%	-1.297%
BP	-0.168%	0.818%	1.926%
Citigroup	-0.574%	-0.294%	0.112%
Caterpillar	0.758%	-0.170%	-0.205%
Colgate Palmolive	0.087%	0.247%	0.158%
Comcast Corp	-0.703%	0.107%	-0.421%
Credit Suisse	-1.468%	2.205%	-0.225%
Chevron Texaco	-1.487%	0.083%	0.302%
Dell	0.010%	-1.088%	0.433%
Walt Disney	-0.358%	-0.554%	0.131%
Dow Chemical	0.067%	0.843%	0.174%
FedEX	-1.577%	-0.070%	0.103%
General Electric	-0.532%	-0.839%	0.385%
Gilead	1.342%	-0.552%	-1.657%
Goldman Sachs	0.178%	-0.002%	-0.484%
GlaxoSmithKline	0.597%	-1.437%	0.170%
Home Depot	-0.710%	1.829%	-0.526%
Honeywell	-0.753%	0.164%	0.056%
IBM	-0.290%	-0.413%	-0.138%
JPMorgan Chase	-0.653%	-2.005%	1.688%
Lilly	-0.549%	0.194%	0.169%
Altria	-0.282%	0.012%	0.375%
Merck	-0.260%	0.217%	-0.641%
Morgan Stanley	-0.859%	-1.060%	2.842%
Microsoft	0.974%	0.857%	-1.682%
Novartis	-0.837%	0.545%	0.216%
NewsCorp	0.527%	0.583%	-0.185%
Pfizer	1.082%	-1.741%	0.434%
Polaris	-0.474%	0.184%	-0.983%
Prudential Financial	0.057%	-0.187%	1.784%
AT&T	0.607%	-0.010%	0.047%
Target	2.870%	0.103%	-0.331%
Time Warner	-0.648%	-0.528%	-1.417%
UPS	-0.095%	0.650%	0.115%
Viacom	0.186%	-0.193%	-0.507%
Wells Fargo	-0.594%	-0.622%	1.519%
Walmart	0.164%	0.108%	-0.149%
Xerox	-0.855%	0.172%	-0.538%

Appendix 3: T-Statistics for Firm Abnormal Returns (Three Day Abnormal Holding Period Returns): Firms That Pledged Not to Make Political Contributions with Corporate Treasury Funds

	60 Days	30 Days	Election
Citigroup	0.038	0.791	-0.168
Colgate Palmolive	-1.876*	-0.864	0.242
Dell	0.545	-0.006	-0.215
General Electric	0.441	-0.398	-0.429
Gilead	0.636	-0.303	-0.350
Goldman Sachs	0.857	0.819	-0.116
IBM	-1.087	0.351	-0.576
JPMorgan Chase	1.029	0.906	-0.420
Morgan Stanley	0.938	0.583	0.332
Microsoft	-0.863	-0.888	0.076
Wells Fargo	1.517	0.724	0.108
Xerox	0.727	0.674	-0.387

***, **, * indicate significance at 1%, 5% and 10% levels, respectively, two-tailed tests.

Appendix 4: CAR Three-Day Holding Period Returns for Firms That Did Not Sign NYC Public Advocate Pledge

	60 Days	30 Days	Election
Aflac	2.477%	0.447%	0.188%
AstraZeneca	-1.552%	0.070%	-1.469%
Boeing	0.455%	1.222%	-3.662%
Bank of America	3.024%	0.993%	-0.610%
Best Buy	4.035%	0.387%	-1.751%
Bristol Myers Squibb	-3.272%	-1.669%	-2.164%
BP	2.124%	2.796%	2.576%
Caterpillar	2.228%	-2.767%	0.383%
Comcast Corp	1.262%	-2.051%	-1.017%
Credit Suisse	0.911%	-1.392%	0.511%
Chevron Texaco	0.047%	0.717%	-1.102%
Walt Disney	1.235%	1.068%	-0.781%
Dow Chemical	3.239%	0.985%	1.084%
FedEX	0.764%	-0.419%	-1.543%
GlaxoSmithKline	-0.179%	0.850%	-0.670%
Home Depot	1.952%	0.232%	0.593%
Honeywell	4.171%***	-0.302%	-0.533%
Lilly	-2.023%	0.041%	-0.186%
Altria	-2.557%	-1.067%	0.106%
Merck	-3.951%	-0.954%	-0.684%
Novartis	-4.011%**	-0.941%	-0.076%
News Corp	1.514%	-0.883%	0.925%
Pfizer	-1.752%	-2.223%	-0.224%
Polaris	2.561%	-1.608%	-1.273%
Prudential Financial	3.352%	-6.515%	1.655%
AT&T	-3.668%	1.195%	0.644%
Target	-1.943%	0.446%	2.642%
Time Warner	0.521%	-1.061%	-2.594%
UPS	0.745%	-0.261%	0.670%
Viacom	-1.258%	0.303%	-0.514%
WalMart	-1.432%	1.083%	0.123%

***, **, * indicate significance at 1%, 5% and 10% levels, respectively, two-tailed tests.

Appendix 5: T-Statistics for Index Abnormal Returns (Three Day Abnormal Holding Period Returns)

	Supreme Court	Citizens United	60 Days	30 Days	Election
Aerospace & Defense Index	-0.513	0.177	0.540	-0.710	-0.858
Broadcasting & Entertainment Index	0.366	0.091	0.726	-0.069	-0.327
Banks Index	0.788	-0.007	1.144	0.808	-0.253
Construction & Materials Index	-0.685	-0.258	0.468	0.068	-0.095
Oil & Gas Index	-0.255	-0.606	0.314	0.678	0.498
Food & Beverage Index	0.237	1.534	-2.385**	0.412	-1.265
Financial Services Index	0.479	-1.342	1.519	-0.173	0.232
Financials Index	0.731	-0.378	1.122	0.645	-0.024
Health Care Index	0.068	1.391	-1.164	-0.466	-0.252
Household Goods & Home Construction Index	-0.810	1.761*	-2.112**	0.313	-0.394
Industrial Goods & Services Index	-0.242	0.077	2.253**	-0.822	-0.206
Industrials Index	-0.311	0.042	2.150**	-0.752	-0.203
Insurance Index	-0.060	0.529	0.368	-0.126	0.353
Health Care Equipment & Services Index	0.153	0.988	-0.045	-0.323	0.527
Media Index	0.261	0.384	0.961	-0.086	-0.272
Mining Index	-1.534	-1.859*	-0.679	-0.108	-0.557
Personal & Household Goods Index	-0.159	1.690*	-1.404	-0.243	-0.519
Pharmaceuticals & Biotechnology Index	0.013	1.404	-1.612	-0.475	-0.667
Real Estate Index	0.417	0.182	-1.032	0.862	0.435
Real Estate Investment & Services Index	0.692	-0.197	0.929	0.280	0.431
Retail Index	-0.054	2.614***	0.818	-0.285	0.234
Software & Computer Services Index	-0.159	-1.100	-0.875	-0.722	-0.671
Technology Index	0.074	-1.419	0.148	-1.400	0.604
Telecommunications Index	-0.244	1.205	-2.081**	0.859	0.327

***, **, * indicate significance at 1%, 5% and 10% levels, respectively, two-tailed tests.

Appendix 6: CAR Three Day Holding Period Returns for Firms in the Financial Services Industry

	Supreme Court	Citizens United	60 Days	30 Days	Election
Bank of America	6.860%**	-3.660%	3.024%	0.993%	-0.610%
Citigroup	-1.891%	-3.194%	0.172%	3.552%	-0.756%
Credit Suisse	5.133%*	-8.347%***	0.911%	-1.392%	0.511%
Goldman Sachs	2.194%	-2.594%	2.273%	2.174%	-0.308%
JPMorgan Chase	0.022%	-4.548%**	2.375%	2.090%	-0.969%
Morgan Stanley	2.435%	-5.993%**	2.614%	1.626%	0.924%
Prudential Financial	0.685%	-2.636%	3.352%	-6.515%	1.655%
Wells Fargo	2.053%	1.546%	4.265%	2.037%	0.304%

***, **, * indicate significance at 1%, 5% and 10% levels, respectively, two-tailed tests.

Appendix 7: CAR Three Day Holding Period Returns for Firms in the Pharmaceuticals & Biotechnology Industry

	Supreme Court	Citizens United	60 Days	30 Days	Election
AstraZeneca	-1.843%	2.044%	-1.552%	0.070%	-1.469%
Bristol Myers Squibb	-2.695%	1.022%	-3.272%	-1.669%	-2.164%
GiloxSmithKline	-0.406%	1.912%	-0.179%	0.850%	-0.670%
Lilly	-1.869%	0.050%	-2.023%	0.041%	-0.186%
Merck	5.256%	0.843%	-3.951%*	-0.954%	-0.684%
Novartis	-0.803%	4.927%***	-4.011%**	-0.941%	-0.076%
Pfizer	-2.062%	-0.097%	-1.752%	-2.223%	-0.224%

***, **, * indicate significance at 1%, 5% and 10% levels, respectively, two-tailed tests.