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The Dissenting Shareholder in Campaign Finance Law

"Most men are more generous with other
people's money than with their own."[2]

1. Introduction

Much has been, and still shall be written on the curiously elusive and challenging subject of corporate political speech rights in the United States. Besides the upsurge of scholarship, recent years have also seen their fair share of campaign finance reform debates with regards to the influence of corporations on politics both in legislatures and in the courts, not to mention the ongoing and intensifying discussion on American politics and corporate influence amongst those affected the most: the citizens themselves[3]. It would by no means be an exaggeration to say that corporate money in political campaigns is – and has been for some time now - one of the most pressing concerns and yet to be resolved dilemmas of American democracy.

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[2] Editorial ("Corporate Campaign Contributions") in *The Outlook*, (September 30, 1905, p. 167) as cited in Robert E. Mutch, *Corporations and Elections: A Century of Debate*, American Political Science Association, 2003 Annual Meeting, Philadelphia, Pennsylvania, at 28. Available at: http://electionlawblog.org/archives/APSA_paper.rtf (last visited October 27, 2011). A digitalized copy of the Outlook Magazine's relevant volume is available at Google books, at: http://books.google.com/books?id=_7a0sWazYH8C&printsec=frontcover&hl=hu&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false, the quote is at 249.

[3] There are numerous nonprofit organizations in the U.S. that try to bring transparency into the democratic process, strengthen citizen participation in government and limit the influence of money in political life, such as the Center for Political Accountability, http://www.politicalaccountability.net/; Common Cause, http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=4741359; Public Citizen, http://www.citizen.org/Page.aspx?pid=183; Center for Responsive Politics, http://www.opensecrets.org/, to name but a few. Some of these organizations have been around for quite some time, and have an impressive success record. As for a more spontaneous movement, the Occupy Wall Street Movement – that has now gone global – is a recent example of citizen frustration with corporate influence in politics; whether this spontaneous movement shall yield results is still to be seen. *See*: http://occupywallst.org/.

An important aspect of this debate concerns the role of corporate shareholders with regards to corporate donations and spending in political campaigns, or more precisely, the ambivalent situation of the *dissenting* shareholder: the stockholder who may find himself in disagreement with the corporation's political spending. The subject of this Article is *that* shareholder, and the recourses he may have or should have in case of such disagreement. While admittedly the focus is narrow, it is nevertheless significant, especially since the Supreme Court's 2010 decision in Citizens United v. FEC[4] essentially opened up the floodgates to corporate money in candidate elections on the federal level – the effects of which can already be felt to a considerable extent, but most certainly have not yet reached their peak[5] -, thereby ending a century-long ban on corporate political spending from general treasury funds in federal candidate elections, as well as the deferential approach that has once characterized the Court's behavior in this respect.

This new deregulation of campaign finance law is deeply unsettling in an already troubled political landscape. There is - for the moment and with the present justices - little chance that the Supreme Court would change its position on the subject in the near future, and following the judicial evisceration of the Bipartisan Campaign Reform Act of 2002[6] with Citizens United, there is also small chance that a Congress torn apart in partisan bickering will be able to come up with a wholesome upholstering of campaign finance law. As a result, corporate money in federal and state elections will likely reach unprecedented levels in the coming years – in fact, this is already taking place[7]. One aspect of such increased spending may well be that shareholders will lose control over even larger amounts of money, a concern that has been of some significance in election law for over a hundred years now.

In this Article, I will argue that greater protection should be afforded to the dissenting shareholder. At the same time, this protection will not in itself solve the myriad problems that American democracy has come to face, as the problem now cuts much deeper than that. Yet, it might alleviate some of the associated pains.

This Article is divided into six parts. Part II. contains a short primer on corporate political spending, with special regard to the various rationales that have in the past been used to justify legal limitations on it. In Part III., corporate structure and the rights of the dissenting

[4] Citizens United v. Federal Election Commission, 130 S. Ct. 876 (2010).
[5] *See infra* notes 45 and 46.
[6] Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002). Also known as the McCain-Feingold law after the sponsors of the legislation, it was signed into law by President George W. Bush on March 27, 2002.
[7] *See supra* note 5.

shareholder and his optional recourses are considered. Part IV. describes current proposals to protect shareholder voice and Part V. offers an overview of reasons for supporting the shareholder protection rationale.

2. The Dissenting Shareholder Rationale in a Historical Perspective

2.1. Three Rationales for Campaign Finance Regulation

The health of American democracy is in danger. Move along folks, there is nothing to see here – or at least nothing new. The "evil" that corporate money has come to signify in the political process was not born today. As early as the end of the 19th century, concerns over corporate influence in politics were voiced:

> "(C)oncern with corporate power over democratic processes in America grew sharply toward the close of the nineteenth century as concentrations of private capital, in the form of corporations and trusts, reached unprecedented size and power. These huge pools of capital raised the frightening prospect that candidates and elections might actually be bought in a systematic fashion."[8]

From the Progressive Period onwards, it was noted that the undue influence of corporations over the democratic process in America - achieved through the donation and spending of large amounts of money from corporate treasuries in candidate elections - could pose at least three distinct forms of threats.

First, there is the threat on the democratic process through the systemic distorting effect that corporate political spending can have on politics. This is sometimes known as the antidistortion rationale and its essence can be distilled down to this: through the corporate form, companies enjoy certain state-conferred financial benefits that enable them to amass massive amounts of wealth, which – when deployed in the political process – are well capable

[8] Mark M. Hager, *Bodies Politic: The Progressive History of Organizational 'Real Entity' Theory*, 50 U. PITT. L. REV. 575, 639 (1989). One such example of concerns was Elihu Root's famous speech before the New York Constitutional Convention in 1894: "The idea is to prevent … the great railroad companies, the great telephone companies, the great aggregations of wealth from using their corporate funds, directly or indirectly, to send members of the legislature to these halls in order to vote for their protection and the advancement of their interests as against those of the public. It strikes at a constantly growing evil which has done more to shake the confidence of the plain people of small means of this country in our political institutions than any other practice which has ever obtained since the foundation of our Government. And I believe that the time has come when something ought to be done to put a check to the giving of $50,000 or $100,000 by a great corporation toward political purposed upon the understanding that a debt is created from a political party to it." *See* Elihu Root, Addresses on Government and Citizenship 143 (1916), quoted in United States v. UAW, 352 U.S. 567, 571 (1957).

of distorting it. The antidistortion rationale was upheld in Austin v. Michigan Chamber of Commerce in 1990[9], but it has recently been squarely refuted by the Supreme Court with Citizens United. This rationale is often overlapping with an otherwise separate rationale[10], the anticorruption rationale or the interest in the prevention of corruption, which – taken in its narrow form, which is "preventing the appearance or actuality of a quid pro quo exchange of money for political favors"[11], or in other words: outright bribery – has been somewhat more readily embraced by the Supreme Court in the past decades[12].

The third threat is posed by the "managerial misuse of shareholders' money"[13]: corporations contributing to, and spending on political campaigns from their general treasuries without shareholder consent. This threat falls under the umbrella of what is often called in campaign finance literature the "shareholder protection rationale", which is in essence the main focus of the present Article.

2.2. The Shareholder Protection Rationale in Legislative and Judicial History

It is safe to say that all of the above concerns – the shareholder protection interest, the anticorruption interest, the antidistortion rationale - have appeared in discussions from around the turn of the 19th century, as noted by a Supreme Court account for the 1907 Tillman Act's[14] – the first comprehensive federal campaign finance law - origins:

> "This legislation seems to have been motivated by two considerations. First the necessity for destroying the influence over elections which corporations exercised through financial contribution. Second, the feeling that corporate officials had no moral right to use corporate funds for contributions to political parties without the consent of the stockholders."[15]

[9] Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 659-660 (1990). "Michigan's regulation aims at a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."

[10] In fact, the Supreme Court called the antidistortion rationale a "different type of corruption" in Austin. *See* Austin, 494 U.S. at 659-660.

[11] Dan Tokaji, *The Obliteration of Equality in American Campaign Finance Law (And Why the Canadian Approach Is Superior)*, Ohio State Public Law Working Paper No. 140, 11 (2011). Electronic copy available at: http://ssrn.com/abstract=1746868 (last visited December 27, 2011).

[12] *Id.* at 4. As Professor Tokaji notes, the Supreme Court – ever since Buckley – has permitted the prevention of corruption to serve as a rationale for regulating campaign spending.

[13] Adam Winkler, *McConnell v. FEC, Corporate Political Speech, and the Legacy of the Segregated Fund Cases*, 3 ELECTION L.J. 361, 362 (2004).

[14] Act of Jan. 26 1907 (Tillman Act), 34 Stat. 864.

[15] United States v. CIO, 335 U.S. 106, 113 (1948).

It is of course not by pure accident that these concerns appear at the end of the 19th century, as this period also marks a meteoric rise in the number of American corporations. As Lawrence M. Friedman notes, corporations were rare before 1800, and most of them were not even business corporations[16]. While the overall number of corporate charters was 335 for the entire 18th century[17], the 19th century brought with it a surge in the number of corporate charters that were issued[18]. With the increase in the number of corporations in the 19th century, the influence of corporations over major aspects of American life soon became not only noticeable, but also non-neglectable.

Naturally, corporations have attempted – and have done so with considerable success – to assert their interests through the democratic process from early on, and the most efficient way proved to be through spending in candidate elections (often by making donations to both sides) and ballot measures. And spend, they did. It was the influx of corporate money into politics and the unwarranted use of shareholder money for political campaigns that prompted the Tillman Act and soon similar laws on the state level followed suit[19]. Thus it can safely be said that - as Robert E. Mutch points out - statutes regulating corporate political spending have been on the books for more than 100 years[20].

It is also worth noting for purposes of the present article that according to some scholars, such as Adam Winkler, the shareholder protection rationale was *directly* behind the adoption of the Tillman Act, which was spurred mainly by the New York life insurance scandal - otherwise known as the "Great Wall Street Scandal"- of 1905, when the discovery of large campaign contributions made by insurance company management from the company assets prompted public outrage and the first thorough investigation of such matters[21]. Professor Winkler actually goes as far as to characterize the dissenting shareholder rationale as a "different conception of corporate political corruption"[22]. He also offers an interesting perspective on the Progressive Era's fight against corporate political spending: while it is true

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[16] Lawrence M. Friedman, A HISTORY OF AMERICAN LAW 129 (3rd ed. 2005).
[17] *Id*. There were only seven corporations in the colonial period, and 181 between 1796 and 1800.
[18] *Id*. at 130.
[19] As Adam Winkler notes, by 1928, thirty-six states enacted legislation prohibiting corporate campaign contributions. Adam Winkler, *Election Law as its Own Field of Study: The Corporation in Election Law*, 32 LOY. L. A. L. REV. 1243, 1247 (1999).
[20] Robert E. Mutch, *Corporations and Elections: A Century of Debate*, American Political Science Association, 2003 Annual Meeting, Philadelphia, Pennsylvania, 2. Available at: http://electionlawblog.org/archives/APSA_paper.rtf (last visited October 27, 2011).
[21] For a detailed history behind the purposes of the Tillman Act and the Great Wall Street Scandal, *see* Adam Winkler, *„Other People's Money": Corporations, Agency Costs, and Campaign Finance Law*, 92 GEO. L. J. 871, 877-881, 887-927 (2004).
[22] *Id*. at 873.

that corporations grew in numbers and size in this period, it is important to acknowledge "the common person's essential participation in the new behemoth. Corporations were not just external monsters; the people themselves financed them and provided the revenue they used to purchase legislative protection"[23]. What the stockholders and the general public objected to in the Great Wall Street Scandal and the legislative attempts that followed was "not corporate power in and of itself, but rather executive excess, especially when it came to spending from the corporate treasuries[24].

Later legislations, such as the Publicity Act of 1910[25], and the Federal Corrupt Practices Act of 1925[26], extended regulation over campaign finance issues and corporate speech rights. The Taft-Hartley Act, also known as the Labor Management Relations Act of 1947[27], prohibited labor unions and corporations from making either expenditures or contributions in connection with federal elections[28]. Besides restricting legislation, corporate political spending was further restricted by a line of cases collectively known as the *Segregated Funds Cases*[29], three cases that – spanning practically four decades – forbid labor unions and corporations the use of their general treasury funds to finance political speech[30]. However, unions and corporations were both allowed to make contributions and expenditures, if the funds used for those were provided by their members voluntarily. This idea of establishing *separate segregated* funds first gained true official acknowledgment and acceptance in Pipefitters v. U.S[31]. Once again, the main concerns dominating the Court's holding in this case were the protection of the political process from the effects of aggregated wealth, and the protection of the dissenting shareholder[32].

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[23] *Id*. at 939.
[24] Winkler, *supra* note 21, at 939.
[25] Publicity Act of 1910, 36 Stat. 822.
[26] 43 Stat. 1070, providing for the publicity of contributions made for the purpose of influencing elections.
[27] 61 Stat. 136, prohibiting all corporate contributions.
[28] The Labor Management Relations Act also prohibited unions from using general treasury funds to make political contributions to federal election campaigns, a prohibition originally put in place by the 1943 Smith-Connally Act (also known as War Labor Disputes Act), which banned direct contributions from labor unions to candidates for federal office. In response, unions started establishing 'political action committees' (PACs) in order to circumvent the regulation. PACs collected voluntary contributions from union members, separate from the general treasuries of the union, and used those funds ('separate segregated funds' as they are kept in a separate bank account from the general treasury) to make contributions to candidates. PACs therefore have been around since 1944. Their meteoric rise in recent times is due to the changes introduced by the 1974 Federal Election Campaign Act.
[29] United States v. CIO, 335 U.S. 106 (1948), United States v. Autoworkers 352 U.S. 567 (1957), and Pipefitters v. United States, 407 U.S. 385 (1972). I adopted the collective title "Segregated Funds Cases" from Professor Adam Winkler. *See* Winkler, *supra* note 13, 361(2004).
[30] Winkler, *supra* note 13, at 362.
[31] *See supra* note 29.
[32] Pipefitters, 407 U.S. at 414-415.

The Segregated Fund Cases worked as the primary guideline for corporate political speech cases prior to First National Bank of Boston v. Bellotti[33] - decided just six years after Pipefitters in 1978 -, which brought a major turning point [34]. Bellotti was decided in the aftermath of the adoption of the Federal Election Campaign Act of 1971[35] and its 1974 Amendments ('FECA'); these laws essentially followed the Segregated Funds Cases line with regards to corporate political speech[36]. The FECA prohibited union and corporate use of general treasury funds in federal election campaigns, but the use of separate segregated funds, just like in the Segregated Funds Cases, was still permitted[37]. These restrictions naturally did not bar corporations from exerting influence in the political arena. Their voice could still be heard, but they had to resort to establishing separate segregated funds, or in other words, political action committees ('PACs'), to influence political campaigns.

Bellotti presented a break with the past in that the Court - severing the Segregated Funds Cases tradition[38]-, invalidated a state ban on corporate spending in ballot referenda. One of the main arguments of Massachusetts was that the state sought to protect dissenting shareholders with the legislation. The Court refused this argument stating that shareholders are "normally presumed competent to protect their own interests" or are otherwise able to use the "procedures of corporate democracy" to enjoin the corporation from spending on politics[39].

The 1990 case of Austin v. Michigan Chamber of Commerce, which once again allowed for the distinctive treatment of corporations by prohibiting the use of general treasury funds for express advocacy, returned to the pre-Bellotti line of the treatment of corporate political spending. The concerns that appeared in Austin were eerily familiar once again: concern over the use of "other people's money", and by using the aggregate wealth of a corporation's general treasury, "obtaining an unfair advantage in the political marketplace"[40]. Unfortunately, the Supreme Court decided to treat Austin as the outlier, and Bellotti as the norm in Citizens United. The shareholder protection concern raised by the Government was quickly rebuffed, and with little concern. The Court found "little evidence of abuse that

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[33] First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978).
[34] Winkler, *supra* note 13, at 365.
[35] Federal Election Campaign Act of 1971, Pub. L. 92-223, 86 Stat. 3 (1972).
[36] Winkler, *supra* note 13, at 364.
[37] 2 U.S.C. §441b.
[38] It is worth noting that the Segregated Funds cases only indirectly concerned corporations, as their primary concern was labor unions, whereas Bellotti was a direct treatment of corporate speech rights in politics.
[39] Bellotti, 435 U.S. at 794-795.
[40] Austin, 494 U.S. at 659.

cannot be corrected by shareholders "through the procedures of corporate democracy"'[41]. The only interest that the Court accepted as a basis for campaign finance legislation was the prevention of corruption.

To sum up the present situation, corporations can spend money in politics in various ways. First of all, independent expenditure is a possibility, and since Citizens United, the previous restriction of only using separate segregated funds has disappeared[42]. From now on, corporations can also use their general treasury to finance such expenditures. Direct contributions to candidates, however, are still prohibited for corporations and labor unions.

It is clear that despite a century-long history of regulations and - rather fluctuating - Supreme Court jurisprudence, campaign finance law is not in any better shape now than it was in the Progressive Era. One is tempted to say that things took a turn for the worse, and Citizens United no doubt contributes to and accelerates this downward spiraling. In other respects, it also represents a rather unfortunate milestone: the disappearance of equality from campaign finance[43]. This alone would merit further discussion, but alas, not amongst the limited framework of the present article.

Rather, to reiterate the focus of this Article: it is the dissenting shareholder and his precarious place in campaign finance law that is of essence here. It is all the more important to examine all aspects of this complex issue in the aftermath of Citizens United, since the decision will without a doubt radically transform the campaign finance landscape; in fact, it has already done so to a significant extent. Corporate spending specifically has soared in federal elections since 2010. According to a report by Public Citizen[44], spending by outside groups reached $294.2 million in the 2010 election cycle. This is a 427% increase from the last mid-term elections in 2006, when outside spending topped at $68.9 million. It is even more worrying that more than 75% of the $294.2 million was spent by groups that accepted contributions larger than $5,000 or that did not reveal the sources of their money, and nearly half of the $294.2 million came only from ten groups[45]. In light of these figures, a spending

[41] Citizens United, 130 S. Ct. at 911, Bellotti, 435 U.S. at 794.

[42] Independent expenditures are expenditures not coordinated directly with the political candidate. Ever since Buckley v. Valeo, a difference has been drawn between independent expenditures, generally falling under less restrictive regulations, and political contributions, which are coordinated with the candidates. Contributions, as a rule, are subject to severe size and source restrictions as well as disclosure rules.

[43] Daniel Tokaji calls "the most noxious feature" of Citizens United "its rejection of equality as a democratic value". Later on, he elaborates: "The real problem with *Citizens United* is its emphatic rejection of political equality as a countervailing value that may be used to justify limitations on campaign spending". *See* Tokaji, *supra* note 11, at 1.

[44] *See* http://www.citizen.org/documents/Citizens-United-20110113.pdf (last visited September 30, 2011).

[45] *Id.* at 13.

spree of cosmic proportions is expected in the 2012 presidential elections, and corporations will no doubt represent a huge chunk of the sources.

Another consequence of the Citizens United decision is the creation and rise of SuperPACs[46] or independent expenditures-only committees. SuperPACs are a fairly new phenomenon; their creation took off after July 2010, following the decision of the D.C. Circuit Court of Appeals in SpeechNow.org[47] v. Federal Election Commission[48] in the inevitable aftermath of Citizens United. In SpeechNow.org v. FEC, the D.C. Circuit ruled that individual contributions to advocacy groups (527s)[49] may not be limited, thus limits on annual individual contributions are unconstitutional. SuperPACs are thus the new PACs, but with a significant advantage: they can raise unlimited sums of money from individuals, corporations and labor unions and use that to advocate for and against political candidates. Much of the record spending that is projected for the 2012 presidential elections will no doubt be tied to their new existence, for better or worse (although probably worse).

In light of these new developments in campaign finance law, it is imperative to examine whether the protection of the dissenting shareholder should present a valid argument for regulating - at least to a certain extent - corporate political spending in federal elections.

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[46] For the origins of PACs, *see supra* note 28. Originally, PACs or political action committees are political organizations with the primary objective of raising and spending money for the election or defeat of political candidates. As the FEC defines, there were originally two main types of PACs: separate segregated funds (SSFs) and nonconnected PACs. SSFs are political committees established and administered by corporations, labor unions, membership organizations or trade associations. These committees can only solicit contributions from individuals associated with connected or sponsoring organization. By contrast, nonconnected committees are not sponsored by or connected to any of the aforementioned entities and are free to solicit contributions from the general public. For more on the difference between the two types of PACs, *see*: http://www.fec.gov/pages/brochures/ssfvnonconnected.shtml (last visited November 17, 2011).
What changed with Citizens United, however, is that corporations and labor unions are now free to use their *general treasury funds* - which they haven't been able to do since 1944 - to use for independent expenditures in support of political candidates. Direct donations to candidates are still not permitted.
A PAC can give $5,000 to a candidate per election (primary, general or special) and up to $15,000 annually to a national political party. PACs may receive up to $5,000 each from individuals, other PACs and party committees per year. A PAC must register with the Federal Election Commission within 10 days of its formation, providing the name and address of the PAC, its treasurer and any affiliated organizations. *See*: http://www.opensecrets.org/527s/types.php (last visited November 17, 2011).

[47] SpeechNow.org is a 527 organization – a tax-exempt group organized under section 527 of the Internal Revenue Code – with the primary objective of raising funds for political activities. If the 527 group is a political party or a PAC engaging in electioneering communications or expressly advocating the election or defeat of a federal candidate, the group needs to file regular disclosure reports (on a monthly or quarterly basis). In other cases, the disclosure report must be filed either with the government of the state in which is located or the Internal Revenue Service. *See*: http://www.opensecrets.org/527s/types.php (last visited November 17, 2011).

[48] SpeechNow. org v. FEC, 599 F.3d 686 (D.C. Cir. 2010).

[49] *See supra* note 47.

3. The Dissenting Shareholder and Corporate Structure

3.1. Separation of Ownership and Control

As the previous chapter has divulged, the unparalleled rise of corporations in America started in mid-19th century, with the number of corporations growing exponentially[50]. By the end of the century, corporations were not only numerous, but also represented a significant factor in the political arena, one not to be taken lightly.

It is important to note, however, that the 19th century meant important changes in the corporate world in another respect as well: not only did the number of corporations rise[51], the *size* of corporations also increased, and this had a direct bearing on corporate structure itself. As Lawrence M. Friedman notes, until about the middle of the 19th century, the corporation was not the dominant form of business organization; most commercial enterprises were partnerships, consisting of "two or three partners, often related by blood or marriage"[52]. In a new, more intensive economic climate[53], however, the corporate form soon proved to be the most efficient way to organize business ventures[54].

As corporations grew in size, their inner structure underwent enormous changes as well; in many ways, a "professionalization" of the business entity can be perceived in the 19th century. This professionalization entailed the *separation of control and ownership* within the company, as Adolf A. Berle and Gardiner C. Means described in their highly influential book written in 1932[55], The Modern Corporation and Private Property[56]. Shareholders of large,

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[50] *See* Section II.2. *See also* Winkler, *supra* note 21, at 906.

[51] The number of corporations could rise with the emergence of general incorporation acts, which put an end to the original special charter system (that was inherited from the English common law system) in the second half of the 19th century. Special charters were in fact tailor-made statutes, which by the mid-19th century proved to be too slow and complicated, and although special charters were a good method of maintaining state control over corporations, they also had their fair share of disadvantages (such as corruption), not to mention their cumbersome nature. *See* Friedman, *supra* note 16, 129-139. *See also* Michael A. Schaeftler, *Ultra Vires-Ultra Useless: The Myth of State Interest in Ultra Vires Acts of Business Corporations*, 9 J. CORP.L. 81, at 87-88 (1983).

[52] Schaeftler, *id.*

[53] As Dalia Tsuk Mitchell notes, increasing demand on the part of consumers, an expanding capital and work force, and the invention of legal devices supporting large-level cooperations were essential in the creation of large corporations around the turn of the 20th century. Dalia Tsuk Mitchell, *Shareholders as Proxies: The Contours of Shareholder Democracy*, 63 WASH. & LEE L. REV. 1503, 1515 (2006).

[54] *Id.*

[55] Berle published a highly influential article on the topic in 1931, a year before the book's publication. Some of his views, however, notably regarding shareholder primacy, underwent notable changes in that year. A.A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931). It is also worth noting that while Berle and Means described the separation of ownership and control in the 1930s, this phenomenon was prominent by the mid-19th century. In fact, they were not even the first to describe this evolutionary step – others in the Progressive Era have already done so. For more on this, *see* Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L. J. 1593, 1681-1683 (1988).

publicly traded companies were no longer in direct control over corporate assets, as corporate decisions were now made by the management of a company. This separation of ownership and control in large corporations proved to be a very efficient way of organizing business entities and enhance profits, and as such, became the norm for large-scale companies[57]. The separation and ownership was such an essential development in the evolution of corporations that, as Stephen M. Bainbridge says, "that phenomenon has been the defining characteristic of the modern public corporation"[58], and as such, it is also the source of a number of important consequences and dilemmas regarding ownership of the company, the role of shareholders, management, and other corporate constituents, such as the suppliers, creditors, and employees of the corporation and the community itself in which the company operates[59].

One assumption of the Berle-Means model of corporate governance was to reinforce that shareholders are the true owners of the company, and emphasize that the primary concern of management should be increasing the value of shares[60]. This view would of course strengthen management accountability to shareholders[61]. This perspective is often considered the origins of the shareholder primacy model[62]. Berle and Means, writing at the dawn of Depression, pointed out that the managers of large public companies enjoyed large discretion in making decisions for the company, and that this large discretion could often lead to mistreatment of shareholders[63]. It is important to add at this point that Berle came to refine this model very soon afterwards, where he emphasized the social responsibility that a

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[56] ADOLF A. BERLE AND GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (New York, 1932). "The separation of ownership from control produces a condition where the interests of owner and of ultimate manager may, and often do, diverge, and where many of the checks which formerly operated to limit the use of power disappear….In creating these new relationships, the quasi-public corporation may fairly be said to work a revolution. It has divided ownership into nominal ownership and the power formerly joined to it. Thereby the corporation has changed the nature of profit-seeking enterprise". *Id.* at 6.

[57] *See* Winkler, *supra* note 21, 906-912.

[58] Stephen M. Bainbridge, *The Board of Directors as Nexus of Contracts: A Critique of Gulati, Klein & Zolt's "Connected Contracts" Model,* 88 IOWA L. REV. 1, at 8 (2002).

[59] Adam Winkler argues that there was a reason why the first major scandal with regards to corporate political spending involved insurance companies: these companies were early adopters of the separated ownership and control model. Winkler, *supra* note 21, 900-906.

[60] Berle, *supra* note 55, at 1049, 1074(1931).

[61] Thomas Joo, *Race, Corporate Law, and Shareholder Value*, 54 J. LEGAL EDUC. 351, 352-353 (2004).

[62] William W. Bratton & Michael L. Wachter, *Shareholder Primacy's Corporatist Origins: Adolf Berle and the Modern Corporation,* 34 IOWA J. CORP. L. 99, at 101 (2008).

[63] George W. Dent, Jr., *Toward Unifying Ownership and Control in the Public Corporation*, 1989 WIS. L. REV. 881, 884 (1989), discussing Berle and Means' view on the topic of managerial discretion.

corporation must bear towards the community in which it is set, as opposed to singularly focusing on the usually narrower shareholder interests[64].

At the same time that Berle described his (initial) model, another view emerged - and did so in fact directly as a response to the former approach - , first championed by E. Merrick Dodd Jr. [65]. Dodd argued that corporate directors are not solely the agents of shareholders, since a corporation must cater to a plethora of other interests pertaining to various segments of society and of the corporation itself, such as the creditors, suppliers, employees of the company and other constituencies, even the community in which the company operates[66]. The view advanced by Dodd – better known as *managerialism* - became dominant by the 1950s[67], only to recede in the 1970s and 1980s, when shareholder wealth maximization once again became a priority, and to a certain extent continued to the 1990s and 2000s. The Dodd model deemphasized accountability towards shareholders only, as shareholders might focus excessively on narrow, short term wealth growth, and instead stressed the need and obligation of the company - through the direction of corporate management - to serve not only the interests of the shareholders, but also the other constituents of the company, such as creditors or employees, as well as the community in which it is set.

Models of the firm thus can be - somewhat crudely - grouped into two large groups: those favoring shareholder primacy and those advocating for managerialism[68]. As it stands today, managerialism is being less and less influential, and it is usually one or other form of shareholder primacy theory that leads the pack. Currently, as Stephen Bainbridge notes, the leading contemporary theory is "*the nexus of contracts model*", blended with agency costs economics[69], generally linked to the work of Michael C. Jensen and William H. Meckling[70]. This approach rejects the shareholder as the sole owner of the firm, and instead emphasizes

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[64] *See* Thomas Joo, *Theories and Models of Corporate Governance*, UC Davies Legal Studies Research Paper Series, Research Paper No. 213, March 2010, at 7, available at SSRN: http://ssrn.com/abstract=1543397 (last visited November 21, 2011).

[65] For a good analysis of the historical background of the Berle-Dodd debate, *see:* Bratton & Wachter, *supra* note 62, 99-152.

[66] E. Merrick Dodd Jr, *For Whom Are Corporate Managers Trusteers?*, 45 HARV. L. REV. 1145, 1162 (1932). *See also* Joo, *supra* note 61, at 353, Bainbridge, *supra* note 58, at 10, Dent, *supra* note 63, at 892.

[67] Joo, *id*.

[68] Bainbridge, *supra* note 58, at 5.

[69] *Id*. at 6.

[70] Michael C. Jensen and William H. Meckling, *Theory of the Firm: Managerial Behavor, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=94043 (last visited November 21, 2011). "The private corporation or firm is simply one form of legal fiction which serves as a nexus for contracting relationships and which is also characterized by the existence of divisible residual claims on the assets and cash flows of the organization which can generally be sold without permission of other contracting individuals", *id*. at 9.

that the firm *is* - or as others have suggested *has*[71] - a nexus of contracts among actors who all have interests attaching them to the firm:

> "There is in a very real sense only a multitude of complex relationships (i.e., contracts) between the legal fiction (the firm) and the owners of labor, material and capital inputs and the consumers of output. (…) The firm is not an individual. It is a legal fiction which serves as a focus for a complex process in which the conflicting objectives of individuals (some of whom may 'represent' organizations) are brought into equilibrium within a framework of contractual relations"[72].

The agency cost analysis – which, as Professor Thomas Joo points out, is another way of saying "other people's money problem"[73] – is especially important for our present purposes. The separation of ownership and control of the corporation, a process that started in the second half of the 19th century and was completed by the first decades of the 20th century, is – as Jensen and Meckling wrote – "intimately associated with the general problem of agency"[74]. It is also, I would add, intimately associated with the problem of the dissenting shareholder.

3.2. The Agency Problem

"According to a common American myth, shareholders govern corporations through a process of corporate democracy"[75]. To understand why the process of corporate democracy is indeed nothing more than a myth, if a very convincing one, first we need to take a look at the problem of agency.

By definition, an *agency relationship* is a "contract under which one or more persons (the principal(s)) engage another person (the agent) to perform some service on their behalf which involves delegating some decision making authority to the agent"[76]. According to the Restatement, agency relationships bear two important characteristics: the agent is subject to the principal's control, and the principal has the right to terminate the agent at any time[77].

[71] Bainbridge, *supra* note 58, at 18.
[72] Jensen & Meckling, *supra* note 70, at 9.
[73] Joo, *supra* note 64, at 12.
[74] Jensen and Meckling, *supra* note 70, at 6.
[75] Thomas Joo, *A Trip through the Maze of "Corporate Democracy": Shareholder Voice and Management Composition*, 77 ST. JOHN'S L. REV. 735, at 735 (2003).
[76] Jensen & Meckling, *supra* note 70, at 5.
[77] Daniel J.H. Greenwood, *Essential Speech: Why Corporate Speech Is Not Free*, 83 IOWA L. REV. 995, 1038 (1998); *Restatement (Second) of Agency 1*, 14 and 118 (1984). Greenwood also notes that these two traits do not in fact characterize the shareholder-management relationship well. Greenwood, *id*. at 1038-1045.

Yet all agency relationships come with the danger that the agent might not always act in the best interest of the principal (in this case, the shareholder)[78]; there is, in other words, always a *cost* to agency relationships.

Jensen and Meckling provide a definition of agency cost: "In most agency relationships the principal and the agent will incur positive monitoring and bonding costs (non-pecuniary as well as pecuniary) and in addition there will be some divergence between the agent's decisions and those decisions which would maximize the welfare of the principal. The dollar equivalent in welfare experienced by the principal as a result of this divergence is also a cost of the agency relationship, and we refer to this latter cost as the "residual loss""[79]. Thus Jensen and Meckling define agency costs as the sum of the monitoring expenditures by the principal, the bonding expenditures by the agent, and the residual loss[80].

The question arises: who bears the agency costs arising from the separation of ownership and control? And why do agency costs matter in our analysis? They matter, because this is at the core of the dissenting shareholder dilemma. With the separation of ownership and control, shareholders gradually "witnessed the diminution of their right to oversee management"[81]: they became practically uninvolved in the day-to-day affairs of the corporation, handing over the reins to management, which is not to say that this was not – at its thrust – a beneficial arrangement for them; this separation of ownership and control is after all in many respects what made the corporate form so effective and attractive. But it also signaled the beginning of the end for shareholder power within the firm, especially when one considers that the interests of shareholders and management can often differ, and sometimes rather significantly. The agency costs inherent in the separation of ownership and control can be steep indeed and more often than not, as we shall see, it is the shareholders and the firm who bear them[82].

For the purposes of the present analysis, and with regards to political spending on the part of large public corporations, it is extremely important to note that agency problems[83] within a firm can usually be associated with larger political donations as well, mostly because

[78] "If both parties to the relationship are utility maximizers, there is good reason to believe that the agent will not always act in the best interest of the principal", Jensen & Meckling, *supra* note 70, at 5.
[79] Jensen & Meckling, *supra* note 70, at 5.
[80] *Id*. at 6.
[81] Winkler, *supra* note 21, at 908.
[82] *See* Harold Demsetz, *The Structure of Ownership and the Theory of the Firm*, 36 J. L. & ECON. 375, 376 (fn. 3)(1983).
[83] Certain characteristics within firms that are associated with agency problems are, for instance, board sizes, CEO compensations, entrenchment of CEOs, to name a few. *See* Rajesh K. Aggarwal, Felix Meschke & Tracy Wang, *Corporate Political Donations: Investment or Agency*, 15-16. Available at: http://ssrn.com/abstract=972670 (last visited December 21, 2011).

"there is a positive correlation between governance variables that exacerbate agency problems and donations"[84]. Not only that, but in their seminal study, Aggarwal, Meschke and Wang also came to the conclusion that political donations are usually indicative of deeper agency problems within firm, and are often associated with a reduction in future excess returns[85]. Interestingly, many corporations often donate to both sides, but in case they donate only to one, as the Aggarwal study notes, it doesn't seem to make much of a difference whether the donation was done to the winning or the losing side with regards to future returns[86]. Either way, donating is still associated with worse returns in the long run than not making any political donations[87], and is often emblematic of overreach on the part of a politically motivated management.

3.3. Disclosure of Election-related Spending

As an additional symptom of agency problems, in most large firms, shareholders possess very little information about political spending made by the firm[88]. Corporations are obliged to make disclosures under election law (both federal and state), state corporate statutes and federal securities law, but the results are less than satisfactory from the shareholders' point of view.

Federal election law mandates certain disclosure for corporations, as well as for individuals. These regulations have proven to be quite resistant in the face of constitutional scrutiny, and since many states have adopted disclosure laws on their own, they are often the primary tools in the campaign finance arsenal[89], although we must concede that their effectiveness is often doubtful despite advances in recent years. Historically, in Buckley v. Valeo, the Court found that disclosure rules are justified by the government's interest in providing the electorate with information about the sources of election-related spending[90].

[84] *Id*. at 17.
[85] *Id*. at 2. Important to note that the Aggarwal, Meschke & Wang study examines soft money donations and 527 Committee donations. *See id*. at 15.
[86] Aggarwal, Meschke & Wang, *supra* note 83, at 3.
[87] *Id*.
[88] *Id*. at 8. *See also*: Thomas Joo, *The Modern Corporation and Campaign Finance: Incorporating Corporate Governance Analysis into First Amendment Jurisprudence,* 79 WASH. U. L. Q. 1, 48-52 (2001)
[89] As Ciara Torres-Spelliscy points out, however, states have yet to succeed in creating meaningful disclosure databases. Ciara Torres-Spelliscy, *Corporate Campaign Spending: Giving Shareholders a Voice*, at 11 (Brennan Center for Justice, 2010. Electronic copy available at: http://brennan.3cdn.net/54a676e481f019bfb8_bvm6ivakn.pdf (last visited December 21, 2011), also at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1550990 (last visited December 21, 2011).
[90] Buckley, 424 U.S. 1, at 66 (1976).

The Bipartisan Campaign Reform Act reinforced and strengthened disclosure rules for both individuals and corporations, and revitalized the reporting system[91]. While information may be more readily available than before, it is still up to the shareholder to seek out this information, and underreporting is still a major concern[92], especially since intermediaries in the political process such as trade associations, PACs, and now SuperPACs, make it hard to track the original source of the money[93]. Justice Kennedy's statement in Citizens United that "shareholder objections raised through the procedures of corporate democracy can be more effective today because modern technology makes disclosures rapid and informative"[94] might be overly optimistic after all.

Direct disclosure to shareholders is even less promising. The Securities Exchange Act requires corporations to make certain periodic disclosures, but these disclosures only cover "material information"[95], and materiality in this case means *economic* materiality, not social or political[96]. Regulation S-K[97], which lays down reporting requirements to the SEC for public companies, does not specifically mandate reporting by corporations on political spending, and lacking other specific legal foundations to do so, corporations usually do not include this information in the annual reports[98]. As for state laws, they generally do not mandate corporations to disclose information on political spending either, and shareholders have only a limited right to seek out such information, since they have to present a proper purpose for examining the corporation's books[99]. Such proper purpose must be related to the company's financial situation, and political concerns do not usually serve as a valid basis for such inquiry[100].

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[91] For a good analysis on disclosure under BCRA, *see* Elizabeth Garrett, *McConnell v. FEC and Disclosure*, Working Paper No. 25. (2004). Electronic copy available at: http://lawweb.usc.edu/centers/cslp/assets/docs/cslp-wp-025.pdf (last visited December 21, 2011).

[92] *See* Torres-Spelliscy, *supra* note 89, at 11.

[93] Not to mention the fact that spending in state elections or ballot initiatives is reported in that state, but not to the FEC, which complicates things for interested shareholders. Moreover, many corporations now donate through trade associations, where the source of the money is not revealed. *See* Torres-Spelliscy, *supra* note 89, at 11-12.

[94] Citizens, 130 S. Ct., at 916.

[95] Information is considered material if there is "a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote". Ciara Torres-Spelliscy, *Corporate Political Spending & Shareholders' Rights: Why the U.S. Should Adopt the British Approach*, quoting TSC Indus v. Northway, Inc., 426 U.S. 438, 449 (1976) at 22 (Brennan Center for Justice, 2010). Electronic copy available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1474421 (last visited December 8, 2011).

[96] Joo, *supra* note 88, at 48. *See also*: Faith Stevelman Kahn, *Legislatures, Courts and the SEC: Reflections on Silence and Power in Corporate and Securities Law*, 41 N.Y.L. SCH. L. REV. 1107, 1136-1137 (1997).

[97] *See* 17 C.F.R. §§229.10-.702 (1999).

[98] Joo, *supra* note 88, at 48(2001).

[99] *Id*., 50-51. *See also* Kahn, *supra* note 96, 1132-1133.

[100] Joo, *id*. at 51-52; Kahn, *supra* note 96, at 1132-1133.

Current disclosure rules, whether federal or state, nudged in corporate statutes or in election law, do little to inform the shareholders regarding the use of corporate assets for political purposes. And while disclosure is nevertheless important, it is worth noting that it is also, by nature, after the fact, and therefore often means little consolation for the shareholder whose money has been used to support a cause or candidate he does not feel much sympathy for. By the time information about the corporation's political spending is to reach the wronged shareholder, it is usually too late.

3.4. Shareholder Voting Rights

As noted above, shareholders gradually lost effective control over the firm in the 19th century. Professional management took over the direction of corporate affairs, and this arrangement proved to be a very efficient form of organizing modern business enterprises. As Dalia Tsuk Mitchell notes, the traditional doctrine of *ultra vires*[101] became less and less controlling and the idea that the power of the board was "original and undelegated" paved the way for seriously diminished shareholder authority[102]. Shareholders soon became so far removed from corporate decision-making that their participation in corporate affairs became in essence restricted to voting rights. The advent of the proxy system meant, however, that even those rights became practically meaningless[103].

Shareholders' "biggest chance to shine" in terms of practicing their voting rights is the annual election of the directors of the corporation, but even that is a sorry affair, and a rather far cry from the corporate democratic myth still embraced by – amongst others – the current Supreme Court. Annual corporate elections tend to end up in incumbent victories, with no serious competition to begin with[104]. In fact, as Professor Thomas Joo points out, boards

[101] The "ultra vires" doctrine (its literal meaning: beyond the powers) was for a long period a central, unshakeable tenet of corporation law, and as Lawrence Friedman notes, it signified that "the corporation was a creature of limited authority". The ultra vires doctrine acted to prevent corporations from acting beyond the scope of the charter that granted their existence; the charters contained a finite list of the powers granted to the corporations. Any corporate act beyond the charter would be considered ultra vires, and thereby null and void.
As corporations grew in numbers, size and power, the ultra vires doctrine gradually lost its importance, and became an obstacle in the path of development. In time, corporate law dispensed with it, by drafting almost infinitely broad corporate charters. Friedman, *supra* note 16, 395-396.

[102] Tsuk Mitchell, *supra* note 53, at 1522.

[103] *Id*.

[104] *See* Lee Harris, *Shareholder Campaign Funds: A Campaign Subsidy System for Corporate Elections*, 58 UCLA L. Rev.167, 167-168 (2010). As Professor Harris notes: "The corporate election system is (…)broken, anticompetitive, and in need of significant reform". Election results are predictable because

simply elect and reelect themselves, since they are the ones who propose the candidates, and shareholders cannot vote against incumbents[105].

In large public firms, shareholder voting rights are practiced almost entirely through the proxy system[106]. Long gone are the days when shareholders were required to attend an annual meeting[107]. In reality, management sends out a package to shareholders including an annual report, a description of issues and offices to be voted upon, and also a proxy card[108]. Since most shareholders don't attend the actual elections, the proxy cards enable them to cast their vote through the management[109], which in most cases means that they vote "with the management". It is very rare that a shareholder would contest management decisions, engage in a proxy contest, or make proposals, especially since the costs of such action would be prohibitive. Shareholder proposals are rare, difficult and cumbersome to carry out, and they are subject to several types of limitation. Besides, even if they were to succeed, they are usually not binding on the board, in accordance with state laws and SEC rule 14a-8[110].

Furthermore, shareholders are widely dispersed and diversified, having multiple portfolios, which also adds to widespread shareholder apathy[111]. Communication amongst shareholders is next to impossible for anyone other than the board of directors[112]. There is also the lingering question and doubt as to whether any one shareholder would make the effort to reach out to the others - an ever-changing group -, even if the means for doing so were more readily available[113]. Besides, although most Americans are shareholders, almost half of them are so through institutional investors and mutual funds[114], intermediaries that all but make the individual shareholders invisible[115], not to mention that individual shareholders owning shares through institutional ones do not even possess voting rights, the last vestige of shareholder authority.

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incumbent directors have free access to corporate treasuries to finance their reelection campaigns, therefore challengers – if there are any - rarely stand a chance against them. *Id.*, 167-169.

[105] They may withhold their vote but this is pointless, as only a plurality of shareholder votes is needed in the election. Joo, *supra* note 75, 744-745.

[106] Joo, *supra* note 75, at 753. *See also* Securities and Exchange Commission, *Concept Release on the U.S. Proxy System*, at 12, available at: http://www.sec.gov/rules/concept/2010/34-62495.pdf (last visited November 30, 2011).

[107] Tsuk Mitchell, *supra* note 53, at 1547-1548.

[108] Tsuk Mitchell, *supra* note 53, at 1547-1548. Certain shareholders proposals can also be included in the proxy mailings in accordance with SEC Rule 14a-8.

[109] *Id. See also* SEC, *supra* note 106, at 11.

[110] Joo, *supra* note 75, at 754-755.

[111] Thomas W. Joo, *People of Color, Women, and the Public Corporation: Corporate Hierarchy and Racial Justice*, 79 ST. JOHN'S L. REV. 955, 963 (2005).

[112] Joo, *supra* note 75, at 753.

[113] *Id.*

[114] Greenwood, *supra* note 77, 1033.

[115] *See* Tsuk Mitchell, *supra* note 53, at 1572.

Agenda control is also an important factor. The range of topics that shareholders can vote on is extremely limited, as agenda is very much controlled by management. More often than not, shareholders do not vote on corporate actions and policies; as stated above, their main and often singular chance to participate in corporate decision-making is at the annual elections[116]. Therefore decisions about corporate political expenditures are usually made without any form of input from shareholders[117]. Moreover, in most cases, shareholders will not even be informed of such actions[118]. As noted in the preceding section, information about such spending would only reach shareholders after the fact, which is of course of little use.

In reality, even if shareholders are in disagreement with a corporation's actions, policies (such as its political spending) or contest its leadership, there are very few things they can do about it. Shareholder lawsuits would be – not to rub it in, but once again – after the fact, and thus, mostly useless. They could only prevent future abuse of shareholder assets, but the harm to those shareholders that are in disagreement with the political spending of the company has already, irreversibly been done. Besides, shareholder private actions, even if they could offer some form of remedy in theory, are expensive and very likely to fail, mostly as a result of the *business judgment rule*, which mandates judicial deference to management discretion unless shareholders can show that management failed to "act in good faith, on an informed basis, or in the best interests of the corporation[119]. Only corrupt conduct or conduct bordering on recklessness could result in shareholders' prevailing against management, and it is very unlikely that decisions on political spending would fall under this category[120].

According to the "Wall Street Rule", shareholders who are unhappy with management decisions should sell their shares rather than trying to take action against the management[121]. But selling one's shares can entail significant costs, not to mention that it would - once again - be after the fact, and it would also offer little remedy to the shareholder who disagrees with the corporation's political spending, and overall would have very little effect on the company's policies regarding political spending[122]. When the Supreme Court talks about the

[116] Joo, *supra* note 88, at 43.
[117] *Id*., 45.
[118] Joo, *supra* note 88, at 46.
[119] Joo, *supra* note 111, at 959.
[120] *Id*.
[121] Joo *supra* note 88, at 44-45.
[122] Joo, *supra* note 88, at 58-59. Also, by selling his shares, the shareholder does not cause any damage to the corporation, and does not signal his distress either. He is simply replaced by another, new shareholder.

"procedures of corporate democracy"[123], surely it means a remedy more effective and less harmful than this.

4. An Overview of Current Proposals

As illustrated above, the current legal climate in the U.S. is not exactly shareholder-friendly when it comes to corporations' using shareholder money in support of political goals. There is, however, no shortage of proposals to solve the matter. Herein I attempt to introduce a few of these.

Non-profit organizations, such as the Center for Political Accountability, have been experimenting and pushing for various solutions with regards to the shareholder protection rationale. The Center for Political Accountability, for instance, has introduced a model code of conduct[124] for companies, and a model shareholder resolution[125]. Organizations such as the Center for Political Accountability, Public Citizen[126], Common Cause, and the Center for Responsive Politics[127] contribute to establishing transparency by introducing such proposals and tracking corporate money in politics. Shedding light on corporate political spending is essential in creating and maintaining transparency in politics, the work of these watch groups is therefore extremely relevant and in many ways complements a less than perfect disclosure system.

As for other proposals, Ciara Torres-Spelliscy of the Brennan Center for Justice argues - with good reason – in support of taking cues from the British model. The United Kingdom allows for direct corporate donations in elections, but since 2000[128], British companies are required to disclose political contributions to their shareholders, and even more importantly, they have to ask for permission from their shareholders before making such donations[129]. In case the company donates over £2,000, then the annual report of the directors need to disclose

[123] *Supra* note 95.
[124] http://www.politicalaccountability.net/index.php?ht=d/sp/i/871/pid/871 (last visited on December 22, 2011).
[125] http://www.politicalaccountability.net/index.php?ht=d/sp/i/867/pid/867 (last visited December 22, 2011).
[126] *See* e.g.: http://www.citizen.org/Page.aspx?pid=3151, arguing for a Shareholder Protection Act (last visited December 22, 2011).
[127] *See* e.g. http://www.opensecrets.org/elections/index.php (last visited December 22, 2011).
[128] Political Parties, Elections, and Referendums Act, c. 41 §§ 139, 140 sched. 19 (2001), http://www.legislation.gov.uk/ukpga/2000/41/notes/contents. The Companies Act was amended in 2006 to exclude trade unions from this rule. More interestingly, directors are jointly and severally liable for unauthorized political spending. Companies Act c. 46 §§ 369, 374 (2006). *See also* Torres-Spelliscy, *supra* note 89, fn. 56, also Torres-Spelliscy, *supra* note 95, at 51.
[129] Torres-Spelliscy, *supra* note 89, at 16, also Torres-Spelliscy, *supra* note 95, at 51.

the exact amount and the recipient of the donation[130]. When it comes to political spending over £5,000, shareholder consent is required[131]. In the absence of such consent, political donations cannot be made for the relevant period[132]. It would of course be inconvenient, and next to impossible, to request shareholder authorization before each and every political expenditure that a company wishes to make. Under the British system, managers ask for a political budget for a year or longer for a certain sum, and shareholders vote on this proposal.

As Torres-Spelliscy notes, experiences with the reform in Britain have been positive. In general, corporate political spending has significantly dropped in the U.K. post-2000[133]. While there is a general tendency to refrain more from corporate spending, several corporations, such as British Airways, decided to forgo such spending altogether[134]. Most political budget requests have been approved by shareholders, but at least on one occasion, shareholders have refused to accept such a budget[135].

Such a model, introducing a three-fold commitment of direct disclosure of political spending to shareholders, prior consent and director liability[136], could work well in the U.S. It represents a workable compromise, in the sense that it does not require authorization for individual political expenditures, but instead the vote is on a periodic political budget, which makes the system more effective and reduces the costs of its administration[137]. Such a system would quite possibly reduce corporate political spending in general, without presenting an absolute ban on corporate political speech[138]. I would argue that the introduction of a similar system would also be in many ways symbolic and would send a clear message regarding executive excess and the sometimes rampant misuse of shareholder assets. Nevertheless, the introduction of this model on the federal level would probably raise constitutional objections with regards to freedom of speech and federalism[139], and while it would represent a significant step forward in terms of campaign finance reform, it would not be a catch-all solution for campaign finance concerns.

Disclosure itself is not enough, and even prior authorization cannot stop corporate money from flooding the election process, since shareholders could just as well vote for any

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[130] Political Parties, Elections, and Referendums Act, *supra* note 128, at §140.
[131] Companies Act, *supra* note 128, at §378.
[132] Political Parties, Elections, and Referendums Act, *supra* note 128, at §§ 139-140.
[133] Torres-Spelliscy, *supra* note 95, at 53-54; Torres-Spelliscy, *supra* note 89, at 18.
[134] Torres-Spelliscy, *supra* note 95, at 57; Torres-Spelliscy, *supra* note 89, at 19.
[135] Torres-Spelliscy, *supra* note 95, at 59; Torres-Spelliscy, *supra* note 89, at 20.
[136] Torres-Spelliscy, *supra* note 89, at 21.
[137] Torres-Spelliscy, *supra* note 95, at 64.
[138] *Id*. at 65.
[139] *Id*. at 66-69.

political budget. But increasing transparency is essential in preserving the health of a democracy, and in the post-Citizens United climate of campaign finance, it is all the more important. Efforts at introducing a model similar to the British one has been under way in the U.S. as well. The Shareholder Protection Act[140], sponsored by Rep. Michael Capuano (D-MA8), was reintroduced in Congress in July 2011; the Act aims to amend the Securities and Exchange Act of 1934 to require a shareholder authorization before a public company can make political expenditures[141]. The Act would require public companies to disclose to their shareholders the amounts and recipients of their political spending each year[142]. The Act would also require a board of directors vote on corporate expenditures on political activities[143]. As a third requirement, shareholder authorization of certain political expenditures would be necessary[144]. All three rules would be mandatory for public companies, and would greatly improve transparency in corporate political spending, as well shareholder control over the corporation's assets.

Whether the Shareholder Protection Act is to become law still needs to be seen. 2012 being election year, chances for passing such legislation might be slim. At the same time, the record spending predicted for the coming presidential election cycle, coupled with the growing discontent of average citizens with the state of democracy and the Siamese intertwining of big money and politics might just rally constituents enough to push for the adoption of such legislation. The current economic crisis has reinforced sentiments that shareholders need protection. We'll just have to see how far that sentiment may carry us into action. Overall, strengthening disclosure rules (both federal and state, in election and securities law) and monitoring their execution is key in establishing transparency.

Strengthening shareholder control over corporate assets is also essential. Requiring consent for a political budget would mean a significant step in the right direction. Amending corporate statutes to strengthen the voting rights of shareholders and make the application of such rights meaningful can also help controlling executive excess[145].

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[140] The bill was re-introduced in Congress July, 2011: H.R. 2517--112th Congress: Shareholder Protection Act of 2011. (2011). In *GovTrack.us (database of federal legislation).* Retrieved December 22, 2011, from http://www.govtrack.us/congress/bill.xpd?bill=h112-2517. Also: S. 1360--112th Congress: Shareholder Protection Act of 2011. (2011). In *GovTrack.us (database of federal legislation).* Retrieved December 22, 2011, from http://www.govtrack.us/congress/bill.xpd?bill=s112-1360.

[141] For a brief summary on the proposed bill, *see* Lucian Bebchuk's blog post at http://blogs.law.harvard.edu/corpgov/2011/07/14/the-re-introduction-of-the-shareholder-protection-act/ (last visited December 22, 2011).

[142] The Shareholder Protection Act of 2011, Sec. 5.

[143] *Id.*, Sec. 4.

[144] *Id.*, Sec. 3.

[145] *See* e.g. Lee Harris' proposal, *supra* note 104.

5. Why Protect the Dissenting Shareholder?

Why do corporations donate or spend on political campaigns? A company per se does not have political convictions (but its management may). Corporations are created to and exist to fulfill certain economic goals and expectations, or at least this is considered their primary function. Their every action is - at least theoretically - dictated by the rules of the economic marketplace. In other words, "corporate participation (…) is more transactional than ideological"[146].

At the same time, corporations have undeniably participated actively in American politics right from the start. They have realized early on the need to assess and push their agenda through the democratic processes, and since "American free speech doctrine has never been comfortable distinguishing among institutions"[147], they have had a rather corporation-friendly environment to do so. The fact that corporate philanthropy has been encouraged from the 1970s onwards has also contributed to a laxer, more cavalier approach to political spending on the part of corporations and it has also strengthened management's decision-making powers in these regards, while at the same time chipping away from shareholder power[148]. Both charitable giving and political spending are acts of management, financed from shareholder money, yet more often than not carried out without shareholder knowledge and consent, usually expressing the agenda of a politically interested management[149]. The shareholders of large public companies thus are all but invisible in the process. This took place at the same time that large corporations have become in many ways the most active participants in the democratic conversation. In an age where there is a scarcity of avenues for effective communication[150], it matters who has the means to speak, and to speak effectively. When corporations have their voices heard, this is achieved with money from shareholders, so it matters whether it is their voice we hear, or whether their assets are used by a politically interested management – often at the expense of the corporation's fortune – to amplify their own views.

Most Americans are shareholders. Most care little about what social or political cause is supported by the corporations whose assets they own as long as the profit keeps on

[146] Supp. Brief for Committee for Economic Development as Amicus Curiae 10. *See also* Citizens United, 130 S. Ct. at 973.
[147] Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 84 (1998).
[148] For a great analysis of corporate charitable giving and shareholder power, *see* Kahn, *supra* note 96.
[149] Aggarwal, Meschke & Wang, *supra* note 83, at 3.
[150] Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1411-12 (1986).

streaming in. But some do[151]. And those that do deserve protection. The fact that corporations` voices do not represent the voices of the shareholders *should* make a constitutional difference and this sentiment is embodied in the shareholder protection interest. Ciara Torres-Spelliscy identifies at least two shareholder rights that are worth protecting in this situation: the shareholders' *right to a fair return* on their investment, and the shareholder's First Amendment *right to remain silent* in a political debate, or to support the candidate of his own choosing[152]. Both of these rights are at risk in the case of corporate spending from the company's general treasury funds, which is exactly what happens in the wake of Citizens United. We should not be mistaken: corporate speech, as it stands today, is not necessarily speech by the shareholder. At best, "corporate speech reflects the hypothetical interests of a creature given reality by the market and the law: the fictional shareholder"[153]. This fictional shareholder, however, might bow to very different values that ordinary citizens of a democracy uphold, not to mention that he is made of an entirely different cloth than ordinary human beings. As Daniel Greenwood notes, and allow me to quote at length here:

> "The law and the legally created structure of corporation and market filter out all the complexity of conflicted, committed, particularly situated, deeply embedded and multi-faceted human beings, leaving only simple, one-sided monomaniacs. Human beings have short lives, spent in particular places with particular relationships to other human beings; they constantly confront the problems of finitude and commitment. Shareholders, in contrast, are in significant senses immortal, uncommitted and universal: They are indifferent to time and place, language and religion. They are indifferent between project and personalities. They are understood to care deeply about one important and vital human aim – profit maximization – but not at all about numerous others. While the ultimate owners of the shares are specific, situated, conflicted and

[151] A survey commissioned by the Center for Political Accountability and conducted by Mason-Dixon Polling & Research found that an "overwhelming majority" of shareholders are concerned that company political spending "puts corporations at legal risk and endangers shareholder value". 85 percent of shareholders interviewed for the survey agreed that 'the lack of transparency and oversight in corporate political activity encourages behavior that threatens shareholder value" (internal quotation marks omitted). For the key findings of the survey, *see*: http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/1267 (last visited December 22, 2011).

[152] Ciara Torres-Spelliscy, *supra* note 95, at 15.

[153] Greenwood, *supra* note 97, at 1002. Also at 1002-1004 and at 1052-53.

> committed human beings, shareholder in most instances may be through of more appropriately as a 'large, fluid, changeable and changing market'"[154].

The fictional shareholder is a convenient replacement for the real one, whose control over the assets of the company and participation in the corporate decision-making process has largely disappeared or has been rendered ineffective[155]. While adopting the concept of this fictional shareholder and more importantly, acting upon this reduced premise of a "person" makes corporate governance considerably simpler for management[156], it is nevertheless a dangerous equation, especially when it comes to politics. And we should not fool ourselves: when it comes to large public corporations, it *will* eventually come to politics.

In most cases, however, it is not even the fictional shareholder that speaks. Corporate political speech is often management speech amplified with shareholder assets, without input, consent or knowledge on the part of the people whose money is used for such communication. As pointed out earlier, such spending is a short term loss for the company, and negatively affects future excess returns as well[157]. As the recession and economic turmoil of the past years is still taking its heavy toll, perhaps it is time to strengthen shareholder control over corporate decisions, especially when it comes to political spending. Shareholders are real. We may conveniently replace them with a fictionalized, singularly profit-motivated concept, but for all short-cuts there is a price paid, whether by the dissenting shareholders, the company, or democracy itself.

6. Conclusion

As the Supreme Court slowly chips away from hard-won campaign finance regulation in the name of the First Amendment, as corporations are now treated as individuals in terms of free speech rights, as money is flooding politics, and citizens are putting up tents on the streets of American cities in protest over their being rendered invisible, their voices drowned out in the political process, the search for new, constitutionally acceptable avenues to control corporate spending (which is admittedly only one aspect of the problem) continues. More importantly, the battle over the fate of American democracy is being fought each moment. Admittedly, it has been so since the founding days. Now, as at other times in American history, the time for

[154] *Id*. at 1025-1026.
[155] *Id*. at 1029.
[156] *Id*.
[157] *See* Aggarwal, Meschke & Wang, *supra* note 83, at 9-14.

convenient, simple solutions is over, and hard questions need to be asked, hard decisions need to be made, responsibility needs to be assumed. One small, yet significant aspect of this process is to strengthen shareholder participation in the corporate decision-making process, especially with regards to political spending, as well as to increase disclosure and transparency in this respect. Spending other people's money is easy right now. It shouldn't be so.