CORPORATE POLITICAL SPEECH: WHO DECIDES?

Lucian A. Bebchuk and Robert J. Jackson, Jr.***

For Professor Victor Brudney, who long ago anticipated the significance of corporate law rules for regulating corporate political speech.

I. INTRODUCTION

The Supreme Court spoke clearly this Term on the issue of corporate political speech, concluding in *Citizens United v. FEC*[1] that the First Amendment protects corporations' freedom to spend corporate funds on indirect support of political candidates.[2] Constitutional law scholars will long debate the wisdom of that holding, as do the authors of the two other Comments in this issue.[3] In contrast, this Comment accepts as given that corporations may not be limited from spending money on politics should they decide to speak. We focus instead on an important question left unanswered by *Citizens United*: who should have the power to decide whether a corporation will engage in political speech?

Under existing law, a corporation's decision to engage in political speech is governed by the same rules as ordinary business decisions, which give directors and executives virtually plenary authority. In this Comment, we argue that such rules are inappropriate for corporate po-

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* William J. Friedman and Alicia Townsend Friedman Professor of Law, Economics, and Finance and Director of the Corporate Governance Program, Harvard Law School.

** Associate Professor of Law, Columbia Law School.

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[1] 130 S. Ct. 876 (2010).

[2] *Id.* at 913.

[3] *See* Samuel Issacharoff, *The Supreme Court, 2009 Term — Comment: On Political Corruption*, 124 HARV. L. REV. 118 (2010); Kathleen M. Sullivan, *The Supreme Court, 2009 Term — Comment: Two Concepts of Freedom of Speech,* 124 HARV. L. REV. 143 (2010).

litical speech decisions. Instead, lawmakers should develop special rules to govern who may make political speech decisions on behalf of corporations. We analyze the types of rules that lawmakers should consider. We also offer a set of proposals, and policymaking considerations, for designing such rules.

In Part II, we consider existing corporate law rules governing the political speech decision. As long as corporations are permitted to engage in political speech, we show, decisional rules governing whether and how they decide to do so are inevitable. Under existing corporate law rules, corporate political speech decisions are subject to the same rules as ordinary business decisions. Accordingly, corporate political speech decisions do not require shareholder input, a role for independent directors, or disclosure — the safeguards that corporate law rules establish for special corporate decisions.

We explain that the interests of directors and executives with respect to political speech decisions may diverge from those of shareholders,[4] that the financial implications of these decisions are hardly trivial, and that the costs of the divergence of interests may be exacerbated by the special expressive significance that these decisions carry for shareholders. We conclude that political speech decisions are substantially different from, and should not be subject to the same rules as, ordinary business decisions.

In Part III, we assess lawmakers' choices with respect to rules that would align corporate political speech decisions with shareholder interests. In particular, we suggest that lawmakers consider adopting rules that (i) provide shareholders with a role in determining the amount and targets of corporate political spending; (ii) require that independent directors oversee corporate political speech decisions; (iii) allow shareholders to opt out of — that is, either tighten or relax — each of these first two rules; and (iv) mandate detailed and robust disclosure to shareholders of the amounts and beneficiaries of a corporation's political spending, whether made directly by the company or indirectly through intermediaries. We explain how such rules would benefit shareholders. We also explain why the proposed rules are best viewed not as limitations on corporations' speech rights but rather as a method of determining whether the corporation actually wishes to engage in political speech. Thus, these rules protect, rather than abridge, corporations' First Amendment interests.

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[4] For ease of exposition, throughout this Comment we shall refer to the preferences of a majority of shareholders of a corporation as reflecting the preferences of shareholders on the whole. In Part IV, we focus on differences in shareholder preferences, and consider the extent to which the preferences of a majority of the shareholders with respect to corporate political speech should be imposed on the minority.

Part IV discusses an additional objective that decisional rules concerning corporations' political speech may seek to serve: the protection of minority shareholders from forced association with political speech supported by a majority of shareholders. We discuss the economic and First Amendment interests of minority shareholders that lawmakers may seek to protect. Although we conclude that requiring unanimous shareholder approval for corporate political speech would likely be neither desirable nor permissible, we argue that decisional rules addressing political spending opposed by a sufficiently large minority of shareholders should be viewed as constitutionally permissible, and we discuss how lawmakers could best design such rules.

In our view, as long as corporations have the freedom to engage in political spending, the types of decisional rules we describe in this Comment will be desirable. While *Citizens United* expanded the scope of corporate resources that may be used for such speech, substantial corporate political spending was permitted before the decision.[5] The expansion of the scope of constitutionally protected corporate political speech brought about by *Citizens United*, however, makes the need for such rules all the more pressing.

II. CHOOSING CORPORATE LAW RULES FOR POLITICAL SPEECH DECISIONS

In this Part, we consider the need for corporate law rules to govern the corporate political speech decision. In section A we show that, given the nature of corporations, legal rules are necessary to determine whether and when a corporation wishes to speak, and *Citizens United* itself assumed the existence of such rules. Section B briefly describes the current corporate law treatment of political speech decisions, which subjects those decisions to the same rules that apply to ordinary business decisions. Section C explains how political speech decisions differ from ordinary business decisions — and why the existing rules governing political speech decisions are inadequate.

For ease of exposition, we use the term "corporate law" to refer to all sources of law — including state corporate law, federal securities law, and listing standards promulgated by the national securities exchanges — that govern firms' internal allocation of authority and rela-

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[5] Of course, some corporate political speech also remains impermissible even after *Citizens United*. For example, federal law still prohibits corporations from coordinating expenditures with candidates or providing them with direct contributions, *see* 2 U.S.C. § 441b (2006), and has done so for over a century, *see* Robert H. Sitkoff, *Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters*, 69 U. CHI. L. REV. 1103, 1103 (2002) (describing the initial passage of the Tillman Act, which made it illegal for corporations to make financial contributions directly to candidates for federal office, in 1907). The *Citizens United* decision did not expressly address its implications for such political spending.

tionships with shareholders. In addition, the term "lawmakers" refers to all federal and state legislators and regulators responsible for corporate law rules (although there is reason to expect that certain rules are most likely to be developed through federal intervention[6]). Throughout, we focus on political speech decisions by large, publicly traded companies, which deploy a significant fraction of corporate capital in the United States and are often subject to a distinct set of corporate law rules.

A. The Inevitability of Corporate Law Rules Concerning Political Speech

When the political speech of a natural person is afforded constitutional protection, there is usually little question whether the individual wants to engage in the protected speech. But when constitutional protections are accorded to corporate speech, the law must address a predicate question: how do we know that the company wishes to engage in the protected speech? A corporation, after all, is not a natural, Platonic entity. It is a legal arrangement, and its internal allocation of authority is a product of legal rules. Thus, as Professor Victor Brudney explained nearly three decades ago, law is needed "to allocate the corporation's capacity to become a 'speaker.'"[7]

Indeed, in *Citizens United* itself the Court explicitly acknowledged the existence of legal rules that allocate corporate decisionmaking authority. Justice Kennedy's opinion for the majority expressly referred to "the procedures of corporate democracy" that govern corporate decisions to engage in political speech.[8]

Existing law establishes an elaborate system of rules governing corporate decisionmaking authority. Under that system, the distribution of decisionmaking power is governed to a substantial extent by state law. However, for the large, publicly traded corporations on which we focus, there are additional layers of federal law that supplement — and occasionally override — state law.

For present purposes, however, the precise nature of these rules is not important. What is important is that, given the existence of constitutionally protected corporate political speech, legal rules are needed to govern how corporations make the decision to engage in such speech.

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[6] *See generally* Lucian A. Bebchuk & Assaf Hamdani, *Federal Corporate Law: Lessons from History*, 106 COLUM. L. REV. 1793 (2006) (documenting that, over the past seven decades, most corporate law rules that constrain insider behavior have been developed through federal intervention).

[7] Victor Brudney, *Business Corporations and Stockholders' Rights Under the First Amendment*, 91 YALE L.J. 235, 241 (1981).

[8] *Citizens United*, 130 S. Ct. at 911 (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 794 (1978)) (internal quotation mark omitted).

B. Existing Corporate Law Rules

Under existing corporate law rules, political speech decisions are by default governed by the same rules as ordinary business decisions. As a result, with respect to corporate political speech decisions, there is under current corporate law (i) no role for shareholders; (ii) no mandatory role for independent directors; and (iii) no mandatory disclosure to investors.

As to the role of shareholders, corporate law rules provide shareholders with a role in certain special corporate decisions, such as decisions to merge, amend the charter or bylaws, or approve equity compensation plans.[9] However, shareholders are generally not able to enact binding resolutions with respect to ordinary business decisions, which currently include corporate decisions to engage in political speech. In particular, under the basic rules of state law, shareholders do not have the right to vote directly on, or to enact bylaws addressing, the ordinary business decisions of the corporation.[10]

Under federal proxy rules, shareholders are permitted to offer advisory proposals with respect to some issues.[11] But the types of proposals that shareholders may offer are limited, and the distinction between proposals that directors and executives may exclude from the proxy and those that must be included is far from clear. For example,

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[9] For examples of corporate law arrangements involving shareholder approval, see DEL. CODE ANN. tit. 8, § 251(c) (2001 & West 2010), which requires such approval for certain mergers; *id.* § 242(b), which requires such approval for charter amendments; and Order Approving NYSE and Nasdaq Proposed Rule Changes Relating to Equity Compensation Plans, Exchange Act Release No. 48,108, 68 Fed. Reg. 39,995 (July 3, 2003) [hereinafter SEC Equity Compensation Order], which approved exchange-listing rules requiring firms to obtain shareholder approval for equity-based compensation plans.

[10] In an important recent decision, the Delaware Supreme Court examined the scope of shareholders' power to adopt bylaws under Delaware law, concluding that this power "is limited by the board's management prerogatives," that the proper function of bylaws is merely "to define the process and procedures by which [board] decisions are made," and that even process-related bylaws must leave directors free to disobey the bylaws if the directors conclude that doing so is necessary to discharge their fiduciary duties. CA, Inc. v. AFSCME Emps. Pension Plan, 953 A.2d 227, 232, 235 (Del. 2008); *see also Corporate Governance After* Citizens United*: Hearing Before the Subcomm. on Capital Mkts., Ins., & Gov't Sponsored Enters. of the H. Comm. on Fin. Servs.*, 111th Cong. 10 (2010) (testimony of John C. Coffee, Jr., Adolf A. Berle Professor of Law, Columbia Law School) (arguing that, in light of these developments, Delaware law gives shareholders "little practical ability to limit or restrict political contributions by mandatory shareholder action").

We note, however, that the Delaware courts and the courts of other states have not yet explicitly ruled on the permissibility of bylaws placing limits on a company's political spending. Thus, state law could conceivably evolve in the future to make such fully binding bylaws permissible. We would welcome such a development, which would be consistent with the proposal we put forward in section III.A to enable shareholders to pass binding resolutions concerning political spending.

[11] Shareholder Proposals, 17 C.F.R. § 240.14a-8 (2010) (requiring that certain proposals by certain shareholders be included for a vote in the corporate proxy).

the staff of the Securities and Exchange Commission has allowed companies to exclude from their proxy statements shareholder proposals recommending that the company disclose its lobbying expenses, concluding that such expenses relate to "ordinary business operations,"[12] but has not allowed firms to exclude proposals requesting disclosure of political spending.[13] Whether shareholders may use the federal proxy rules to put forward proposals recommending changes to the amount or targets of political spending is unclear, but such proposals, if included in the proxy and adopted by shareholders, would in any event be nonbinding.[14]

As to the role of independent directors, corporate law rules separately require that independent directors oversee certain special types of decisions, including those related to executive compensation and auditing of the firm's financial statements.[15] However, under existing rules, the board is completely free to delegate corporate political speech decisions to management. And indeed, in practice, public corporations often leave these decisions to management. A recent survey reported that, among the one hundred largest public companies in the United States, only thirty-four require board-level approval of political contributions.[16]

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[12] *See, e.g.*, Bristol-Myers Squibb Co., SEC No-Action Letter, 2009 WL 851540, at *1 (Feb. 17, 2009) (concluding that a proposal requesting that the company provide a report related to lobbying activities and expenses could be excluded from the proxy).

[13] *See, e.g.*, American International Group, Inc., SEC No-Action Letter, 2004 WL 346068, at *1 (Feb. 19, 2004).

[14] We also note that the staff of the SEC has permitted the exclusion of shareholder proposals recommending that a corporate political action committee be eliminated on the basis of the "ordinary business operations" exception to the shareholder proposals rules. *See, e.g.*, NiSource Inc., SEC No-Action Letter, 2002 WL 32072765, at *1 (Mar. 22, 2002).

[15] *See* Standards Relating to Listed Company Audit Committees, Exchange Act Release No. 47,654, 17 C.F.R. § 240.10A-3 (2010) (requiring that audit committees consist entirely of independent directors); New York Stock Exchange Rule 303A.05 (requiring all listed firms to have a compensation committee consisting entirely of independent directors).

[16] BRUCE F. 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), *available at* http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/611. This low figure actually reflects increased board-level oversight of these decisions; just two years earlier, a similar survey of 120 large public companies found that just two required board approval of political contributions. *See* BRUCE F. FREED ET AL., THE GREEN CANARY: ALERTING SHAREHOLDERS AND PROTECTING THEIR INVESTMENTS 28–29, 41 app. II (2005), *available at* http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/920. Moreover, board oversight appears to be concentrated among the largest public companies, which were the focus of these surveys. A more recent survey of the entire S&P 500 found that just twenty-two percent of those companies, or 110 firms, had in place board-level oversight of political spending decisions. *See* Email from Heidi Welsh, Exec. Dir., Sustainable Invs. Inst., to Robert J. Jackson, Jr. (Sept. 20, 2010, 11:23 EST) (on file with the Harvard Law School Library).

Finally, as to disclosure, corporate law rules also mandate special disclosure with respect to some decisions, such as those involving executive compensation or related-party transactions.[17] However, corporate law rules do not require any special disclosure with respect to ordinary business decisions — including, under current rules, political speech decisions. Of course, the aggregate effects of such decisions are reflected in a firm's financial statements, but corporate law rules do not require a company to separate political spending from other expenses or to provide shareholders with specific details about that spending.

C. How Political Speech Decisions Differ from Ordinary Business Decisions

The latitude that corporate law gives directors and executives to make ordinary business decisions without any of the safeguards typically used to protect investors — such as disclosure, required oversight by independent directors, and shareholder involvement — may well be warranted. The interests of directors and executives may be sufficiently aligned with those of shareholders with respect to ordinary business decisions. And even if such decisions occasionally depart from shareholder interests, these departures are unlikely to be sufficiently common to warrant the introduction of one or more of these protective mechanisms.

While these protective devices have not been adopted with respect to ordinary business decisions, they have been adopted with respect to special types of decisions, such as those concerning executive compensation, the audit of the firm's financial statements, and charter amendments. In these cases, departures from shareholder interests are viewed as potentially more common and more significant than in the case of ordinary business decisions.

Might the existing rules of corporate law — as the *Citizens United* Court appeared to suggest[18] — be adequate for the purpose of protecting shareholders from corporate political speech decisions contrary to their interests? Or are political speech decisions sufficiently different from ordinary business decisions that, like certain other types of corporate decisions, they call for different rules?

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[17] *See* 17 C.F.R. § 229.402(b)(2)(i)–(xv) (2010) (listing fifteen nonexclusive considerations that may be among the information that firms are required to disclose with respect to executive compensation); *id.* § 229.404(a) (requiring detailed disclosure on related-party transactions).

[18] *Citizens United*, 130 S. Ct. at 916 (arguing that "[s]hareholder objections raised through the procedures of corporate democracy," along with existing disclosure rules, would "permit[] citizens and shareholders to react to the speech of corporate entities in a proper way" (citing First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 794 (1978))).

Below we discuss important differences between political speech decisions and ordinary business decisions that should guide lawmakers' consideration of those questions. We explain that political speech decisions favored by directors and executives (i) may differ from those favored by shareholders; (ii) are, based on the limited available empirical evidence, likely to be of nontrivial financial significance; and (iii) may have expressive significance for shareholders (and impose costs on shareholders) beyond their financial effects.

1. Divergence of Interests. — Where the interests of directors and executives diverge from those of shareholders with sufficient regularity and magnitude, corporate law rules impose special requirements designed to address this conflict. For example, existing rules impose special requirements with respect to decisions related to executive compensation.[19] As we explain below, the interests of directors and executives may also diverge frequently and significantly from those of shareholders with respect to corporate political speech decisions.

To be sure, the interests of directors and executives might be aligned with those of shareholders with respect to some political speech decisions. This might be the case, for example, for political spending aimed at obtaining industry-specific rules that would enable the company to increase its profits.[20] There are good reasons to believe, however, that the interests of directors and executives with respect to political spending often diverge from those of shareholders.

The basic problem arises from the fact that political spending decisions may be a product not merely of a business judgment regarding the firm's strategy, but also of the directors' and executives' own political preferences and beliefs. Political spending might often have consequences that are exogenous to the firm's performance, and directors' and executives' preferences with respect to such spending might be influenced by these consequences. Thus, a divergence of interests may arise with respect to many political issues that corporations may choose to influence.

Because shareholders generally do not sort themselves among companies according to their political preferences, there is no reason to expect that the preferences of the particular individuals who make the company's political speech decisions will match those of shareholders.

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[19] *See, e.g.*, SEC Equity Compensation Order, *supra* note 9, at 39,997 (requiring shareholder approval of equity-based executive pay plans).

[20] Because some corporate political spending preferred by directors and executives may also be consistent with shareholder preferences, shareholder protection objectives would not warrant corporate law rules banning corporate political speech — even if such a ban were constitutionally permissible. *Cf.* Sitkoff, *supra* note 5, at 1116 (arguing that, notwithstanding the possibility that the interests of managers diverge from those of shareholders with respect to corporate political spending, lawmakers should consider "less drastic" alternatives than a mandatory prohibition on such spending).

Suppose, for example, that the CEO of Company *X* happens to be a left-leaning Democrat who hopes to run one day for Congress in a left-leaning district in the Northeast, and the CEO of Company *Y* happens to be a conservative Republican who hopes to run one day for Congress in a conservative district in the South. We have no reason to expect that the shareholders of each company share their CEO's beliefs on political issues. Thus, to the extent that corporate political speech decisions may be significantly influenced by such beliefs, the interests and preferences of one or both of the CEOs may substantially diverge from those of each company's shareholders.[21]

One area in which directors and executives may be particularly likely to have views divergent from those of shareholders involves rules concerning corporate governance and shareholder rights. Management may use corporate resources to lobby against expansion of shareholder rights that shareholders favor. For example, when the SEC recently considered whether shareholders should be given access to the corporate proxy for the election of directors, companies generally opposed the proposal while institutional investors generally expressed support for it (though to significantly varying degrees).[22] Indeed, because corporate political spending can be expected to affect corporate governance rules in general, a failure to address agency problems related to corporate political speech decisions may make it more difficult in the future to address agency problems with respect to other corporate decisions.[23]

Of course, it may be argued that directors and executives will be deterred from departing from shareholder interests with respect to corporate political speech decisions by markets, including the markets for corporate control, products, and capital.[24] Furthermore, it may be argued that, even if directors and executives were not deterred from

[21] While we focus in this Comment on political speech decisions, our reasoning may also apply to similar corporate decisions, such as decisions to spend corporate funds on charitable contributions. Relative to the ordinary business decisions with which they are now conflated, those decisions may also involve more frequent or significant divergence between the interests of directors and executives and those of shareholders. Accordingly, our analysis may also justify a reconsideration of the rules governing public companies' decisions concerning charitable contributions. *See infra* note 97.

[22] *Compare* Letter from Wayne Watts, Senior Exec. Vice President & Gen. Counsel, AT&T, to Elizabeth M. Murphy, Sec'y, SEC (Jan. 19, 2010), http://www.sec.gov/comments/s7-10-09/s71009-629.pdf, *with* Letter from Jack Ehnes, CEO, Cal. State Teachers' Ret. Sys., to Elizabeth M. Murphy, Sec'y, SEC (Jan. 19, 2010), http://www.sec.gov/comments/s7-10-09/s71009-623.pdf. *See generally Comments on Proposed Rule: Facilitating Shareholder Director Nominations: File No. S7-10-09,* SEC, http://www.sec.gov/comments/s7-10-09/s71009.shtml#33-9086.

[23] *See* Lucian A. Bebchuk & Zvika Neeman, *Investor Protection and Interest Group Politics*, 23 REV. FIN. STUD. 1089, 1113 (2010) (developing an account of interest group politics in which corporate insiders' ability to use corporate assets to lobby politicians leads to a suboptimal equilibrium level of investor protection).

[24] *See, e.g.*, Sitkoff, *supra* note 5, at 1114–18.

pursuing political speech contrary to shareholder wishes, shareholders would be protected by share prices that, ex ante, reflect the possibility of such a divergence of interest.

These generic objections may be raised with respect to any rules seeking to address a potential divergence of interest regarding any type of corporate decision. The responses to these objections are well developed in the literature, and have been presented in detail in other work by one of us.[25] To the extent that one supports the mechanisms established by corporate law rules for various situations involving a divergence of the interests of directors and executives from those of shareholders, and therefore is not prepared to rely simply on market forces to eradicate these problems, one should also be reluctant to rely on market forces to eliminate any similar divergence of interests with respect to political speech decisions.[26]

In the case of corporate political spending, it may be argued that firms will also be restrained by another factor — namely, the risk of retaliation by those outraged by the corporation's political spending. Those advancing this argument might point to the recent example of the Target Corporation, which faced a customer boycott after it was revealed that the firm had donated $150,000 to a political group that

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[25] *See, e.g.*, LUCIAN BEBCHUK & JESSE FRIED, PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION 53–58 (2004) (explaining how market forces cannot fully eliminate problems resulting from a divergence between the interests of directors and executives and those of shareholders with respect to executive compensation decisions); Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435, 1470–75 (1992) (providing such an analysis with respect to reincorporation decisions); Lucian Arye Bebchuk, *Limiting Contractual Freedom in Corporate Law: The Desirable Constraints on Charter Amendments*, 102 HARV. L. REV. 1820, 1840–46 (1989) (providing such an analysis with respect to decisions to initiate charter amendments). For an early work recognizing the limits of market forces in fully addressing problems resulting from interest divergence of this kind, see generally MELVIN ARON EISENBERG, THE STRUCTURE OF THE CORPORATION: A LEGAL ANALYSIS (1976).

[26] Existing empirical work on the frequency with which, and the extent to which, the interests of directors and executives with respect to political spending actually diverge from the interests of shareholders is limited. Recent research provides some empirical evidence consistent with the possibility that corporate political spending is associated with agency problems. *See* Rajesh K. Aggarwal et al., Corporate Political Contributions: Investment or Agency? 1–2, 17–18, 49–50 tbl.4 (June 25, 2009) (unpublished manuscript) (on file with the Harvard Law School Library), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=972670 (providing some evidence that U.S. firms making larger political contributions have lower returns); John C. Coates, IV, Corporate Governance and Corporate Political Activity: What Effect Will *Citizens United* Have on Shareholder Wealth? 13–14, 24–25 tbls. 3, 4 (Sept. 21, 2010) (unpublished manuscript) (on file with the Harvard Law School Library), *available at* http://papers.ssrn.com/abstract_id=1680861. More than two decades ago, Professor Roberta Romano claimed that "casual" empiricism suggests that corporate political spending is profit-maximizing, but did not carry out an empirical study of the subject. *See* Roberta Romano, *Metapolitics and Corporate Law Reform*, 36 STAN. L. REV. 923, 995–96 (1984). Further empirical work is warranted, and we hope that future research will shed further light on this important issue.

backed a gubernatorial candidate opposed to same-sex marriage.[27] However, while the fear of such backlash might restrain corporate political spending not favored by shareholders in some circumstances, it cannot be expected to do so in general. For one thing, a substantial amount of such speech will likely be unrelated to social issues of the type that triggered public backlash in the Target case. For another, as we explain below, existing laws permit corporate political spending to be channeled through intermediaries in a manner that obscures the source and magnitude of the funds, and companies doing so will have little reason to fear such a backlash.

2. *Financial Significance.* — It might be argued that, even accepting that the interests of directors and executives may diverge from those of shareholders, the problem is not of financial significance. On this view, even if directors and executives engage in political spending that is inconsistent with shareholder interests, the financial implications of those decisions are not sufficiently substantial to warrant special treatment for those decisions. Is there a basis, opponents of such treatment may ask, for believing that public corporations have been expending substantial amounts of corporate resources? As we explain below, the answer is yes.

To begin, even prior to *Citizens United*, public corporations have been permitted to provide indirect funding to political causes through intermediaries. Public disclosures do not permit us to obtain precise figures for such political spending for particular corporations. But the existing data do suggest that the amounts may be substantial.

Table 1 below provides data we assembled from public filings describing the amounts spent on lobbying and political expenditures during 2008 by five large intermediaries. Two of them (the Chamber of Commerce and the Business Roundtable) seek to advance the interests of businesses across all of the economy's sectors, and three (the American Petroleum Institute, the Financial Services Roundtable, and the National Association of Manufacturers) seek to do so for firms in particular industries. Three of the five spent more than 40% of the total funds they raised to finance lobbying and political expenditures. Together, these five organizations spent more than $130 million on lobbying and politics in 2008 alone.

[27] Brody Mullins & Ann Zimmerman, *Target Discovers Downside to Political Contributions*, WALL ST. J., Aug. 7–8, 2010, at A2.

TABLE 1. FUNDRAISING AND SPENDING BY INTERMEDIARIES[28]

	Lobbying and Political Expenditures	Percentage of Total Funds Raised by Each Intermediary Spent on Lobbying and Politics
United States Chamber of Commerce	$63.1 million	42.8%
American Petroleum Institute	$42.3 million	13.2%
Business Roundtable	$13.3 million	62.4%
Financial Services Roundtable	$7.6 million	42.3%
National Association of Manufacturers of the United States of America	$7.5 million	18.2%

Of course, the figures above are underinclusive insofar as they do not include many other intermediaries through which public corporations may channel political spending.[29] These figures may also be overinclusive, however, as current disclosure rules do not require intermediaries to disaggregate — and intermediaries do not voluntarily disaggregate — lobbying and political expenses. These rules also do not require the intermediaries, or public corporations supporting them, to indicate how much was provided by a particular corporation — an

[28] The data in Table 1 were assembled from each intermediary's IRS Form 990, which is made publicly available by organizations seeking to track intermediary spending. *See, e.g.*, *About Us*, GUIDESTAR, http://www2.guidestar.org/rxg/about-us/index.aspx (last visited Oct. 2, 2010) (describing the mission of one such organization as including efforts to "encourage nonprofits to share information about their organizations openly and completely"). Each organization's lobbying and political expenditures were drawn from line 2a of Part III-B of Schedule C to Form 990, which requires disclosure of lobbying and political expenses. *See* Am. Petroleum Inst., IRS Form 990, Return of Organization Exempt from Income Tax (OMB No. 1545-0047) (2008); Bus. Roundtable, IRS Form 990, Return of Organization Exempt from Income Tax (OMB No. 1545-0047) (2008); Fin. Servs. Roundtable, IRS Form 990, Return of Organization Exempt from Income Tax (OMB No. 1545-0047) (2008); Nat'l Assoc. of Mfrs., IRS Form 990, Return of Organization Exempt from Income Tax (OMB No. 1545-0047) (2008); U.S. Chamber of Commerce, IRS Form 990, Return of Organization Exempt from Income Tax (OMB No. 1545-0047) (2008). The percentages reflect the quotient of these figures and each organization's gross receipts, which are drawn from line G of Form 990.

[29] Microsoft and News Corporation are two high-profile examples in which corporate political spending was revealed to have been channeled through intermediaries. Microsoft provided over $250,000 to the Michigan Chamber of Commerce, which in turn funded advertisements regarding the Michigan Senate race in 2000, and was reported to have spent nearly $16 million in total on lobbying and political expenses between 1997 and 2000. *See* John R. Wilke, *Microsoft Is Source of 'Soft Money' Funds Behind Ads in Michigan's Senate Race*, WALL ST. J., Oct. 16, 2000, at A3. News Corporation contributed $1 million to the Republican Governors' Association in 2010. *See* Brody Mullins, *Groups' Spending for GOP on Rise*, WALL ST. J., Sept. 14, 2010, at A1.

issue that the disclosure requirements we propose in section III.D are designed to address.[30]

Furthermore, the relatively new freedom to spend corporate funds in connection with elections may produce a material increase in corporate spending related to politics. Such an increase may result from the use of corporate funds to replace, sometimes several times over, amounts now spent by corporate political action committees (PACs). While public corporations have been precluded from spending corporate funds on elections, they have been permitted to sponsor PACs that raise funds from executives and other employees to engage in political spending, and many corporations sponsor PACs that spend substantial amounts. For example, the PACs of AT&T and Honeywell International contributed $3.1 million and $2.5 million, respectively, to candidates for federal office in the 2007–2008 election cycle.[31] During that cycle, business PACs are collectively estimated to have spent over $300 million at the national level alone.[32]

The funds provided by corporate PACs come from the personal wealth of executives and other employees, not from corporate treasuries. With companies now permitted to spend corporate funds on indirect support of candidates, executives may prefer to replace some of the amounts spent by corporate PACs with spending from corporate treasuries, since the costs of the latter type of spending are to a substantial extent borne by shareholders. Alternatively, executives may supplement PAC funds, which may be used for direct support of candidates, with corporate political spending designed to provide indirect support. In either case, the fact that executives were willing to spend substantial amounts of their personal funds on political speech suggests that they will be willing to spend even more corporate funds to advance such causes.

3. Expressive Significance. — The above discussion indicates that the financial stakes of corporate political speech are hardly trivial for public corporations and their shareholders. In assessing the agency

[30] Our analysis focuses on well-known intermediaries. Recent reports, however, have highlighted the existence of some obscure intermediaries that spend millions of dollars on indirect support for candidates. *See* Mike McIntire, *Under Tax-Exempt Cloak, Political Dollars Flow*, N.Y. TIMES, Sept. 24, 2010, at A1. For the reasons given above, it is impossible to discern the extent to which public corporations provide support for these organizations and, if so, how much support is provided by any particular corporation.

[31] *See Top PACs*, CTR. FOR RESPONSIVE POLITICS, http://www.opensecrets.org/pacs/toppacs.php?Type=C&cycle=2008 (last visited Oct. 2, 2010).

[32] This estimate is drawn from a database maintained by the Center for Responsive Politics, which assigns each PAC included in Federal Election Commission filings to one of thirteen sectors. The figure includes PACs assigned to sectors relating to particular industries, but excludes PACs assigned to the "Ideological/Single-Issue," "Labor," and "Other" sectors. *See* Email from Spencer MacColl, Ctr. for Responsive Politics, to authors (Sept. 20, 2010, 12:04 AST) (on file with the Harvard Law School Library).

costs related to these decisions, it is important not to limit our attention to the financial stakes. The costs of political speech decisions that depart from shareholder interests are not limited to the financial costs incurred by the company. Accordingly, these costs are not limited to whatever adverse effects those costs may have on the corporation's profits or stock returns.[33]

In particular, shareholders may attach expressive significance to corporate political speech that goes far beyond the amount spent. Shareholders may have an interest in not being associated with political speech that they do not support, and this interest is not properly measured by the amount of the firm's political spending. Suppose, for example, that a corporation's CEO spent a financially trivial amount on an advertisement on the company's behalf expressing support for a political position that most of the shareholders loathe. While the shareholders may be practically indifferent to an ordinary business decision with similar financial costs, they might feel differently about spending on the advertisement that associates their company — and, indirectly, the shareholders themselves — with such a political position.

The SEC has long recognized that shareholders may have an interest in social policy issues that goes beyond the issues' direct financial relevance. Federal securities rules do not require directors and executives to include on the corporate proxy a shareholder proposal that "deals with a matter relating to the company's ordinary business operations."[34] However, recognizing the "depth of interest among shareholders in having an opportunity to express their views" on social issues, the SEC has concluded that the "ordinary business" exclusion should not apply to precatory shareholder proposals related to such social issues.[35] Thus, for example, the SEC has concluded that shareholder proposals requesting that the firm create a policy regarding investments in nations with serious human rights violations must be included on the corporate proxy, even when the company has few such investments.[36] Indeed, the SEC has expressly identified political con-

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[33] Nevertheless, the costs of special decisional rules may sometimes exceed the benefits to shareholders, even when considering the expressive significance of corporate political speech decisions. For that reason, we suggest that lawmakers provide shareholders with the ability to opt out of any such rules, provided that certain procedural protections are observed. *See infra* section III.C, pp. 102–04.

[34] Shareholder Proposals, 17 C.F.R. § 240.14a-8(i)(7) (2009).

[35] Amendments to Rules on Shareholder Proposals, 63 Fed. Reg. 29,106, 29,108 (May 28, 1998).

[36] *See, e.g.*, Unocal Corp., SEC No-Action Letter, 1996 WL 106112 (Mar. 11, 1996); Gillette Co., SEC No-Action Letter, 1996 WL 8089 (Jan. 4, 1996). The Commission had previously concluded that shareholder proposals of this type could be excluded from the proxy; but, noting that "[n]early all commentators from the shareholder community who addressed the matter supported the reversal of this position," the Commission concluded that "proposals that raise significant so-

tributions as an example of the "ethical issues" that "may be significant to the issuer's business, even though such significance is not apparent from an economic viewpoint."[37]

III. ALIGNING POLITICAL SPEECH DECISIONS WITH SHAREHOLDER INTERESTS

We turn in this Part to an examination of how special rules should be designed to address the divergence between the interests of directors and executives and those of shareholders with respect to corporate political speech decisions. In the course of our analysis, we comment on legislative proposals considered by Congress in the wake of *Citizens United*.[38] We consider in turn four elements of governance rules that could be used to address agency problems arising in connection with corporate political speech decisions: the role of shareholders (section A); the role of directors (section B); procedures that permit shareholders to opt out of lawmakers' chosen default arrangements (section C); and disclosure, with an emphasis on disclosure of indirect contributions through "conduit" entities (section D).[39] In section E, we consider the constitutionality of these proposed rules.

A. Shareholders

1. Role. — As previously noted, although prevailing corporate law rules do not allow shareholders to provide direct input into ordinary business decisions, they do require shareholder approval for certain

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cial policy issues" could no longer necessarily be excluded pursuant to the "ordinary business" exception. Amendments to Rules on Shareholder Proposals, 63 Fed. Reg. at 29,108.

[37] Adoption of Amendments Relating to Proposals by Security Holders, Exchange Act Release No. 12999, 10 SEC Docket 1006 (Nov. 22, 1976).

[38] One such proposal passed the House of Representatives in June 2010. *See* Democracy Is Strengthened by Casting Light on Spending in Elections Act (DISCLOSE Act), H.R. 5175, 111th Cong. (2010). It appears, however, that this proposal will not pass during the 111th Congress. *See* Eric Lichtblau & Carl Hulse, *Senate Democrats Fail to Advance a Campaign Finance Bill, an Obama Priority*, N.Y. TIMES, Sept. 24, 2010, at A17. Other proposals are currently pending before Congress, including one passed by the House Financial Services Committee. *See* Shareholder Protection Act of 2010, H.R. 4790, 111th Cong. (2010).

[39] Some opponents of these proposals may argue that firms should be expected to adopt these arrangements voluntarily if they are beneficial to investors — and thus that the existing set of corporate law rules must be optimal. This argument, sometimes referred to as the "Panglossian" view, can be offered in response to any proposal that introduces corporate governance rules that do not already prevail in the marketplace. For responses to these Panglossian arguments, see, for example, Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 888–91 (2005). We also note that, other than the disclosure requirements, described in section III.D, the corporate law arrangements described in this Part are proposed as default arrangements from which shareholders may opt out. Thus, these arrangements can be expected to survive in the marketplace only if they enjoy the support of a majority of shareholders. *See infra* section III.C, pp. 102–04.

other corporate decisions.[40] Because of the significant likelihood that the interests of directors and executives will diverge with respect to political speech decisions, lawmakers should also require shareholder approval for corporate political spending.

We therefore favor a default corporate law arrangement that, inter alia, provides shareholders with a veto over the overall amount of corporate resources spent on political speech.[41] This rule might specify that in any given year political spending may exceed a certain minimum threshold only up to the level authorized by a shareholder resolution in the preceding annual meeting. For this purpose, political spending should include both amounts spent directly and amounts spent indirectly through intermediaries. One proposal introduced in Congress following the decision in *Citizens United* would require shareholder approval for political expenditures exceeding $50,000 at U.S. public companies.[42]

While a requirement that shareholders approve a budget for political spending would be novel in the United States, companies in the United Kingdom have been subject to such a requirement for over a decade. Under British law, shareholders must consent, by majority vote on a shareholder resolution, to any political spending that exceeds £5000.[43] Although data regarding British corporations' spending on political speech are incomplete, they suggest that spending fell following the adoption of this legislation.[44] For example, one study indicated that twenty-eight large British firms donated £50,000 or more between 1987 and 1988, but between 2001 and 2009 none of these firms do-

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[40] *See supra* note 9 and accompanying text.

[41] Although not the basis for our analysis or conclusions, we note that there is some survey evidence suggesting that adoption of this approach would be well received by the public. *See* STEPHEN ANSOLABEHERE & NATHANIEL PERSILY, KNOWLEDGE NETWORKS, FIELD REPORT: CONSTITUTIONAL ATTITUDES SURVEY 101 Q515 (2010), *available at* http://www.law.columbia.edu/null/download?&exclusive=filemgr.download&file_id=54767 (reporting that in response to the question, "Should corporations be required to get approval from their shareholders for expenditures related to political campaigns?", 84.5% of those polled answered "Yes").

[42] *See* Shareholder Protection Act of 2010, H.R. 4790 § 4(a).

[43] Political Parties, Elections and Referendums Act, 2000, c. 41, §§ 139–40 (U.K.). While shareholder rights in the United Kingdom and other common law countries are generally stronger than those in the United States, the annual shareholder approval requirement with respect to political spending is unique among U.K. shareholders' voting rights. *See generally* Paul L. Davies, *The United Kingdom*, *in* SHAREHOLDER VOTING RIGHTS AND PRACTICES IN EUROPE AND THE UNITED STATES 331, 331–52 (T. Baums & E. Wymeersch eds., 1999) (describing the limited use of shareholder meetings and resolutions in the United Kingdom).

[44] *See, e.g.*, CIARA TORRES-SPELLISCY, BRENNAN CTR. FOR JUSTICE, CORPORATE CAMPAIGN SPENDING: GIVING SHAREHOLDERS A VOICE 18 (2010), *available at* http://brennan.3cdn.net/54a676e481f019bfb8_bvm6ivakn.pdf.

nated more than £1500.[45] Aggregate corporate contributions, too, appear to have declined since the adoption of the legislation.[46]

In our view, however, subjecting the total level of expenditures to shareholder approval would not by itself ensure that corporate political speech decisions are consistent with shareholder interests. Shareholders may have interests that differ from those of directors and executives not only with respect to the total amount spent on politics, but also with respect to how that spending is targeted.

Some might argue that shareholders' power to veto the budget in future years is enough to deter directors and executives from spending this year's budget in a manner contrary to shareholder preferences. But it may be in shareholders' interests to approve a budget even if some of management's political spending is contrary to shareholder interests. Thus, giving shareholders a veto over the budget, without any say over targeting, may unnecessarily require them to choose between having no political spending at all or having a budget spent, in part, in accordance with directors' and managers' preferences rather than their own. Such a limited choice may produce an outcome that falls substantially short of the one most preferred by shareholders.

Accordingly, we also propose that shareholders be permitted to adopt binding resolutions concerning corporate political spending. Providing shareholders with the power to adopt such binding resolutions would require a change in current rules, which permit shareholders to adopt binding bylaws with respect to some governance issues but not with respect to ordinary business decisions — which, as we have discussed, currently include political speech decisions.[47] Such resolutions on political spending could apply either for a given year or until replaced by a subsequent resolution. For example, 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) or that the corporation must follow certain principles in allocating any authorized budget for political spending.

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[45] *See id.* at 18, 37 n.78 (citing Michael Pinto-Duschinsky, *Trends in British Party Funding 1913–1987*, 42 PARLIAMENTARY AFF. 197, 210 (1989); *Register of Donations to Political Parties*, ELECTORAL COMM'N, http://registers.electoralcommission.org.uk/regulatory-issues/regdpoliticalparties.cfm (last visited Oct. 2, 2010)).

[46] As noted in the text, data on British corporations' contributions are incomplete and limited, and it is difficult to draw conclusions about the relationship between these rules and aggregate corporate contributions. However, the data indicate that overall contributions to the Conservative Party, which receives the bulk of corporate donations, fell from £2.88 million for fiscal year 1997–1998, before these rules were adopted, to £1.74 million in 2001 and £1.16 million in 2003. *Id.* at 18; *see also Register of Donations to Political Parties*, *supra* note 45 (providing data on corporate contributions to the Conservative Party after 2000).

[47] *See, e.g.*, CA, Inc. v. AFSCME Emps. Pension Plan, 953 A.2d 227, 234–36 (Del. 2008) (describing the types of bylaws that shareholders may, and may not, adopt under Delaware law).

The power to adopt such resolutions will make it more likely that both the firm's budget for political spending and the chosen targets will be consistent with shareholder interests. And, as a practical matter, this power will give shareholders an alternative to merely approving management's proposed budget for political spending. Finally, even if shareholders' power to pass such binding resolutions is used only rarely, its existence would improve the incentives of directors and executives to target the corporation's political spending in ways consistent with shareholder interests.

2. Objections. — Requiring shareholder voting on corporate political spending may be opposed on grounds of the general objection — equally applicable to shareholder voting on compensation issues, mergers, and charter amendments — that shareholders' ability to replace directors is, standing alone, enough to prevent the firm's decisions from diverging from shareholder interests.[48] Shareholders displeased with the company's political spending, it may be argued, could vote in favor of challengers seeking to replace incumbent directors, and the prospect of such a proxy fight can be expected to deter directors from making decisions contrary to shareholder interests.

However, given existing rules of corporate law that impose substantial impediments to proxy fights,[49] the threat of an election contest can hardly be relied upon to ensure that corporate political spending does not diverge significantly from shareholder interests. Furthermore, when shareholders prefer that the company not engage in political spending but are otherwise satisfied with incumbent directors' management of the firm, there are substantial advantages to allowing shareholders to veto the political spending decision directly, rather than requiring shareholders to bundle that decision with their overall assessment of the directors' performance.[50]

Opponents of shareholder voting on corporate political speech may also raise a second generic objection — which, again, is equally applicable to matters on which shareholders already have approval rights — namely, that imperfectly informed shareholders are best served by having better-informed directors and executives make decisions for

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[48] *See, e.g.*, Leo E. Strine, Jr., *Toward a True Corporate Republic: A Traditionalist Response to Bebchuk's Solution for Improving Corporate America*, 119 HARV. L. REV. 1759, 1762 (2006).

[49] *See* Lucian A. Bebchuk, Essay, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675, 688–94 (2007) (discussing the various impediments that make it costly and difficult for shareholders to replace incumbent directors). The SEC has recently promulgated rules that would permit certain shareholders to place a limited number of candidates on the corporate ballot. *See* Facilitating Shareholder Director Nominations, 75 Fed. Reg. 56,668 (Sept. 16, 2010) (to be codified at 17 C.F.R. pts. 200, 232, 240, and 249).

[50] *Cf.* Bebchuk, *supra* note 39, at 856–61 (arguing that shareholder power to replace directors does not obviate the need for shareholders to have the power to make "rules-of-the-game" decisions).

them.[51] But requiring shareholder approval does not necessarily result in shareholders' substituting their judgments for those of directors and executives. Shareholders can and often do defer to insiders' decisions, and insiders have the opportunity to explain the basis for their views to shareholders. However, where shareholders decide, after weighing those considerations, that they prefer to limit insiders' control over political spending, they should be able to do so.[52]

Finally, introducing shareholder voting may be opposed on grounds that it would produce wasteful transaction costs. In assessing this objection, however, it should be noted that the proposed shareholder voting would take advantage of shareholder votes that would be cast anyway. In connection with each annual meeting, shareholders mark their preferences on many issues on the corporation's proxy card. Thus, our proposal would merely involve marking additional preferences on a ballot that shareholders would send in any event.

B. Independent Directors

Ordinary business decisions — which, under current law, include political speech decisions — are commonly delegated to, and made by, the corporation's executives. However, as previously noted, existing corporate law arrangements require the board — and in particular its independent directors — to take an active role in overseeing certain special types of decisions.[53] Whether or not lawmakers introduce shareholder voting with respect to corporate political speech determinations, they should require independent directors to play a role in such decisions.[54]

As we have explained, the interests of directors and executives regarding corporate political speech may often diverge from those of shareholders. While there is substantial debate over the efficacy of in-

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[51] *See, e.g.*, Stephen M. Bainbridge, *Director Primacy and Shareholder Disempowerment*, 119 HARV. L. REV. 1735, 1745–46 (2006).

[52] *Cf.* Bebchuk, *supra* note 39, at 894–95 (suggesting that when shareholders decide not to defer to directors, letting shareholders overrule management may maximize expected shareholder value).

[53] *See supra* note 15 and accompanying text.

[54] We note that, after *Citizens United*, Iowa law was amended to require that a majority of the board approve such expenditures, and that the board give its approval in the same year as those expenditures are made. *See* S. 2354, 83d Gen. Assemb., 2d Reg. Sess. § 3 (Iowa 2010) (amending IOWA CODE § 68A.404 (Supp. 2009)). In addition, at least two states, Louisiana and Missouri, had already required that corporate political expenditures be expressly approved by the board of directors or a designee. *See* LA. REV. STAT. ANN. § 18:1505.2(F) (2004 & Supp. 2010); MO. REV. STAT. § 130.029.1(1) (2000). However, only a small percentage of public companies in the United States are incorporated in (and, thus, subject to the rules of) one of these three states. *See* Lucian Arye Bebchuk & Alma Cohen, *Firms' Decisions Where to Incorporate*, 46 J.L. & ECON. 383, 391 tbl.2 (2003) (documenting the distribution of incorporations for U.S. public companies among the fifty states and the District of Columbia).

dependent directors as representatives of shareholder interests,[55] independent-director oversight is especially useful in cases, like corporate political speech decisions, where operational expertise possessed by insiders but not by independent directors may not be needed to evaluate the company's alternatives. And, in cases where operational expertise might be relevant, the judgment of the independent directors could be informed by — but not beholden to — the views of management.

Accordingly, we support rules requiring corporate speech decisions to be approved, or at least overseen, by a committee of independent directors. Boards should not be required to establish a separate committee for this purpose; instead, boards could authorize one of the other committees staffed solely by independent directors, such as the corporate governance and nominating committee required by existing corporate law rules, to fulfill this role. The committee could be required to include in each year's proxy statement a discussion of its work and an explanation of the choices it made during the preceding year.

Our approach, which favors vesting oversight and responsibility for corporate speech decisions in independent directors rather than executives, differs from the approach taken by the drafters of some proposals introduced in Congress in the wake of *Citizens United*. One such proposal, for example, would have required the chief executive officer or a designee to certify, among other things, that the corporation has provided an accurate report regarding its political spending to federal regulators.[56] While such a requirement may have some beneficial effects, we believe that corporate law rules should vest responsibility for corporate political spending in independent directors rather than executives.[57]

C. *Private Ordering*

1. Opting Out Procedures. — In addition to considering the role of shareholders and directors with respect to corporate political speech decisions, lawmakers should also consider whether — and, if so, in what way — companies should be able to opt out of lawmakers' cho-

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[55] For different perspectives on the effectiveness of independent directors, compare Victor Brudney, *The Independent Director — Heavenly City or Potemkin Village?*, 95 HARV. L. REV. 597, 658 (1982), with Ira M. Millstein & Paul W. MacAvoy, Essay, *The Active Board of Directors and Performance of the Large Publicly Traded Corporation*, 98 COLUM. L. REV. 1283, 1291–92 (1998).

[56] *See* DISCLOSE Act, H.R. 5175, 111th Cong. § 212(c) (2010).

[57] In contrast to the DISCLOSE Act, *id.*, the Shareholder Protection Act of 2010, H.R. 4790, 111th Cong. (2010), would require the national securities exchanges to adopt a rule requiring all listed firms to include in their bylaws a requirement that directors must vote on any political expenditure exceeding $50,000. Firms would also be required to make the individual votes of each director public within 48 hours of the vote. *See id.* § 4.

sen default arrangements. While many corporate law rules are mandatory — such as those requiring shareholder approval for mergers and charter amendments, and those requiring independent-director oversight of compensation and audit decisions — other corporate law rules permit shareholders to opt out. With respect to the role of shareholders and independent directors, we favor permitting shareholders to opt out of the default arrangement — so long as appropriate rules, discussed below, ensure that any opting out is consistent with shareholder interests.

Giving shareholders the ability to opt out should make lawmakers comfortable adopting default arrangements that include substantial safeguards such as those discussed in the preceding sections of this Part. To begin, permitting shareholders to opt out should strengthen the case for the constitutional permissibility of such rules, because rules that permit opting out burden corporate speech only to the extent that such rules enjoy the support of a majority of shareholders. Furthermore, permitting opting out should allay any concerns that the chosen default arrangements would require companies to be subject to rules that are not in shareholders' interests. In such a case, directors would be expected to initiate, and shareholders to approve, opting out of the default arrangements.

What rules should govern the process of opting out? Three features are, in our view, important. First, shareholders should be free to opt out of lawmakers' chosen default arrangements in both directions. For example, shareholders should be permitted to raise the majority of shareholders whose approval is needed to approve political spending (for example, to sixty percent), but they also should be free to waive the requirement for shareholder approval.

Second, to ensure that the corporation is governed by arrangements consistent with shareholder interests, any opting out should require shareholder approval, and shareholders should have the power to initiate such a vote. While the rules should permit the board to initiate opting out and bring that proposal to a shareholder vote, the board should not be able to effect an opt-out (and particularly not an opt-out that weakens shareholder protections) unilaterally, nor make it more difficult for shareholders to effect an opt-out.

Third, the rules should provide that shareholder decisions to opt out of the chosen default arrangement sunset after a specified period of time, say, five years. Such a sunset provision would ensure that opting out continues to enjoy shareholder support.

2. *Opting Out vs. Opting In.* — In light of the ability of shareholders to opt in and out of the default arrangements we propose, some may argue that lawmakers should retain the existing corporate law rules — which subject corporate political speech decisions to the same rules as ordinary business decisions — and simply allow shareholders to opt in to different arrangements, such as those we propose. Howev-

er, lawmakers must take into account a substantial asymmetry that exists between default rules that provide shareholders with protective arrangements and rules that merely permit shareholders to opt in to such arrangements. When a default corporate law rule is inefficient, opting out of it is much more likely to happen when directors and boards favor an opt-out than when shareholders favor one.[58]

Accordingly, lawmakers should not rely on shareholders' ability, on their own, to enact rules providing shareholders and independent directors a role in corporate political speech decisions. As emphasized in work co-authored by one of us,[59] in designing these rules lawmakers should instead use the approach of reversible defaults — that is, take into account which default rule is practically easier to reverse. This consideration favors default rules that provide a role for shareholders and independent directors with respect to corporate political speech decisions — but permitting shareholders to opt out of those rules.[60]

D. Disclosure Requirements

Corporate law rules generally do not require public firms to provide their shareholders with disclosure regarding ordinary business decisions. However, as we have previously noted, public firms are required to provide their shareholders with detailed disclosure with respect to certain specified types of decisions.[61] Public corporations should similarly be required to make detailed disclosures concerning political spending, including robust and effective disclosure of spending via intermediaries.

Whatever lawmakers choose to do with respect to the roles of shareholders and independent directors in corporate political speech decisions, effective disclosure to shareholders is necessary. If, as we propose, shareholders are permitted to vote on these matters, they will need such information in order to cast informed votes. If shareholders are not to be provided with a vote, and instead must rely on voting in director elections to discourage political speech they disfavor, they

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[58] *See* Lucian Arye Bebchuk & Assaf Hamdani, *Optimal Defaults for Corporate Law Evolution*, 96 NW. U. L. REV. 489, 490–91 (2002) (identifying this asymmetry); Lucian A. Bebchuk & Scott Hirst, *Private Ordering and the Proxy Access Debate*, 65 BUS. LAW. 329, 345 (2010) (arguing that, because of the asymmetry, it is desirable for the SEC to provide a default proxy access arrangement rather than merely enabling shareholders to opt in to it from a no-access default).

[59] Bebchuk & Hamdani, *supra* note 58, at 492–93 (putting forward the "reversible defaults" strategy).

[60] We also note that a poll of U.S. public company shareholders conducted before *Citizens United* was decided reported that a majority of shareholders do not believe that existing law provides sufficient checks on directors and executives with respect to corporate political spending. *See* MASON-DIXON POLLING & RESEARCH & THE CTR. FOR POLITICAL ACCOUNTABILITY, CORPORATE POLITICAL SPENDING: A SURVEY OF AMERICAN SHAREHOLDERS 9 (2006).

[61] *See supra* note 17 and accompanying text.

must know enough about the company's political speech to inform their votes on directors. Effective disclosure should be supported even by those who are fully content with the existing "procedures of corporate democracy" under corporate law rules, as such procedures cannot be expected to have a meaningful impact on political speech decisions if shareholders are uninformed about the corporation's political spending. Below, we discuss what information should be provided to public investors for disclosure of corporate political spending to be effective.

At first glance, one might conclude that significant information about political spending is already available in the public domain. Disclosure rules already exist in the United Kingdom, where all public companies are required to include in the annual directors' report the amounts of the company's individual donations over a threshold amount and the identity of the recipient of each such donation.[62] In U.S. companies, precatory shareholder proposals recommending disclosure of political spending have increasingly gained support from shareholders,[63] and some U.S. firms have decided voluntarily to provide disclosure with respect to political spending.[64] Moreover, existing law, such as regulations promulgated by the Federal Election Commission, require detailed disclosure with respect to political spending,[65] although these rules are designed to provide the public with information regarding the source of funds for particular politicians — not to address agency problems within the corporate entities providing the funding.[66] Despite these existing rules and practices, however, for two reasons substantial additional disclosure is needed to provide shareholders of public corporations with adequate information about the corporation's political spending.

First, some information that is critical for assessing any particular public corporation's political spending is simply not in the public domain. In particular, as we have noted, it appears that corporations make significant contributions to intermediary entities that spend sub-

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[62] *See* Political Parties, Elections and Referendums Act, 2000, c. 41, § 140 (U.K.).

[63] *See, e.g.*, *Investors Consider Climate, Other Risk in Busy Season*, CORP. SOC. ISSUES REP., June/July 2008, at 1; THE CONFERENCE BOARD, HANDBOOK ON CORPORATE POLITICAL ACTIVITY (forthcoming Oct. 2010) (manuscript at 31) (on file with the Harvard Law School Library).

[64] *See, e.g.*, *Medtronic Medical Technology Fund: FY 2010 Contributions*, MEDTRONIC, http://www.medtronic.com/wcm/groups/mdtcom_sg@mdt/@ap/@au/@corp/documents/document/fy11_contributions.pdf (last visited Oct. 2, 2010).

[65] *See, e.g.*, 2 U.S.C. § 434(f)(1), (4) (2006 & Supp. III 2009) (requiring reporting for persons whose political speech expenditures exceed $10,000 in the aggregate annually).

[66] *See, e.g.*, McConnell v. FEC, 540 U.S. 93, 196 (2003) (noting that Congress designed FEC disclosure requirements to require those funding political advertisements "to reveal their identities so that the public is able to identify the source of the funding" (quoting McConnell v. FEC, 251 F. Supp. 2d 176, 237 (D.D.C. 2003))), *overruled on other grounds by Citizens United*, 130 S. Ct. 876.

stantial sums on politics,[67] but these intermediaries are not required to disclose the identities of the public corporations contributing to them — or the amounts each corporation contributed. As a result, there is generally no information in the public domain regarding how much of each intermediary's funds, if any, was provided by a particular public corporation. With little information available to the public, organizations attempting to monitor political spending resort to speculation that corporations with executives on the boards of an intermediary are likely to be a source of some funding for that intermediary — but still cannot know how much funding, if any, that corporation provides.[68]

Second, even information already required to be disclosed under existing rules is not provided in a manner that makes it feasible for shareholders to understand the amounts and beneficiaries of a public corporation's political spending. As we have discussed, this information is often included separately in disclosures to the Federal Election Commission, various tax filings, and other public sources of information. Public investors interested in this information should not have to bear the costs of assembling it from these sources. The corporation, rather than individual investors, is in the best position to put together the needed information in a cost-effective way. Accordingly, public corporations should be required to provide shareholders with frequently updated information about the total amounts spent on political speech, as well as the identity of each recipient that receives amounts over a certain threshold from the company.

For these disclosure rules to be effective, they must also include look-through requirements for indirect political spending.[69] Suppose, for example, that a public company elects not to spend on political causes directly but rather to provide $X to an intermediary organization that pools the $X with some other funds for spending on political causes. To be able to assess whether the $X in contributions was in their interests, shareholders need to know more than the mere fact that the corporation gave to the intermediary — they also need to know how the total pool of funds put together by the intermediary is spent.

To facilitate the necessary disclosure by corporations, these intermediaries should be required to provide contributors with information concerning the targets to which their contributions are directed. If an

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[67] *See supra* Table 1, p. 94.

[68] *See, e.g.*, CTR. FOR POLITICAL ACCOUNTABILITY, POLITICAL TRANSPARENCY AND ACCOUNTABILITY PROFILE, CATERPILLAR, INC. 3 (2009) (noting that Caterpillar's CEO is a member of the Business Roundtable, and the Caterpillar Group President serves on the board of the United States Chamber of Commerce).

[69] We note that lawmakers have previously recognized the importance of contributions made through intermediaries or conduits. The Federal Elections Campaign Act imposes criminal penalties for those who "knowing[ly] and willful[ly]" violate contribution limits through such intermediaries. 2 U.S.C. § 437g (2006 & Supp. III 2009).

intermediary organization receives funds that are earmarked for a particular political purpose, such reporting would be straightforward. And if the funds are not earmarked, then the intermediary organization would simply need to record how its total pool of unrestricted funds was spent on political causes, and then report to its contributors, including corporations, their prorated spending on each political cause. Public companies would then be able to disclose to shareholders any political cause for which they provide support — either directly or indirectly through intermediary organizations — that exceeds a certain threshold level.[70]

While bills introduced in Congress in the immediate wake of *Citizens United* seek to impose disclosure requirements with respect to corporate political spending,[71] they do not include the robust disclosure requirements concerning spending through intermediaries described above. One proposal includes a requirement that corporations disclose contributions that were given to an intermediary and transferred to a third party, but only where those funds were designated for a particular political purpose.[72] Thus, the proposal does not appear to address the important scenario in which corporations provide funds to intermediaries without formally specifying the recipients of these funds.

The approach we propose — a requirement that companies disclose both contributions to intermediary organizations and the ultimate political beneficiaries of these contributions — is essential to providing shareholders with effective disclosures regarding corporate speech decisions. Without such a requirement, shareholders will lack an accurate picture of the political causes that their money is used to support.

E. Constitutional Permissibility

In this Part, we have analyzed which legal rules would reduce the likelihood that corporate political speech decisions are a product of a divergence between the interests of directors and executives and those of shareholders. However, in the wake of *Citizens United*, it might be argued that courts will be suspicious of any corporate law reforms applying to corporate political speech decisions, particularly because content-based regulation of speech has been disfavored as a matter of constitutional law.[73] As we explain below, however, although the re-

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[70] We note that the Conference Board has recently recognized that it may be advisable for corporations to inquire about how their contributions to intermediaries are actually spent. *See* THE CONFERENCE BOARD, *supra* note 63 (manuscript at 24–25).

[71] *See, e.g.*, Shareholder Protection Act of 2010, H.R. 4537, 111th Cong. § 4 (2010).

[72] *See* DISCLOSE Act, H.R. 5175, 111th Cong. § 211 (2010).

[73] To survive a First Amendment challenge, content-based speech regulations must satisfy strict scrutiny: that is, they must serve a compelling interest of the state and be "narrowly tailored

forms that we have put forward would raise some novel constitutional questions, there is a strong basis for concluding that these reforms should pass constitutional muster.

To be sure, there are likely to be some constitutional limits on the choice of corporate law rules in this area. For example, a court would likely find unconstitutional rules that would subject corporate political speech decisions to highly expensive procedures that appear to be clearly motivated by a desire to deter corporate speech rather than to advance the purposes that internal regulation of corporate decisionmaking ordinarily serves. Such rules could well be viewed as a roundabout way to limit corporate political speech that is wholly unjustified by any compelling state interest. But for the reasons given below, we think that the rules proposed in this Part — which are designed to prevent corporate political speech that is contrary to the interests of a majority of shareholders — should be found constitutionally permissible.

To begin, and most importantly, these rules should not be viewed at all as limitations on corporate political speech. To assess whether any First Amendment speech rights have been abridged, a court must first conclude that the bearer of the right wishes to speak. And, as we have seen, a corporation is merely a product of legal rules that govern the relationships between shareholders, directors, and executives. To say that a corporation has the right to speak, then, leaves open the question as to what legal rules should determine whether the corporation wishes to speak. Lawmakers may reasonably conclude that companies should not be viewed as wishing to engage in political speech when such speech is disfavored by the company's shareholders.

Thus, the rules put forward in this Part should be viewed not as limitations on corporations' rights to engage in speech but rather as an effort to prevent the use of corporate resources for speech that the corporation does not wish to engage in. On this view, the rules we have put forward should be viewed as protecting corporations' First Amendment speech rights — by ensuring that each corporation's political speech reflects the wishes of its owners — rather than limiting them.

Some might go further and argue that shareholders, rather than corporations, are the actual bearers of the speech rights described in *Citizens United*.[74] While this view could also provide a basis for the

to achieve that interest." FEC v. Wis. Right to Life, Inc., 127 S. Ct. 2652, 2664 (2007) (collecting cases).

[74] This view was elegantly expressed by Justice White over thirty years ago. *See* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 806 (1978) (White, J., dissenting) ("[W]hen a profitmaking corporation contributes to a political candidate this does not further the self-expression or self-fulfillment of its shareholders in the way that expenditures from them as individuals would.").

constitutional permissibility of the rules we have put forward, it is not necessary to take this view in order to conclude that these rules are permissible. As just explained, the conclusion that the corporation is the independent bearer of a constitutional right to free speech leaves to lawmakers the question of determining how the law will assess the corporation's wishes.

Accepting that the corporation independently bears these rights does not suggest that the corporation's wishes should be determined solely by, say, its executives, and surely the Constitution does not require that result. Fully accepting that the corporation, as a separate legal entity, is the right-bearer, lawmakers may determine that this legal entity should not be viewed as wishing to engage in speech disfavored by shareholders, and therefore may adopt corporate law rules designed to prevent the use of corporate resources for speech that the entity does not wish to pursue.

Furthermore, even if the rules put forward in this Part were viewed as limitations on corporate political speech, it would be far from clear that they would be found to be constitutionally impermissible. In particular, these rules may not be subject to the strict scrutiny analysis usually reserved for content-based regulations of political speech. *Citizens United* itself, after all, did not apply that analysis to the disclosure and disclaimer rules challenged in that case, but upheld those restrictions in part because such rules "do not prevent anyone from speaking."[75] Like those regulations, rules providing a role for shareholders and independent directors would not operate to prevent the corporation from speaking. Note also that, as discussed earlier in this Part, the safeguards we propose for political speech decisions are rules that already apply to other corporate choices.

Moreover, shareholders can eliminate any burden imposed by the rules by simply opting out of their application. Thus, adding the ability to opt out substantially strengthens the constitutional case for these rules. In light of these considerations, and the fact that the Court has long declined to apply strict scrutiny to securities law rules,[76] the rules put forward in this Part should survive a First Amendment challenge.

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[75] *Citizens United*, 130 S. Ct. at 914 (quoting McConnell v. FEC, 540 U.S. 93, 201 (2003)) (internal quotation marks omitted).

[76] Securities rules result in prior restraints on speech, content-based regulations, and compelled speech under certain circumstances, yet have generally avoided the strict scrutiny ordinarily triggered by these characteristics. *See* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1779–80 (2004) (citing Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 38–40 (1986) (Stevens, J., dissenting)); *cf.* Frederick Schauer & Richard Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803, 1835–36 (1999) (arguing that a context-specific approach to constitutional analysis of electoral speech regulation is consistent with the structure and purpose of First Amendment doctrine generally).

We note that the *Citizens United* Court appeared to acknowledge that protection of shareholder interests is a legitimate legislative objective in this context. To be sure, Justice Kennedy suggested — incorrectly, for the reasons given in Part II — that this objective is adequately addressed by existing corporate law rules.[77] But like previous opinions in this area,[78] *Citizens United* seems to contemplate that lawmaking designed to protect shareholders from corporate political speech decisions contrary to their interests serves a legitimate purpose.[79] This aspect of *Citizens United* is consistent with our view that rules reasonably designed to serve such a purpose should be found constitutionally permissible.

While all the rules put forward in this Part should in our view pass constitutional muster, they vary in the ease with which they do so. In particular, the constitutional permissibility of the disclosure requirements that we propose is straightforward. As noted earlier, *Citizens United* itself upheld extensive disclosure requirements related to corporate political speech; like those requirements, the disclosure rules we propose "do not prevent anyone from speaking." By contrast, the default rules we propose with respect to the role of shareholders and independent directors fall in less well-charted territory, and we expect that objections to their constitutionality will be raised and carefully considered by the courts.[80] For the reasons described above, however, we believe that courts should reject these challenges.

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There are also reasons to expect courts to be relatively deferential to lawmakers' judgments regarding corporate governance rules such as those described in this Part. In particular, courts may be disinclined to make a constitutional determination regarding the circumstances under which a corporation wishes to engage in political speech. *Cf.* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1374–75 (6th ed. 2009) (noting that, with respect to the location of a corporation's principal place of business for purposes of diversity jurisdiction, federal courts declined to extend the treatment of corporations under 28 U.S.C. § 1332(c)(1) (2006) to labor unions, concluding that judgments regarding the citizenship of these entities were better left to Congress (citing United Steelworkers v. R.H. Bouligny, Inc., 382 U.S. 145 (1965))).

[77] *Citizens United*, 130 S. Ct. at 916.

[78] *See, e.g.*, Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 675 (1990) (Brennan, J., concurring) ("[T]he State surely has a compelling interest in preventing a corporation it has chartered from exploiting those who do not wish to contribute to [the corporation's] political message.").

[79] We note, moreover, that nothing in Justice Kennedy's opinion suggested that existing mechanisms of shareholder protection could not be strengthened or expanded in the corporate political speech context.

[80] For example, a recently enacted Iowa statute, previously discussed in note 54, requiring, inter alia, board approval of certain political expenditures, *see* S. 2354, 83d Gen. Assemb., 2d Reg. Sess. § 3 (Iowa 2010) (amending IOWA CODE § 68A.404 (Supp. 2009)), is currently the subject of a First Amendment challenge. *See* Verified Complaint for Declaratory and Injunctive Relief, Iowa Right to Life Comm., Inc. v. Miller, No. 4:10-cv-00416 (S.D. Iowa Sept. 7, 2010).

We recognize that some of the current interest in reforming the corporate law rules governing political spending might be motivated by a desire to limit such spending. We should therefore note that it is far from clear that the proposals put forward in this Part would have any such effect. In particular, the proposals may not have that effect if a significant amount of political spending is favored by a majority of shareholders in many or most companies. While the effect of our proposed rules on the level of political spending by public companies is uncertain, the rules can be expected to better align political speech decisions with shareholder interests. Lawmakers considering these rules should pursue this objective — which should be sufficient motivation to adopt the rules we have put forward — rather than a reduction in political spending by public companies.

IV. PROTECTING DISSENTING MINORITY SHAREHOLDERS

In examining the design of the corporate law rules that should govern corporate political speech decisions, we have thus far focused on ensuring that directors and executives do not make decisions that deviate from shareholder interests. But lawmakers may also be concerned with a separate objective: adopting rules that protect the interests of dissenting minority shareholders. Such rules would have a conceptually different basis from — and would necessitate more demanding procedural requirements than — rules designed to ensure that directors and executives do not make decisions that deviate from shareholder interests in general. In this section, we consider the extent to which such rules may be reasonable and constitutionally permissible for lawmakers to adopt.

A. Why Protect Minority Shareholders?

For many corporate decisions, it is reasonable to let the majority of shareholders have their way. Allowing the majority of shareholders to impose their will on the minority makes particular sense when shareholders have a common interest in the decision. For example, a majority of shareholders has the power to elect directors — the individuals who make significant decisions on behalf of the firm — and, in most companies, a majority of shareholders is sufficient to approve a charter or bylaw amendment.[81] In such cases, it may be reasonable to assume that the majority of shareholders is more likely to get the decision right than the minority, and majority rule would consequently result in decisions most likely to be best for the shareholders' common interest.

[81] *See, e.g.*, MODEL BUS. CORP. ACT § 10.03 (1985); CAL. CORP. CODE § 903 (West 2004); DEL. CODE ANN. tit. 8, § 242(b) (2001 & West 2010); N.Y. BUS. CORP. LAW § 803 (McKinney 2003).

Where the interests of the majority and the minority diverge, however, corporate law rules sometimes limit the power of the majority to make decisions that could adversely affect the minority. For example, corporate law mandates that certain procedural requirements be satisfied before a large majority shareholder may effect a "freezeout" transaction that could divert resources from minority shareholders for the benefit of the majority.[82] Even when no dominant majority shareholder exists, corporate law limits the ability of a majority of shareholders, and the directors that shareholders elect, to cause the corporation to engage in transactions, or to effect distributions, that do not distribute benefits to shareholders on a pro rata basis.[83] The mandatory rules that limit the ability of majority shareholders to divert value from minority shareholders are viewed as important to facilitating investment in public companies and to the development of stock markets.[84]

A simple example illustrates how the interests of minority shareholders may be implicated in the context of corporate political speech. Suppose that 60% of the shareholders of a given public company, expecting that the company's political spending will support causes they favor, would like the company to engage in such spending. Suppose also that the remaining 40% of the shareholders strongly prefer that the company not engage in political speech — either because they generally believe that corporations should stay out of politics or because they expect the company's future political spending to advance political causes that they oppose (or merely do not support). In such cases, should corporate law place any limits on the majority's ability to impose its preferred choices on the minority?

In considering this question, lawmakers may consider two interests that dissenting minority shareholders have in preventing a majority of shareholders from spending corporate resources on political speech. First, permitting a majority of shareholders to engage in such spending over the objections of the minority may functionally amount to subsidizing the majority's speech at the expense of the minority. Allowing

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[82] In these transactions, a significant majority shareholder often merges a corporation that is wholly owned by the majority on terms that divert resources from minority shareholders to the majority shareholder. *See infra* note 96.

[83] *See, e.g.*, *In re* Primedia, Inc. Derivative Litig., 910 A.2d 248, 260, 261 (Del. Ch. 2006) (finding that allegations that a preferred stock redemption exclusively benefited a controlling shareholder provided the basis for a claim for breach of the directors' duty of loyalty). *See generally* Sinclair Oil Corp. v. Levien, 280 A.2d 717, 721 (Del. 1971) (holding that large dividend payments made at the behest of a majority shareholder do not provide the basis for such a claim where the dividends were distributed to all shareholders pro rata).

[84] *See, e.g.*, Simeon Djankov et al., *The Law and Economics of Self-Dealing*, 88 J. FIN. ECON. 430, 430–32 (2008); *see also* Brudney, *supra* note 7, at 261–64 (describing this argument in the context of corporate political speech).

the shareholder majority to extract this subsidy may thus be viewed as a diversion of corporate resources from the minority to the majority, and consequently regarded as comparable to the diversion of value from the minority to the majority constrained by corporate rules.

In response to this claim, it might be argued that the volitional nature of shareholder participation in public companies provides shareholders with sufficient protection from value diversion related to political speech. On this view, shareholders who are ex post displeased by a company's political spending can protect themselves by simply selling their shares — and, moreover, to the extent that shareholders are concerned about such ex post outcomes, corporations seeking to attract investment from public investors have sufficient incentive to provide investors ex ante with optimal protective mechanisms. These, however, are generic objections that may be raised in response to the many existing mandatory corporate law rules that protect minority shareholders from diversions of value by the majority. The literature provides extensive analysis showing why the operation of markets is generally not sufficient to obviate the need for mandatory protection of minority shareholders.[85]

Second, and importantly, lawmakers might be concerned with minority shareholders' First Amendment interest in not being forced to be associated with political speech that they do not support — even when the speech at issue involves very small amounts of corporate resources. Some shareholders may oppose being associated with any speech that they do not in fact support; others may take issue with being associated with speech that they in fact oppose. Whatever the reason, the First Amendment interests of minority shareholders may be adversely affected by a regime that permits the majority of shareholders to force them to be associated with the corporation's political speech.

The Supreme Court has long recognized that the First Amendment's protection of "[f]reedom of association . . . plainly presupposes a freedom not to associate."[86] Of course, the Court has generally addressed this principle in the context of legislation that imposes

[85] *See, e.g.*, Edward Glaeser et al., *Coase Versus the Coasians*, 116 Q.J. ECON. 853, 896–97 (2001); *see also* Bebchuk, *Limiting Contractual Freedom in Corporate Law, supra* note 25, at 1835–51 (showing that, in firms with a dominant shareholder, market forces alone will not prevent the adoption of value-decreasing charter amendments).

[86] Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000) (alterations in original) (quoting Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984)). This Term the Court expressly acknowledged the relationship between these associational freedoms and free speech rights in a case addressing the constitutionality of rules requiring student organizations to comply with a university's nondiscrimination policy. *See* Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 130 S. Ct. 2971, 2985 (2010) ("Insisting that an organization embrace unwelcome members . . . 'directly and immediately affects associational rights.'" (quoting *Dale*, 530 U.S. at 659)).

requirements on associations that compromise the association's message — for example, a law requiring that the association admit certain members.[87] But the Court has also acknowledged individuals' constitutional interest in avoiding association with political messages with which they disagree — holding, for example, that unions violate the First Amendment rights of their members when union leaders spend union funds for political speech that the individual members oppose, even when the speech is in the members' collective interest.[88] In such cases, the Court has held, laws requiring individuals to be union members may be remedied by providing those individuals with the right to opt out of spending in support of political speech with which they disagree.[89]

Thus, the Court has recognized the First Amendment value of protecting individuals from being required to finance political speech contrary to their preferences, even where those protections may impose costs on the majority. To be sure, it may be suggested that the union case and the public company case are distinguishable because participation may be required by law in the former but not the latter. However, as explained earlier, the volitional nature of being a shareholder in a public company does not protect shareholders from the consequences of political speech they disfavor.

It should be noted that the *Citizens United* Court did not accept the government's "asserted interest" in "protecting dissenting shareholders from being compelled to fund corporate political speech" as a justification for a ban on corporate speech for a specified period prior to elections.[90] But the Court held only that this interest could not justify a ban, noting that, as a protective device for this interest, the ban was both underinclusive (since dissenting shareholders' interests are implicated whether or not an election is approaching) and overinclusive (since the ban applied even to firms with a single shareholder-manager, such as Citizens United itself).[91] The Court seemed to accept the legitimacy of the government's interest in protecting dissenting shareholders, but reasoned that, with respect to firms with more than one shareholder, "the remedy is not to restrict speech but to consider and explore other regulatory mechanisms."[92] We thus believe that

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[87] *See, e.g.*, *Dale*, 530 U.S. at 648; N.Y. State Club Ass'n v. City of New York, 487 U.S. 1, 13 (1988).

[88] *See, e.g.*, Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235–36 (1977); *see also* Brudney, *supra* note 7, at 269–70 (recognizing first the relevance of this principle in the corporate law context).

[89] *See Abood*, 431 U.S. at 240–41 (citing Bhd. of Ry. & S.S. Clerks v. Allen, 373 U.S. 113, 122 (1963) (describing such a remedy)).

[90] *Citizens United*, 130 S. Ct. at 911.

[91] *See id.*

[92] *Id.*

mechanisms that are properly tailored to the purpose of protecting minority shareholders may well be constitutionally permissible.

B. How Could Minority Shareholders Be Protected?

While a comprehensive analysis of the possible options for protecting the interests of dissenting minority shareholders with respect to corporate political speech decisions is beyond the scope of this Comment, we would like to outline one possible approach, which would involve a refinement of the type of rule we discussed in section III.A. Suppose that lawmakers adopt a rule under which companies are not permitted to spend on political speech unless a budget for that purpose is approved in the company's preceding annual meeting. Rather than requiring approval by at least 50% of shareholders, as discussed in section III.A, suppose that the rule required approval by a higher threshold, *X*%, and that, to be consistent with the minority protection goal of such a rule, the rule allowed opting out of it only with the approval of the same higher threshold of *X*% of the company's shareholders.[93] Is such a rule desirable and constitutionally permissible? How does the answer to this question depend on the value of *X*?

At one extreme, consider a rule requiring unanimous approval of political speech by all holders of the corporation's outstanding shares (that is, X = 100% of outstanding shares). Professor Brudney put forward the possibility of such a rule.[94] A unanimity requirement would prevent even a single unwilling shareholder from being forced to be associated with political speech, reflecting the view that the interests of unwilling minority shareholders in avoiding compelled association with political speech should not be meaningfully balanced against other considerations. If one does not hold such an absolutist view of the rights of minority shareholders, however, such a rule would seem to go much too far. A public company typically has numerous shareholders, and participation in votes is generally much less than 100%. Thus, a rule requiring unanimous approval by all shareholders would make corporate political speech practically impossible.

Furthermore, even if one were to require unanimous approval by all the shareholders participating in a vote (that is, X = 100% of votes cast), such a requirement could reasonably be viewed as too demanding. Suppose that thousands of shareholders of a public company, holding millions of shares, vote in favor of the company's proposed po-

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[93] As discussed earlier, *see supra* section III.C.1, p. 102–03, lawmakers should consider whether such opting out should sunset after several years to ensure that opting out continues to enjoy the requisite shareholder support.

[94] *See* Brudney, *supra* note 7, at 259–60 (concluding that there is "little basis in law or logic" for the notion underlying the claim that "a requirement of unanimous consent would run afoul of the First Amendment," *id.* at 259 (footnote omitted)).

litical speech, and one shareholder holding just ten shares votes against. Allowing the objections of this shareholder to carry the day might ascribe too much weight to the interests of this shareholder. And courts may well conclude that such a requirement is constitutionally impermissible, because as a functional matter the requirement is an excessive hindrance to political speech desired by an overwhelming majority of shareholders.

At the same time, however, setting *X* above 50% should in our view pass constitutional muster as long as it is set sufficiently below 100% — say, at three-fifths, two-thirds, three-quarters, or four-fifths of the votes cast — to give corporations a practically meaningful opportunity to obtain the required approval. In our view, it would not be unreasonable, or constitutionally impermissible, for lawmakers to set *X* at a value greater than 50% because the benefits of such a rule for minority shareholders may well exceed the costs it imposes on the shareholder majority.

Suppose, for example, that a bare majority of shareholders — say, 50% plus one vote — favors a company's political speech, and the rest — 50% minus one vote — are opposed. If such a vote were deemed sufficient for the corporation to speak, the members of the minority would have to bear the costs of being associated with speech with which they do not wish to be associated. By contrast, if approval by a bare majority were deemed insufficient for the corporation to speak, the members of the majority would lose the opportunity to advance the political causes they favor through the corporation but might still be able to do so outside the corporation; thus, the majority would be able to mitigate or limit some of the costs of setting *X* at a value greater than 50%.

Lawmakers seeking to go beyond bare-majority approval to protect the interests of dissenting minorities should carefully consider the required level of approval. In doing so, they should consider the existing use of supermajority requirements in other corporate contexts. Many companies have charter provisions that require supermajority approval for mergers, with such requirements commonly ranging between two-thirds and three-quarters of outstanding shares.[95] Business combination statutes also impose supermajority requirements for freezeout transactions.[96] Whether or not one supports the supermajority provi-

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[95] Kenneth A. Borokhovich et al., *Variation in the Monitoring Incentives of Outside Stockholders*, 49 J.L. & ECON. 651, 657 (2006) (noting that supermajority requirements for mergers are "typically between 66 and 80 percent"); *see also* JERILYN J. CASTILLO & PETER J. MCANIFF, THE PRACTITIONER'S GUIDE TO INVESTMENT BANKING, MERGERS & ACQUISITIONS, CORPORATE FINANCE 355 (2007) (describing such requirements as typically around two-thirds).

[96] *See* DEL. CODE ANN. tit. 8, § 203(a) (Supp. 2008) (requiring that a fifteen percent or greater shareholder seeking to complete a freezeout obtain (i) approval of the target board; (ii) eighty-

sions in these other contexts, evidence concerning the effects of these provisions may be used to inform lawmakers' assessments of which supermajority requirements would give corporations a practically meaningful opportunity to engage in political speech.

V. CONCLUSION

Public corporations' decisions to engage in political speech should not continue to be governed by the same rules that apply to ordinary business decisions. Instead, lawmakers should design special rules concerning how corporations make these decisions. Designing such rules has been long overdue, and *Citizens United* makes the need to do so all the more acute by expanding the scope of constitutionally protected corporate political speech.

We have sought to provide a framework for designing corporate governance rules for political speech decisions. We have examined which rules would best address agency problems and align political speech decisions with the interests of shareholders. We have put forward rules based on a combination of shareholder voting, oversight by independent directors, and detailed transparency requirements that include robust disclosure of spending through intermediaries. We have also analyzed the extent to which, and ways in which, corporate governance rules should go further and seek to provide protection to dissenting minority shareholders from forced association with corporate political speech that enjoys the explicit or implicit support of the majority. We hope that our analysis will provide a framework for policymaking in this important area.[97]

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five percent of the outstanding shares in a single transaction; or (iii) approval of two-thirds of the other shareholders in order to complete a freezeout). These requirements survived a preemption challenge because they give bidders a "meaningful opportunity for success," BNS Inc. v. Koppers Co., 683 F. Supp. 458, 469 (D. Del. 1988), but recent work has sought to question this conclusion on empirical grounds. *See generally* Guhan Subramanian et al., *Is Delaware's Antitakeover Statute Unconstitutional? Evidence from 1988–2008*, 65 BUS. LAW. 685 (2010) (finding that no hostile bidders in the nineteen years since the Delaware statute's adoption have been able to overcome the eighty-five percent threshold).

[97] While we have focused on political speech decisions, the framework we put forward may also be used to assess the rules governing corporations' decisions to make charitable contributions. Like political speech, corporate charitable contributions are, under current law, governed by the rules that govern companies' ordinary business decisions. And, like political speech, there may be reason to believe that special rules are needed to ensure that decisions regarding corporate charitable contributions are in shareholders' interests. For a comprehensive analysis of corporate governance rules that could address corporate charitable contributions, see Victor Brudney & Allen Ferrell, *Corporate Charitable Giving*, 69 U. CHI. L. REV. 1191 (2002).