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CORPORATE POLITICAL CONTRIBUTIONS AS BAD FAITH

JOSEPH K. LEAHY*

A shareholder who objects to a corporate political contribution can file a derivative lawsuit to challenge that contribution as a breach of management's duty of loyalty to the corporation. Such a lawsuit will face long odds, however, if it is founded upon a traditional theory for breach of the duty of loyalty, like waste or self-dealing. Yet, there is a better theory for a shareholder to employ when filing suit to challenge a corporate political contribution: bad faith.

Bad faith is a better basis for challenging a corporate political contribution than either waste or self-dealing because bad faith is a more flexible concept than self-dealing and a less difficult standard to satisfy than waste. Even if she intends no harm, a director acts in bad faith when she (1) takes official action that is motivated primarily by any reason other than advancing the corporation's best interests or (2) consciously disregards her fiduciary duties.

This Article identifies several examples of political contributions—both real and hypothetical—that are ripe for challenge as bad faith because they are made for reasons other than advancing the corporation's best interest. For example, a CEO acts in bad faith if she causes the corporation to make a contribution in support of her own political views or a friend who is running for office. However, in the absence of a "smoking gun," it will be difficult for a plaintiff to prove that the contribution was made for personal reasons rather than to advance the interests of the corporation.

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To overcome the difficulty of proving motive, this Article offers a novel argument: essentially all corporate political contributions made by large public corporations today constitute bad faith because they reflect management's conscious disregard for shareholders' political views. In our zero-sum, two-party political system, a board simply must know that a political contribution in support of a candidate from either major party will upset a substantial number (and perhaps a majority) of shareholders. What's more, although the duty of loyalty typically demands that management consider the best interests of the corporation as a whole, not individual shareholders, a different rule should apply to political contributions. The policy rationales for vesting decision-making power in the board, rather than shareholders or courts, simply do not apply to political contributions. Political matters are outside of management's core competence, and shareholders probably do not view management as a proxy for such matters. Further, political contributions differ greatly from most corporate spending, including charitable contributions. As a result, even if political contributions are not strictly ultra vires—i.e., beyond the corporate powers—they certainly verge on being ultra vires. When a board acts "in the vicinity of" ultra vires, its authority is at its lowest ebb; to shore up that authority, the board ought to consult the shareholders.

If failing to poll the shareholders constitutes bad faith, boards wishing to contribute corporate funds in support of political candidates might nonetheless obtain protection of the business judgment rule in two ways. First, the board could submit a non-binding resolution to the shareholders at each annual meeting to gauge shareholder support for political contributions, generally, and also to gauge support for each major party. Second, management could establish a good faith reason for not consulting the shareholders for a specific contribution—for example, if the contribution directly and unambiguously promotes the corporation's core business.

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[W]hen directors act without an apparent selfish interest to injure the corporation . . . the concept of good faith has its greatest utility.[1]

Bad faith can be the result of "any emotion that may cause a director to intentionally place his own interests, preferences or appetites before the welfare of the corporation . . . ."[2]

INTRODUCTION

In light of *Citizens United v. FEC*,[3] corporations may contribute unlimited sums to "Super PACs" that make independent expenditures[4] on behalf of candidates for election to federal office.[5] If a shareholder learns of,[6] and objects to,

1. Leo E. Strine, Jr. et al., *Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law*, 98 GEO. L.J. 629, 634 (2010).

2. *In re* Walt Disney Co. Derivative Litig. (*Disney III*), 907 A.2d 693, 754 (Del. Ch. 2005) (quoting Guttman v. Huang, 823 A.2d 492, 506 n.34 (Del. Ch. 2003) (Strine, V.C.)).

3. 558 U.S. 310 (2010) (striking down Section 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA), which amended Section 441b of the Federal Election Campaign Act (FECA), as violating the First Amendment of the United States Constitution, and thereby effectively holding that corporations may spend unlimited sums of money on behalf of candidates for federal political office, so long as they do not coordinate with candidates or campaigns). For a discussion of the *Citizens United* decision and the effects thereof, see Joseph K. Leahy, *Are Corporate Political Contributions Waste or Self-Dealing? A Closer Look*, 79 MO. L. REV. 283, 291–96 (2014). For background on the BCRA, see Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 SUP. CT. REV. 181, 206–10.

4. "Independent expenditure" means any spending that results in speech "expressly advocating the election or defeat of a clearly identified candidate; and . . . that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents." 2 U.S.C. § 431(17) (2012); *see also* 11 C.F.R. § 100.16(a) (2012). However, corporations are prohibited from contributing *directly to* (or coordinating with) a candidate for federal office—and have been for over 100 years. *See* Tillman Act, ch. 420, 34 Stat. 864, 864–65 (1907) (current version codified at 2 U.S.C. § 441b(a) (2012)) (bars contributions of money from corporations to candidates for federal political office); *see also* Adam Winkler, *"Other People's Money": Corporations, Agency Costs, and Campaign Finance Law*, 92 GEO. L.J. 871, 918–26 (2004). Corporations also are prohibited from contributing directly to or coordinating with national political parties. *See* 2 U.S.C. § 441b (2012).

5. *See* Leahy, *supra* note 3, at 294–96 (explaining how *Citizens United* and a subsequent appellate court case, SpeechNOW.org v. FEC, 599 F.3d 686 (D.C. Cir. 2010), led to the rise of Super PACs). Super PACs are "independent expenditure-only" political action committees (PACs): they may raise and spend unlimited sums, so long as they restrict themselves to independent expenditures. *See id.* at

295–96. Super PACs are "registered with the FEC, and subject to the federal organizational, registration, reporting, and disclosure requirements that apply to other political committees." Richard Briffault, *Super PACs*, 96 MINN. L. REV. 1644, 1646 (2012); *see generally id.* at 1646–50 (discussing Super PACs).

6. Shareholders of a corporation who are not involved in its day-to-day management generally do not learn what specific political contributions the corporation makes. Neither state corporation law nor federal securities law requires corporations to disclose such spending to its shareholders. *See* Lucian A. Bebchuk & Robert J. Jackson, Jr., *Shining Light on Corporate Political Spending*, 101 GEO. L.J. 923, 925 (2013) ("Under current law, public companies are not required to, and commonly do not, report their political spending to shareholders."); Thomas W. Joo, *Corporate Governance and the Constitutionality of Campaign Finance Reform*, 1 ELECTION L.J. 361, 368 (2002) ("[C]orporate and securities laws do not require corporations to disclose their campaign contributions, soft money contributions, independent political expenditures, or other campaign finance activity to their shareholders.").

What's more, neither federal nor state campaign law requires that corporations disclose *indirect* contributions to organizations that support federal political candidates—e.g., Super PACs—that are made through intermediaries formed under section 501(c) of the Internal Revenue Code (IRC). *See* Briffault, *supra* note 5, at 1649–50. These "section 501(c)" non-profit organizations may engage in political activity and political spending, "as long as that is not their primary purpose and political spending is not their primary expense." *Id.* at 1649 (citing Miriam Galston, *When Statutory Regimes Collide: Will* Citizens United *and* Wisconsin Right to Life *Make Federal Tax Regulation of Campaign Activity Unconstitutional?*, 13 U. PA. J. CONST. L. 867, 876 n.29 (2011)). Further, section 501(c) organizations "may engage in election-related spending without dollar limits and . . . are not required to publicly disclose their donors at all . . . [but] must limit their electoral spending to less than half their total spending in an annual period." *Id.* at 1649–50. Although section 501(c) organizations must "disclose information to the IRS about donors who give $5000 or more in a single year," "this information is not made public." *Id.*

Two types of section 501(c) intermediaries play a major role in obscuring the corporate origin of independent expenditures in federal elections. First, many of the largest-spending Super PACs are "closely connected" with "social welfare" organizations formed under IRC section 501(c)(4). *Id.* If a corporation donates to a social welfare organization, that organization can donate to a Super PAC with impunity without any public disclosure. *See id.*; *see also* Bebchuk & Jackson, *supra*, at 927, 930 ("Public companies . . . engage in political spending that is never disclosed by channeling such spending through intermediaries. [T]hese intermediaries do not have to disclose either the identity of the corporations that make these contributions or the amounts that they contribute."); James Kwak, *Corporate Law Constraints on Political Spending*, 18 N.C. BANKING INST. 251, 276–77 (2013) (explaining that social welfare organizations "are often paired with" Super PACs, so that those who control both entities may "funnel money to" Super PACs without any disclosure). These arrangements were common in the 2012 presidential election: for example, the Super PAC American Crossroads was controlled by a prominent 501(c)(4), American Crossroads Grassroots Political Strategies. *See* Briffault, *supra* note 5, at 1650. Second, corporations can also mask their political contributions by donating to "trade associations" formed under IRC section 501(c)(6). Like social welfare organizations, trade associations can function as intermediaries, funneling money from corporations to Super PACs without disclosing the original source of the money. *See* Richard Briffault,

such a contribution, she could in theory file a derivative lawsuit against the corporation's directors (and/or senior executive officers[7]) alleging a breach of the duty of loyalty.[8]

Updating Disclosure for the New Era of Independent Spending, 27 J.L. & POL. 683, 709 (2012) (If "a corporation contributes to a trade association, which in turn contributes to a Super PAC, the Super PAC would only have to report the trade association as the donor, without any reference to the corporation behind the trade association."). In addition, trade organizations can—and do—spend vast sums of their own money on independent expenditures. *See* CTR. FOR POLITICAL ACCOUNTABILITY, HIDDEN RIVERS: HOW TRADE ASSOCIATIONS CONCEAL CORPORATE POLITICAL SPENDING, ITS THREAT TO COMPANIES, AND WHAT SHAREHOLDERS CAN DO (2008) [hereinafter HIDDEN RIVERS]; *see, e.g.*, Ctr. for Responsive Politics, *U.S. Chamber of Commerce*, OPEN SECRETS, https://www.opensecrets.org/outsidespending/detail.php?cycle=2012&cmte=US+Chamber+of+Commerce (last visited Nov. 16, 2014) (chart explaining that the United States Chamber of Commerce spent over $32 million on independent expenditures to support mainly conservative candidates in the 2012 election cycle). Although many states have their own disclosure requirements, most are similar to the federal statute. *See* Michael Megaris, *The SEC and Mandatory Disclosure of Corporate Spending by Publicly Traded Companies*, 22 KAN. J.L. & PUB. POL'Y 432, 433–34 (2013) (stating that thirty-four states require disclosure of independent expenditures, and twelve states require disclosure of electioneering communications, made in the context of a state election.).

Some large public corporations have begun to voluntarily disclose their political spending, however. *See* CTR FOR POL. ACCOUNTABILITY, 2014 CPA-ZICKLIN INDEX OF CORPORATE POLITICAL DISCLOSURE AND ACCOUNTABILITY: HOW LEADING COMPANIES ARE MAKING POLITICAL DISCLOSURE A MAINSTREAM PRACTICE 8 (Sept. 24, 2014), *available at* http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/8642, *archived at* http://perma.cc/QSP8-ZHF9 (explaining that some of the largest publicly held U.S. companies "increased their transparency and accountability" from 2013 to 2014); *see, e.g., id.* app. D (listing large public corporations that report specific political contributions).

7. This Article uses the term "director" (or "management") to refer to both members of a corporation's board of directors (including "outside" directors, who are not employed by the corporation) and all senior executive officers (including both "inside" directors and those officers who do not sit on the board of directors). Lumping all officers and directors together like this has its theoretical limitations, however. While it is clear that officers who are not directors owe a duty of loyalty to the corporation, *see* Gantler v. Stephens, 965 A.2d 695, 708–09 (Del. 2009), such officers may or may not be protected by the business judgment rule. *Compare* Lyman Johnson, *Unsettledness In Delaware Corporate Law: Business Judgment Rule, Corporate Purpose*, 38 DEL. J. CORP. L. 405, 413 (2013) ("Delaware courts have stated in dicta that the [business judgment] rule covers officers, but they have not held it to be so applicable . . . .") (citations omitted), *with* Lawrence A. Hamermesh & A. Gilchrist Sparks III, *Corporate Officers and the Business Judgment Rule: A Reply to Professor Johnson*, 60 BUS. LAW. 865, 876 (2005) (concluding that "prevailing judicial authority and learned pronouncements on the point" correctly apply the business judgment rule with equal force to directors and officers).

It should be noted, however, that the boards of massive public corporations commonly delegate the decision to make a corporate political contribution to the corporation's executive officers. *See* Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83, 88 (2010) ("A

However, the traditional[9] theory underlying duty of loyalty claims—self-dealing—requires that the defendant directors have a direct or indirect material financial interest in the contribution in question.[10] Hence, this theory will be useful to challenge only a narrow range of corporate political contributions[11] in which the corporation supports a candidate

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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." (citing 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, *archived at* http://perma.cc/XN4N-S3Y3)). Hence, perhaps "officer" would be a better term to use than "director" when discussing the decision to make a corporate political contribution.

8. A suit alleging a breach of the board's other fiduciary duty, the duty of care, will rarely if ever be a viable option. The duty of care is virtually unenforceable against directors under corporation law due to the business judgment rule, corporate indemnification, company-paid insurance, and damage waiver provisions. *See generally* WILLIAM T. ALLEN ET AL., COMMENTARIES & CASES ON THE LAW OF BUSINESS ORGANIZATION ch. 6 (4th ed. 2012).

9. *See* Claire A. Hill & Brett H. McDonnell, Stone v. Ritter *and the Expanding Duty of Loyalty*, 76 FORDHAM L. REV. 1769, 1770 (2007) [hereinafter Hill & McDonnell, *Expanding Duty*] (describing "traditional" duty of loyalty cases as those in which "a decision maker has a material pecuniary interest that directly conflicts with that of the corporation").

10. *See* Leahy, *supra* note 3, at 344–46 (citing Rales v. Blasband, 634 A.2d 927, 936 (Del. 1993); Orman v. Cullman, 794 A.2d 5, 23 (Del. Ch. 2002)).

11. This Article uses the term "political contribution" to encompass several related but distinct concepts. First, in the context of an election for federal, state or local office, this term is used to mean any independent expenditure or any contribution to an independent expenditure-only organization, such as a Super PAC, whether the contribution is made directly to the Super PAC or indirectly through an intermediary such as a 501(c)(4) social welfare organization. See *supra* notes 5 and 6 for an explanation of these terms. Second, in the context of an election for state or local office in a state that does not prohibit direct contributions to candidates and parties, the term "political contribution" also is used to encompass direct contributions to candidates, their committees, or parties. *See supra* note 5. As a result, this Article will generally describe contributions as being "in support of" a candidate to encompass contributions made directly to a candidate or party where that is legal. Third, this Article uses the term "political contribution" to describe direct expenditures in support of or in opposition to, or contributions to organizations that support or oppose, any state or local ballot initiative that relates to social or economic issues rather than narrow industry-specific issues. Fourth, due to the lack of transparency about how the funds of Section 501(c)(6) trade associations are spent, *see supra* note 6, this Article includes contributions to such organizations within its definition of political contribution.

However, except as noted, this Article does *not* use the term "political contribution" to include contributions to single- or multiple-issue advocacy organizations that focus solely on issues specific to the corporation's core business.

who espouses policies that directly or indirectly promote management's own pecuniary interests.[12] Another common basis for alleging that management has breached its duty of loyalty[13]—corporate waste—requires a showing that the transaction being challenged was akin to destroying or giving away the corporation's assets.[14] This approach will almost never succeed in overturning a corporate political contribution to support a mainstream political candidate.[15] As a result, in most instances derivative suits challenging corporate political contributions as self-dealing or waste will fail, and management's decision to make the contribution will be protected by the all-powerful business judgment rule.[16]

However, self-dealing and waste are not the only ways that a board can breach its duty of loyalty. The board also breaches its duty of loyalty by acting in bad faith, thereby failing to satisfy the requirement that directors act in good faith.[17] However, to date, no author has explored whether a shareholder could sue derivatively to challenge a corporate political contribution as bad faith.[18] This Article undertakes that endeavor.

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12. *See* Leahy, *supra* note 3, at 354–55, 361–63 (describing hypothetical and actual examples of corporate political contributions that constitute self-dealing). For example, if a millionaire CEO causes the corporation to make a political contribution in support of a political candidate who runs on a platform of lowering taxes primarily on millionaires (or lowering millionaires' taxes by *more* than she would lower the taxes on everyone else), that contribution might possibly be deemed indirect self-dealing. *See id.* at 362–63; *accord* Kwak, *supra* note 6, at 276, 277.

13. This Article assumes that a board that commits waste violates the duty of loyalty by acting in bad faith. *See* Leahy, *supra* note 3, at 308–09 (citing *Disney III*, 907 A.2d 693, 749 (Del. Ch. 2005)). There is some authority to support this, but the question is not settled. *See* Jamie L. Kastler, Note, *The Problem with Waste: Delaware's Lenient Treatment of Waste Claims at the Demand Stage of Derivative Litigation*, 95 MINN. L. REV. 1899, 1913 (2011).

14. *See infra* Part III.A.

15. *See infra* Part III.A.

16. *See infra* Part III.A.

17. *See* Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006) ("The requirement to act in good faith 'is a subsidiary element[,]' i.e., a condition, 'of the fundamental duty of loyalty. . . . [Upon a] showing of bad faith conduct . . . the fiduciary duty violated by that conduct is the duty of loyalty." (quoting Guttman v. Huang 823 A.2d 492, 506 n.34 (Del. Ch. 2003))).

18. One commentator has mentioned the theory in passing, but brushed it off in a single sentence, urging that bad faith is an "even weaker" basis to challenge corporate political spending than self-dealing. Reza Dibadj, Citizens United *as Corporate Law Narrative*, 16 NEXUS 39, 52 (2011). This Article reaches the contrary conclusion.

Under Delaware law,[19] directors act in bad faith—and thereby, fail to act in good faith[20]—in at least two situations. First, directors act in bad faith by taking official action primarily for a purpose *other than* advancing the best interests of the corporation.[21] As a result, any corporate political contribution that is motivated first and foremost by a director's own personal ties or political views rather than her concern for the corporation's best interest constitutes bad faith.[22] This Article identifies several examples of such contributions, both real and hypothetical.[23] However, absent a proverbial "smoking gun," it usually will be difficult if not impossible for a shareholder plaintiff to *actually prove* that management acted to promote its own personal or political interests.[24]

Second, directors act in bad faith when they consciously disregard their fiduciary duties to the corporation by "utterly failing" to act in furtherance of those duties.[25] Based on this theory, this Article advances a novel argument: since the boards of large public corporations *never* consult the shareholders before making political contributions, essentially *all* political contributions made by such corporations today constitute bad faith because management has "utterly failed" to consider the shareholders' individual political views.[26] Accordingly, the directors of large public corporations should, in order to avoid claims of bad faith, poll the shareholders at each annual meeting with a non-binding resolution asking (1) whether the corporation should make political contributions and (2) if so, in support of candidates from which major political party.[27] Failing that, management should be required

19. This Article focuses principally on Delaware corporation law because it is by far the most important and influential state corporate law in the United States. *See* Leahy, *supra* note 3, at 290 n.34.

20. Bad faith is the binary opposite of good faith in Delaware corporate law. That is to say, if directors fail to act in good faith, they act in bad faith; there is no middle ground. *See* Joseph K. Leahy, *A Decade After* Disney*: A Primer on Good and Bad Faith in Delaware*, 83 U. CIN. L. REV. (forthcoming 2015) (manuscript at 9 n.49, 42–44), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id =2516641, *archived at* http://perma.cc/ML5D-ZWXE.

21. *See infra* Part II.B.2.

22. *See infra* Part II.B.2.

23. *See infra* Part III.C.

24. *See infra* Part III.C.1.b.

25. *See infra* Part II.B.1.b.

26. *See infra* Parts IV.A to IV.C.

27. *See infra* Part IV.D.

Some scholars have proposed that, as a normative matter, federal law *ought*

to show that any contribution that the corporation makes directly and obviously promotes the company's core business.

* * * * *

The remainder of this Article is organized into four parts and a brief conclusion. Part I provides necessary background: it describes the business judgment rule,[28] explains the policy rationales that underlie that rule,[29] and identifies the doctrinal bases for the requirement that directors act in good faith.[30]

Next, Part II briefly addresses the meaning of good faith and bad faith in Delaware corporation law.[31] This Part

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to require that the management of large public corporations consult the shareholders concerning certain political expenditures. *See, e.g.*, Ciara Torres-Spelliscy, *Corporate Political Spending & Shareholders' Rights: Why the U.S. Should Adopt the British Approach, in* RISK MANAGEMENT AND CORPORATE GOVERNANCE 392 (Abol Jalilvand & Tassos Malliaris eds., 2011) (urging that the United States adopt the United Kingdom's requirement that management seek permission from shareholders before making political expenditures and to report annually on such expenditures); Ronald Gilson & Michael Klausner, *That's My Money You're Using*, FORBES (Mar. 29, 2010), http://www.forbes.com/forbes/2010/0329/opinions-citizens-united-corporate-shareholders-on-my-mind.html, *archived at* http://perma.cc/CR74-TULA (urging mandatory annual shareholder votes to gauge shareholder support for corporate political activity); Bebchuk & Jackson, *supra* note 7, at 97–100 (urging that the federal securities laws should be amended to require, *inter alia,* shareholder approval of corporate political spending above a specified dollar amount). By contrast, the argument here is positive in nature: this Article contends that the duty of loyalty *does* demand that the management of large public corporations consult the shareholders before making political contributions. *See infra* Part IV.A.

Accordingly, this Article takes no position in the debate about whether shareholders should wield more power with regard to other governance matters. *Compare* Lucian Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833 (2005) (advocating a move to a "shareholder primacy" regime), *with* Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547 (2003) (describing and defending the current "director primacy" regime). Political contributions are *sui generis* expenditures that fall outside of the scope of the traditional arrangement between shareholders and the board about who makes decisions for the corporation. *See infra* Part IV.C.

28. *See infra* Part I.A.

29. *See infra* Part I.B.

30. *See infra* Parts I.A and I.C.

31. Part II draws heavily upon a lengthy primer on good faith and bad faith. *See generally* Leahy, *supra* note 20. Numerous other articles have been written on good and bad faith since the *Disney* decision. *See, e.g.*, Andrew C.W. Lund, *Opting Out of Good Faith,* 37 FLA. ST. U. L. REV. 393 (2010); Clark W. Furlow, *Good Faith, Fiduciary Duties, and the Business Judgment Rule in Delaware*, 2009 UTAH L. REV. 1061 (2009); Claire A. Hill & Brett H. McDonnell, Disney, *Good Faith, and Structural Bias*, 32 J. CORP. L. 833 (2007) [hereinafter Hill & McDonnell, *Good Faith*]; Sarah H. Duggin & Stephen M. Goldman, *Restoring Trust in Corporate*

describes both bad faith in the classic sense, often called "subjective bad faith,"[32] and the "new" bad faith,[33] which was first identified in the Disney shareholder litigation.[34]

Part III and Part IV then describe two different ways—a conventional approach applicable to all corporations and a novel argument applicable only to large public companies—that a shareholder derivative plaintiff could argue that management acted in bad faith (and thereby breached its duty of loyalty) by causing the corporation to make a political contribution.

Part III focuses on the usual method of proving bad faith, whereby a plaintiff attempts to prove management's *actual* intent when making a business decision (here, the decision to make a political contribution). This Part explains why a claim of bad faith is a better way to overcome the business judgment rule (assuming that courts will apply that rule in the first place[35]) than traditional duty of loyalty claims like waste and self-dealing.[36] Basically, bad faith is a broader and more flexible theory than self-dealing[37] and a far easier standard to satisfy than waste.[38] By way of illustration, this Part provides examples of political contributions that clearly constitute bad faith, including one real-life example—News Corporation's contribution in support of a "friend" of its CEO, Rupert Murdoch[39]—as well as several hypothetical situations.[40]

Yet, although bad faith is easier to plead and prove than either waste or self-dealing, most plaintiffs who challenge

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Directors: The Disney Standard and the "New" Good Faith, 56 AM. U. L. REV. 211 (2006).

32. *See* Leahy, *supra* note 20 (manuscript at 9) (citing *In re* Walt Disney Co. Derivative Litig. (*Disney IV*), 906 A.2d 27, 64 (Del. 2006)).

33. *See id.* (manuscript at 9 & n.49) (citing, *inter alia*, Duggin & Goldman, *supra* note 31).

34. That litigation—which led to several Court of Chancery opinions, including *Disney III*, 907 A.2d 693 (Del. Ch. 2005)—culminated in the Delaware Supreme Court's decision in *Disney IV*, 906 A.2d 27.

35. *But see* Joseph K. Leahy, Intermediate Scrutiny for Corporate Political Contributions (unpublished manuscript) (on file with author) (arguing that Delaware courts should apply intermediate scrutiny rather than the business judgment rule when a shareholder plaintiff files suit to challenge a corporate political contribution).

36. *See infra* Part III.B.

37. *See infra* Part III.B.1.

38. *See infra* Part III.B.2.

39. *See infra* Part III.C.1.

40. *See infra* Part III.C.2.

corporate political contributions as bad faith will nonetheless find it difficult to prove that management acted to further its own personal interests, rather than for corporate purposes.[41] Accordingly, Part III concludes that, under current Delaware law, even if the directors did cause the corporation to make a political contribution in bad faith, it often will be difficult (if not downright impossible) to prove. Plaintiffs may be right, but they will be out of court.

Part IV attempts to address this difficulty of proof by describing a novel approach that does not focus on proving management's actual intent when deciding to make the political contribution. This Part contends that, absent prior consultation with the shareholders, practically *all* corporate political contributions made by large public corporations today should be deemed bad faith because management has consciously disregarded the political views of a substantial number (and possibly a majority) of shareholders by failing to consult the shareholders before making the contribution.[42]

In order for this novel argument to succeed, it must surmount two hurdles, one factual and one legal. Part IV describes both obstacles and endeavors to overcome them.[43]

The first challenge is establishing that the board of a large public corporation *knows* that a substantial percentage of the corporation's shareholders *do not* share management's political convictions.[44] To this end, a plaintiff can show that shareholders today are a heterogeneous lot;[45] that the political landscape is sharply divided between the two major political parties;[46] and that politics, unlike business, is a zero-sum game.[47] Accordingly, Part IV argues that management *must know* that *at least some* shareholders will *always* disagree with management's major political party contributions.[48]

The second hurdle addressed in Part IV is that, as a matter of corporate law, management's fiduciary duties traditionally run to the corporation *as a whole*, rather than

41. *See infra* Part III.C.1.b.
42. *See infra* Part IV.A.1.
43. *See infra* Parts IV.A.2, IV.B and IV.C.
44. *See infra* Part IV.B.
45. *See infra* Part IV.B.1.
46. *See* Part IV.B.2.
47. *See* Part IV.B.2.
48. *See infra* Part IV.B.

directly to the individual shareholders;[49] this would seem to preclude any argument that management must consider the views of individual shareholders. To surmount this obstacle, Part IV argues that management's duties call for a different approach when the corporation makes a political contribution. Simply put, the policy rationales for vesting sole decision-making power in management should not apply to political contributions because (1) political matters and policy are outside of management's core competence;[50] (2) shareholders probably do not view management as their proxy for political spending, as they do for business decisions;[51] and (3) political contributions differ greatly in their nature from other types of corporate spending, including contributions to charitable organizations.[52] Therefore, even if political contributions are not strictly "ultra vires"[53]—i.e., beyond the corporate powers—they certainly *verge on* being ultra vires. As a result, the decision to make a political donation might be described as being "in the vicinity of ultra vires" (by analogy to Delaware's "in the vicinity of insolvency" doctrine[54]). In such situations, management's authority to act is at its lowest ebb. In order to shore up its authority, management should solicit and carefully consider the shareholders' views.[55]

Having concluded that management should consult the shareholders before causing the corporation to make a political contribution, Part IV then addresses the ramifications of that conclusion. First, consulting the shareholders need not be onerous: management can simply poll the shareholders at each annual meeting with non-binding resolutions concerning (1) whether to make political contributions at all and, if so, (2) which major political party to support.[56] Moreover, management can avoid polling the shareholders by establishing

49. *See infra* notes 265–77 and accompanying text.

50. *See infra* Part IV.C.1.a.

51. *See infra* Part IV.C.1.b.i.

52. *See infra* Part IV.C.1.b.ii.

53. The question of whether corporate political contributions are ultra vires is beyond the scope of this Article, but is one that this Author intends to explore in a future article.

54. *See infra* Part IV.C.2.a (explaining the "in the vicinity of insolvency" doctrine).

55. *See infra* Part IV.C.2.b. This support would have to be indirect, going to Super PACs or their intermediaries, since corporations cannot donate to or coordinate with candidates or parties. *See supra* note 4.

56. *See infra* Part IV.D.1.

that it has a good reason for not doing so—for example, if the contribution directly and unambiguously promotes the corporation's core business.[57] Absent that, failing to poll the shareholders means that management has consciously disregarded the shareholders' political views by ignoring the likelihood that a majority of shareholders oppose the contribution.

I. THE BUSINESS JUDGMENT RULE, GOOD FAITH, AND THE DUTY OF LOYALTY

This Article describes how and when management acts in bad faith by causing the corporation to make a political contribution. Before proceeding to that analysis (in Parts III and IV), this Part provides necessary background by describing derivative lawsuits and the business judgment rule, and by explaining the effect of a court's finding that management acted in bad faith.

A. The Business Judgment Rule's Presumption of Good Faith

In a derivative lawsuit, a shareholder sues in the name of the corporation to address an injury to or vindicate a right of the corporation.[58] A shareholder lawsuit challenging a corporate political contribution as a breach of management's duty of loyalty would presumably be derivative in nature.[59]

In a derivative action, if the court concludes that the shareholder plaintiff has standing to sue on behalf of the corporation,[60] the plaintiff must still overcome the onerous business judgment rule.[61] This rule presumes (or perhaps

57. *See infra* Part IV.D.2.

58. *See* Leahy, *supra* note 3, at 296–99.

59. *But see id.* at 299 n.96 (noting the possibility that a shareholder suit to challenge a corporate political contribution could be direct rather than derivative in nature, depending on the shareholder's factual allegations).

60. *See id.* at 296–97. Standing requirements in derivative lawsuits include, most importantly, the requirement that the plaintiff make "demand" on the board of directors. *See id.* However, in some jurisdictions, like Delaware, such demand may be excused as futile under certain circumstances. *See id.* at 297 (citing Aronson v. Lewis, 473 A.2d 805, 811–12 (Del. 1984), *overruled on other grounds by* Brehm v. Eisner, 746 A.2d 244 (Del. 2000)).

61. *See id.* at 297.

assumes)[62] that, in making a business decision, management "acted on an informed basis, *in good faith* and in honest belief that the action taken was in the best interests" of the corporation.[63] Unless the presumption of the business judgment rule is rebutted, a "court will not substitute its judgment for that of the board if the [board's] decision can be 'attributed to any rational business purpose.'"[64] That is to say, unless the plaintiff overcomes the business judgment presumption, management's decision is simply not subject to challenge.[65]

The effect of the business judgment rule is to refocus a court's inquiry into management's conduct. The rule forces courts to substitute the question of whether the applicable standard of care was breached for the question of "whether the directors were truly disinterested and independent and whether their actions were not so extreme, unconsidered, or inexplicable as not to be an exercise of good-faith judgment."[66] In short, the business judgment rule demands that courts ignore "the *quality of the board's decision* (i.e., was the decision negligent?)" and instead focus on the "*integrity of the board's decision-making process* (i.e., was the decision made in good faith, uninterested, independent, minimally informed, and not made in a grossly negligent manner?)."[67] As a result, judges are "effectively prohibited from evaluating the merits" of most "rational, good faith business decisions" made by the

62. *See id.* at 297 nn.87–88 (discussing various views of the business judgment rule as a substantive rule of law, an abstention doctrine, or a hybrid of the two).

63. *Aronson*, 473 A.2d at 812 (emphasis added). There is "no single canonical statement of the business judgment rule," but perhaps the "closest one can come" is that "a decision constitutes a valid business judgment (and gives rise to no liability for ensuing loss) when it (1) is made by financially disinterested directors or officers (2) who have become duly informed before exercising judgment and (3) who exercise judgment in a good-faith effort to advance corporate interests." ALLEN ET AL., *supra* note 8, at 231 (citing AM. BAR ASS'N, CORPORATE DIRECTOR'S GUIDEBOOK (2d ed. 1994)).

64. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985) (quoting Sinclair Oil Corp. v. Levien, 380 A.2d 717, 720 (Del. 1971)).

65. Leahy, *supra* note 3, at 298–99.

66. ALLEN ET AL., *supra* note 8, at 231; *see also* STEPHEN M. BAINBRIDGE, CORPORATE LAW 109 (2d ed. 2009) (explaining that the business judgment rule requires a court to "review the facts to determine not the quality of the decision, but rather whether the decision-making was tainted by self-dealing and the like . . . the merits of the board's decision are irrelevant").

67. Leahy, *supra* note 3, at 298.

corporation's management.[68] This renders "a large swath of director conduct . . . unreviewable."[69]

However, if the plaintiff can show that the board *did not* act in good faith, the business judgment rule is overcome and the plaintiff can proceed with her lawsuit.[70] The business judgment presumption also will be overcome if the plaintiff can establish that the directors employed a grossly negligent decision-making process (such as by utterly failing to inform themselves prior to making a decision).[71]

B. Policy Rationales for the Business Judgment Rule

The business judgment rule is judge-made law for which there exists no legislative history. However, courts and commentators have offered many overlapping justifications for the rule.[72] Among the most common rationales are (1) skepticism that judges are qualified to make business judgments[73] and (2) the view that shareholders have

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68. *Id.* at 298–99.

69. Andrew S. Gold, *A Decision Theory Approach to the Business Judgment Rule: Reflections on* Disney, *Good Faith, and Judicial Uncertainty*, 66 MD. L. REV. 398, 401 (2007).

70. *See Disney III*, 907 A.2d 693, 755 (Del. Ch. 2005); Hill & McDonnell, *Expanding Duty*, *supra* note 9, at 1773.

71. *See, e.g.*, Smith v. Van Gorkom, 488 A.2d 858, 873 (Del. 1985).

72. Perhaps the most comprehensive synthesis of the many rationales for the business judgment rule divides such rationales into four categories: (1) "[d]ifficulties with [a]fter-the-fact [r]eview of [b]usiness [d]ecisions," including that "judges and juries generally are not business experts"; (2) arguments relating to the "[n]ature of [d]amages" in shareholder derivative actions; (3) arguments relating to "the [n]ature of the [p]laintiff"—including that the plaintiff shareholder "has voluntarily entered into the relationship with the directors"; and (4) the lack of "[u]tility of [c]ompensation or [d]eterrence," from a law and economics perspective. Franklin A. Gevurtz, *The Business Judgment Rule: Meaningless Verbiage or Misguided Notion?*, 67 S. CAL. L. REV. 287, 305–17 (1994). Other summaries of the business judgment rule tread much the same ground, although they organize the justifications differently. *See, e.g.*, Elizabeth S. Miller & Thomas E. Rutledge, *The Duty of Finest Loyalty and Reasonable Decisions: The Business Judgment Rule in Unincorporated Business Organizations?*, 30 DEL. J. CORP. L. 343, 350–51 (2005) (describing five justifications for the business judgment rule that overlap with those offered by Gevurtz, including "[p]rotection of the courts from enmeshment in corporate decision-making" and "[p]rotection of the board of directors' franchise to . . . manag[e] . . . the corporation").

73. *See, e.g.*, Auerbach v. Bennett, 393 N.E.2d 994, 1000 (N.Y. 1979) ("[T]he business judgment doctrine . . . is grounded in the prudent recognition that courts are ill equipped . . . to evaluate . . . business judgments."); Julian Velasco, *How Many Fiduciary Duties Are There in Corporate Law?*, 83 S. CAL. L. REV. 1231,

voluntarily hired the directors, not the courts, to make business decisions for the corporation.[74] The Delaware courts have adopted both of these rationales when justifying the rule. For example, Vice Chancellor Nobel recently opined that:

> One of the key rationales underlying the business judgment rule is that it "keeps courts from becoming enmeshed in complex corporate decision-making, a task which courts admittedly are ill-equipped, ill-fitted and neither trained nor competent to perform. Directors are, in most cases, more qualified to make business decisions than are judges."[75]

Further, nearly two decades ago the Delaware Supreme Court opined that:

> [T]he management of the business and affairs of a Delaware corporation is entrusted to its directors, who are the duly elected and authorized representatives of the stockholders. Under normal circumstances, neither the courts nor the stockholders should interfere with the managerial decisions of the directors. The business judgment rule embodies th[is] deference . . . .[76]

The Delaware courts have repeatedly echoed these rationales over the years.[77]

1247 (2010) ("[J]udicial incompetence to make business decisions is one of the key justifications of the business judgment rule.").

74. *See, e.g.*, Joy v. North, 692 F.2d 880, 885 (2d Cir. 1982) (reasoning that shareholders "voluntarily undertake the risk of bad business judgment[s]" and often look to "the quality of a firm's management" when picking investments; and therefore, "the business judgment rule merely recognizes a certain voluntariness in undertaking the risk of bad business decisions"); Alfred Dennis Mathewson, *Decisional Integrity and the Business Judgment Rule: A Theory*, 17 PEPP. L. REV. 879, 879–80 (1990) (explaining that "corporate law divests shareholders of direct decision-making power and . . . vests it in a board of directors"; that shareholders agree to this arrangement "in the hope of . . . profits"; that making a profit "necessarily requires . . . risks"; and that the principal doctrine embodying courts' reluctance to allow disappointed shareholders to seek judicial redress "is . . . the business judgment rule").

75. Freedman v. Adams, C.A. No. 4199–VCN, 2012 WL 1345638, at *12 n.117 (Del. Ch. Mar. 30, 2012), (quoting 1 STEPHEN A. RADIN, THE BUSINESS JUDGMENT RULE 35 (6th ed. 2009) (internal quotations and citations omitted)), *aff'd*, 58 A.3d 414 (Del. 2013).

76. Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34, 41–42 (Del. 1994).

77. *See, e.g.*, *Disney III*, 907 A.2d 693, 746 (Del. Ch. 2005) (observing that the

C. *Section 102(b)(7): Why Most Derivative Plaintiffs Must Plead Bad Faith*

As stated previously, there are essentially two ways (in addition to waste and self-dealing) for a derivative plaintiff to overcome the business judgment rule: the plaintiff can plead that the directors acted in bad faith or that the directors' decision-making process was grossly negligent. However, of these two choices, only pleading bad faith will generally allow derivative plaintiffs to survive a motion to dismiss; pleading gross negligence will usually lead to dismissal of the complaint. This is because (1) directors breach *only* the duty of care (not their duty of loyalty) by making decisions in a grossly negligent manner;[78] (2) Delaware allows a corporation to amend its charter to waive damages for directors' breaches of the duty of care;[79] and (3) perhaps 90 percent of Delaware corporations have amended their charters to waive damages for such breaches.[80] If a shareholder of a corporation that has

business judgment rule exists in part "[b]ecause courts are ill equipped to engage in *post hoc* substantive review of business decisions"); *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 967 (Del. Ch. 1996) (opining that the business judgment rule avoids "substantive second guessing [of business decisions] by ill-equipped judges"); *In re* J.P. Stevens & Co. S'holders Litig., 542 A.2d 770, 780 (Del. Ch. 1988) ("Because businessmen and women are correctly perceived as possessing skills, information and judgment not possessed by reviewing courts . . . courts have long been reluctant to second-guess such decisions when they appear to have been made in good faith." (internal citation omitted)).

78. *See* Stone v. Ritter, 911 A.2d 362, 369 (Del. 2006) (reasoning that "gross negligence" will "giv[e] rise to a violation of the fiduciary duty of care"); *see, e.g.*, Smith v. Van Gorkom, 488 A.2d 858, 873 (Del. 1985) (holding that directors' grossly negligent decision-making violated the duty of care).

79. DEL. CODE ANN. tit. 8, § 102(b)(7) (2014) (allowing waiver of damages with certain exceptions); Strine, *supra* note 1, at 659–62 (explaining how section 102(b)(7) essentially permits only waiver of damages for violations of the duty of care).

However, by its terms the statute that permits this waiver of duty of care damages applies *only* to the board of directors. *See* DEL. CODE ANN. tit. 8, § 102(b)(7) (2014). Accordingly, Delaware corporations arguably cannot waive damages caused by executive officers acting solely in their capacity as officers, rather than in their capacity as board members. *See* Arnold v. Soc'y for Sav. Bancorp, 650 A.2d 1270, 1288 (Del. 1994) (citing R. FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, DELAWARE LAW OF CORPORATIONS & BUSINESS ORGANIZATIONS § 4.19, at 4-335 (Supp. 1992)). Yet, perhaps out of habit, shareholder derivative plaintiffs typically sue only the board of directors, and rarely sue executive officers in their capacity as such. *See Good Faith After* Disney*: Justice Berger's Closing Discussion*, 55 N.Y.L. SCH. L. REV. 659, 665 (2010/2011) (colloquy between Professor Faith Stevelman and Justice Carolyn Berger).

80. *See* Roberta Romano, *Corporate Governance in the Aftermath of the*

effectuated such a waiver files a derivative suit for damages based solely upon a duty of care claim, the complaint is subject to immediate dismissal.[81]

By contrast, a Delaware corporation may *not* waive damages arising from actions taken "not in good faith."[82] Nor can it waive damages for any breach of the duty of loyalty.[83] Indeed, the Delaware Supreme Court recently held that a director who acts in bad faith breaches the duty of loyalty.[84] As a result, if a derivative plaintiff shows that the board acted in bad faith, the business judgment presumption will be rebutted.[85] Absent approval by the corporation's fully informed, disinterested and independent directors or shareholders,[86] the defendant managers presumably[87] must now establish the transaction was entirely fair to the corporation.[88] Failing to

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Insurance Crisis, 39 EMORY L.J. 1155, 1160–61 (1990) (describing survey of Delaware corporate charters in which about 90 percent of those surveyed had waived damages).

81. *See* Malpiede v. Townson, 780 A.2d 1075, 1094 (Del. 2001) (noting that section 102(b)(7) bars a claim when the complaint contains "only an unambiguous . . . due care claim and nothing else").

82. DEL. CODE ANN. tit. 8, § 102(b)(7).

83. *Id.*

84. Stone v. Ritter, 911 A.2d 362, 369–70 (Del. 2006) (explaining that the "failure to act in good faith may result in liability because the requirement to act in good faith is a . . . condition of the . . . duty of loyalty" (internal quotations and citation omitted)); *see also* Guttman v. Huang, 823 A.2d 492, 506 n.34 (Del. Ch. 2003) ("A director cannot act loyally towards the corporation unless she acts in the good faith belief that her actions are in the corporation's best interest."). Thus, *Stone* held that there is no separate fiduciary duty to act in good faith; rather, acting in good faith is a subsidiary element of the duty of loyalty. *See* 911 A.2d at 369 (explaining that "a failure to act in good faith is not conduct that results, *ipso facto*, in the direct imposition of fiduciary liability," because good faith is not a separate stand-alone duty). Some academics have sharply criticized this holding. *See, e.g.*, Andrew D. Appleby & Matthew D. Montaigne, *Three's Company:* Stone v. Ritter *and the Improper Characterization of Good Faith in the Fiduciary Duty "Triad,"* 62 ARK. L. REV. 431, 437–40 (2009) (arguing that good faith is a separate, stand-alone duty that involves conduct that is more culpable than breaches of the duty of care and less culpable than breaches of the duty of loyalty).

85. *See Disney III*, 907 A.2d 693, 746–47 (Del. Ch. 2005) ("The business judgment rule . . . presumption applies when there is no evidence of . . . bad faith . . . on the part of the directors . . . . This presumption can be rebutted by a showing that the board violated one of its fiduciary duties in connection with the challenged transaction." (internal quotations omitted)).

86. *See* DEL. CODE ANN. tit. 8, § 144(a).

87. *But see* Velasco, *supra* note 73, at 1251 (observing that it is "not entirely free from doubt" that "an entire fairness inquiry" follows when a plaintiff successfully pleads that the board acted in bad faith).

88. *See Disney III*, 907 A.2d at 747 (explaining that, when the business judgment rule presumption is rebutted, "the burden shifts to the director

establish the objective fairness of the transaction will result in the directors being held liable for damages.[89]

Hence, absent waste or self-dealing, a derivative plaintiff seeking damages typically must plead and prove bad faith in order for her lawsuit to succeed.

II. A BRIEF INTRODUCTION TO THE MEANING OF "GOOD FAITH" AND "BAD FAITH"

This Part provides a brief introduction to good faith and bad faith in Delaware corporate law.[90] First, this Part provides a basic definition of good faith.[91] Next, this Part briefly describes both the "classic" and "new" meanings of bad faith,[92] and addresses the issue of mixed motives.[93] Finally, this Part summarizes the ways that plaintiffs typically prove that management has acted in bad faith.[94]

A. *Good Faith Requires Subjective Honesty*

"Good faith" requires, at a minimum, that directors act honestly and without pretext.[95] That is to say, *"subjective*

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defendants to demonstrate that the challenged transaction was 'entirely fair' to the corporation and its shareholders" (internal citation omitted)).

89. Directors of a Delaware corporation cannot be indemnified for damages to the corporation arising from their bad faith conduct. *See* DEL. CODE ANN. tit. 8, §§ 145(a), (c). However, directors could in theory be reimbursed by insurance purchased by the corporation. *See* DEL. CODE ANN. tit. 8, § 145(g) (allowing corporation to purchase directors and officers' (D&O) insurance for directors "whether or not the corporation would have the power to indemnify such person"). Whether or not the D&O insurance covers the directors would depend on whether bad faith conduct is excluded from the company's policy. The typical D&O insurance policy may or may not cover bad faith acts. *Compare* Mark R. High, *Disney Directors Survive Attack on Magic Kingdom*, 15 BUS. L. TODAY 18, 21 (2006) (opining that bad faith acts typically are not covered by D&O insurance policies), *with* Bernard Black et al., *Outside Director Liability*, 58 STAN. L. REV. 1055, 1086–87 (2006) (explaining that two exclusions commonly found in D&O insurance policies, the deliberate fraud exclusion and the personal profit exclusion, do not exclude bad faith via conscious disregard of duty).

90. For an extended discussion of good and bad faith in Delaware corporate law, see generally Leahy, *supra* note 20.

91. *See infra* Part II.A.

92. *See infra* Part II.B.

93. *See infra* Part II.C.

94. *See infra* Part II.D.

95. *See* Leahy, *supra* note 20 (manuscript at 7) (citing Strine, *supra* note 1, at 655; BLACK'S LAW DICTIONARY 713 (8th ed. 2004)).

honesty is a *necessary* part of good faith."[96] If directors act dishonestly or with pretext, they fail to act in good faith. This has long been the law of Delaware.[97]

The Delaware courts also have long used "bad faith" to mean "something akin to acting with a dishonest purpose or ill will toward the corporation and/or its shareholders."[98] This classic definition of bad faith (often called "subjective bad faith,"[99] but hereinafter referred to as "classic bad faith") to mean dishonesty or malevolent intent is clearly at odds with subjective honesty and sincerity of belief. Hence, one who acts in *bad* faith necessarily *fails* to act in *good* faith.

Beyond these definitions, for many years the Delaware courts provided little detail about the exact scope of good and bad faith in corporate law.[100] However, nearly a decade ago, in a derivative lawsuit filed by shareholders of The Walt Disney Company against the company's board, the Delaware courts finally filled in some of the blanks.

B. Disney *Provides Two New Definitions of Bad Faith*

In *Disney*, the Delaware courts expanded upon the classic definition of bad faith. The *Disney* decisions identified two new definitions of bad faith (sometimes called the "new" bad faith[101]) that are less culpable than classic bad faith but more culpable than gross negligence.[102] These two definitions are: (1) conscious disregard—i.e., when a director "intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for [her] duties;"[103] and (2) acting for

96. *See id.* (manuscript at 7).

97. *See id.* (manuscript at 7–8 & n.39) (citing Strine, *supra* note 1, at 670 (discussing Cheff v. Mathes, 199 A.2d 548 (Del. 1964))).

98. *See id.* (manuscript at 9) (citing Elizabeth A. Nowicki, *Not in Good Faith*, 60 S.M.U. L. REV. 441, 456 (2007)).

99. *See, e.g., Disney IV*, 906 A.2d 27, 64 (Del. 2006).

100. *See, e.g., Disney III*, 907 A.2d 693, 754 (Del. Ch. 2005) (describing good faith in Delaware as a "fog of hazy jurisprudence").

101. *See, e.g.*, Gordon Smith, *Is the New "Bad Faith" an Empty Set in Delaware Fiduciary Law?*, CONGLOMERATE (Mar. 26, 2009), http://www.theconglomerate.org/2009/03/is-the-new-bad-faith-an-empty-set-in-delaware-fiduciary-law.html, *archived at* http://perma.cc/D5LG-4GGT. Conscious disregard expands upon the traditional ways of proving that management acted in bad faith. *See* Leahy, *supra* note 20 (manuscript at 9 & n.49).

102. Leahy, *supra* note 20 (manuscript at 9) (citing *Disney IV*, 906 A.2d at 66).

103. *Disney IV*, 906 A.2d at 67 (quoting *Disney III*, 907 A.2d 693, 755 (Del. Ch. 2005)). The court also described this concept as "intentional dereliction of duty."

personal rather than corporate purposes—i.e., when a director "intentionally acts with a purpose other than that of advancing the best interests of the corporation."[104] Let us now flesh out these two definitions of the "new" bad faith in turn.

1. Conscious Disregard of Duty

a. Disney: *A Favor for the CEO's Friend*

With regard to conscious disregard of duty, the facts of the *Disney* litigation are instructive: the case involved a challenge to the massive severance package of The Walt Disney Company's ousted president, Michael Ovitz.[105] "The plaintiffs . . . alleged, *inter alia*, that the board rubber-stamped Ovitz's hiring and compensation as a favor to Disney's then-CEO Michael Eisner, because Ovitz and Eisner were long-time, close friends."[106] The plaintiffs contended that, by so doing, the board consciously disregarded its fiduciary duties in bad faith.[107] Both the Court of Chancery and the Delaware Supreme Court agreed that these allegations, if proved at trial, would constitute bad faith.[108] In short, the Delaware courts essentially held that "the plaintiffs adequately pleaded bad faith by alleging that the board hired Ovitz to a massive contract simply because he was Eisner's friend . . . instead [of] consider[ing] whether hiring Ovitz to such a contract was best for the company."[109]

Id.

104. *Id.* (emphasis added).

105. *See id.* at 44–45.

106. Leahy, *supra* note 20 (manuscript at 10) (citing Hill & McDonnell, *Good Faith*, *supra* note 31, at 846).

107. *See id.* (manuscript at 10–11) (citing *In re* Walt Disney S'holder Litig. (*Disney II*), 825 A.2d 275, 286 (Del. Ch. 2004)). Plaintiffs were required to allege at least bad faith because The Walt Disney Company had waived damages for breaches of the directors' fiduciary duties under D.G.C.L. § 102(b)(7). *See id.* (manuscript at 11) (citing *Disney II*, 825 A.2d 275).

108. *See id.* (manuscript at 11–12) (citing *Disney II*, 825 A.2d at 289); *id.* (manuscript at 12) (citing *Disney IV*, 906 A.2d at 65).

109. *Id.* (manuscript at 12). However, the plaintiffs failed to prove these allegations at trial. *See generally Disney III*, 907 A.2d 693 (Del. Ch. 2005) (finding that none of the *Disney* defendants acted in bad faith).

b. Lyondell: *An "Utter Failure" to Act*

Subsequently, in *Lyondell Chemical Co. v. Ryan*,[110] the Delaware Supreme Court clarified that conscious disregard is not an easy standard to satisfy.[111] In *Lyondell*, the Supreme Court admonished that, when assessing whether the directors consciously disregarded their duties, the Chancery Court should *not* ask whether the directors "did everything that they (arguably) should have done" in furtherance of their fiduciary duties.[112] Rather, the trial court must ask whether the directors "utterly failed" to act in accordance with their fiduciary duties.[113] A finding that the board did not do all it reasonably could have done might support a claim of gross negligence, but not bad faith.[114]

The upshot of the *Lyondell* decision is that the Delaware courts probably will not find that a board has consciously disregarded its duties unless the board was "*completely* out to lunch."[115] It is therefore possible that conscious disregard is satisfied only when directors do *absolutely nothing whatsoever* to address a problem[116]—that is to say, when they do not even *try* to do their jobs.[117]

2. "Other Than" the Best Interests of the Corporation: The Catch-All

The second new definition of bad faith conduct, under *Disney*, is "acting with a purpose other than that of advancing the best interests of the corporation."[118] That is to say, under

110. 970 A.2d 235, 243 (Del. 2009).
111. *See* Leahy, *supra* note 20 (manuscript at 12–16).
112. *Lyondell Chem. Co.*, 970 A.2d at 244; *see also id.* at 243 ("[T]here is a vast difference between an inadequate or flawed effort to carry out fiduciary duties and a conscious disregard for those duties.").
113. *Id.* at 243.
114. *See* Leahy, *supra* note 20 (manuscript at 14–15).
115. *Id.* (manuscript at 15).
116. *Id.* (manuscript at 18, 34) (citing, *inter alia*, Robert B. Thompson, *The Short, But Interesting Life of Good Faith as an Independent Liability Rule*, 55 N.Y.L. SCH. L. REV. 543, 553 (2010/11) (referencing Francis v. United Jersey Bank, 432 A.2d 814 (N.J. 1981))).
117. *See id.* (manuscript at 18) (citing ALLEN ET AL., *supra* note 8, at 363–64). In the famed case of *Francis*, 432 A.2d 814, an elderly widow served as a figurehead director. *See id.*
118. *Disney III*, 907 A.2d 693, 755 (Del. Ch. 2005) (emphasis added). Although this definition of bad faith has received little scholarly or judicial attention since

this definition, acting in bad faith means acting in a way that is *not* genuinely intended to advance the best interests of the corporation.[119] Since this type of bad faith is defined by what it excludes rather than what it includes, it is effectively a catch-all category.[120] Further, this catch-all logically encompasses conscious disregard of duty: a board that intentionally ignores its job (whether as a favor to the CEO or for some other reason) acts for reasons *other than* furthering the company's best interests.[121]

Indeed, this catch-all category appears to be "extremely broad."[122] In the past, the Delaware courts have stated that classic bad faith can be the result of "any emotion that may cause a director to intentionally place his own interests, preferences or appetites before the welfare of the corporation," including greed, "hatred, lust, envy, revenge, . . . shame or pride."[123] Most likely, the Delaware courts will take this same, sweeping approach with the catch-all definition of bad faith as well.

C. *The Threshold for Bad Faith: Primary Intent*

Like classic bad faith, the two "new" definitions of bad faith set forth in *Disney* focus on the directors' actual intent when making a business decision. However, people often act with mixed motives. This raises a question (which, in turn, raises further questions): To what extent must a director's mind be consumed by bad faith in order to violate the duty of loyalty? Is any hint of ill will, conscious disregard or a purpose other than the corporation's best interests enough to breach the

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the *Lyondell* decision, it presumably retains its viability. *Cf.* Christopher Bruner, *Good Faith in* Revlon-*Land*, 55 N.Y.L. SCH. L. REV. 581, 590 (2011) (arguing, in *Revlon* context, that "[g]ood faith would appear to maintain some vitality where, as opposed to passively failing to pursue maximum price, directors actively pursue something else").

119. *See* Leahy, *supra* note 20 (manuscript at 21).

120. *See id.* (manuscript at 21).

121. *See id.* (manuscript at 21).

122. *Id.* (manuscript at 22).

123. *Disney III*, 907 A.2d at 754 (purporting to quote *Guttman*, 823 A.2d 492 at 506 n.34, but actually quoting *In re* RJR Nabisco, Inc. S'holders Litig., Civ. A. No. 10389, 1989 WL 7036, at *15 (Del. Ch. Jan. 31, 1989) ("Greed is not the only human emotion that can pull one from the path of propriety; so might hatred, lust, envy, revenge, or . . . shame or pride. Indeed any human emotion may cause a director to place his own interests, preferences or appetites before the welfare of the corporation . . . . The question here is . . . [a matter] of bad faith.")).

duty of loyalty—even if the offending intent does not predominate? Or must the directors' minds be entirely full of bad faith to breach, such that any hint of good faith averts a breach? Or is the standard somewhere in the middle?

With regard to classic bad faith, the Delaware courts have taken a middle ground on the issue of mixed motives, focusing on a director's *primary* motivation.[124] The Delaware courts have not yet addressed mixed motives in the context of *Disney*'s definitions of bad faith, but it seems likely that they will focus on primary motivation for these new definitions, as well.[125] If the courts adopted a lower threshold, a plaintiff could challenge a board decision if the directors were "motivated to some small degree by interests other than the best interest of the corporation, no matter how benign."[126] Or, if the courts adopted a higher threshold, bad faith would be impossible to prove.

D. *How Bad Faith is Proved*

Finally, let us briefly explore how bad faith can be proved. Recall that the business judgment rule requires that courts *presume* good faith. As a result, if the evidence concerning the board's motives for acting is entirely ambiguous, a court must conclude that the board acted in good faith.[127]

Plaintiffs have successfully overcome this presumption by showing that the board utterly failed to act in accordance with its duties;[128] that the board lacked "independence";[129] or that a weak board, although technically independent, nonetheless acceded to the will of a domineering CEO.[130] In addition, plaintiffs have been able to establish bad faith by proving the existence of a "smoking gun"—that is to say, essentially unambiguous, direct evidence of management's motives.[131] Let us touch on each of these ways of proving bad faith in turn.

First, after *Disney*, both scholars and the Delaware courts

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124. Leahy, *supra* note 20 (manuscript at 28) (citing, *inter alia,* Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437 (Del. 1971)).

125. *See id.* (manuscript at 29).

126. *Id.* (manuscript at 28).

127. *Id.* (manuscript at 31) (citing Furlow, *supra* note 31, at 1094).

128. *See id.* (manuscript at 31–33).

129. *See id.* (manuscript at 36–40).

130. *See id.* (manuscript at 40–42).

131. *See id.* (manuscript at 34–36) (citing, *inter alia,* Carter G. Bishop, *Directorial Abdication and the Taxonomic Role of Good Faith in Delaware Corporate Law*, 2007 MICH. ST. L. REV. 905, 934 (2007)).

worried that the line between gross negligence and bad faith is a fine distinction that is often difficult for courts to make.[132] As a result, in cases where the board failed to take corrective action to avert harm to the corporation—including both "oversight" situations (where the board allegedly failed to stop wrongdoing by corporate employees)[133] and "sale of control" situations (where the board allegedly failed to obtain the best price for a company that was "in play")[134]—the Delaware Supreme Court has required that the directors "utterly fail" to do their jobs.[135] Therefore, Delaware courts will be "extremely chary" of allowing plaintiffs to establish an inference of conscious disregard.[136] Bad faith probably will not be inferred from board inaction "unless the board did *absolutely nothing whatsoever*."[137] The courts will not *simply assume* that the board acted in bad faith just because it made a mistake, even if the mistake was egregious. As a result, if the board took *some* action with regard to the matter in question, and that action had a plausible business purpose, it will be extremely difficult if not impossible to show that the board acted in bad faith.[138]

Probably the best way to overcome this difficulty of proof is a smoking gun that provides essentially unambiguous insight into the board's motivations. When the board's conduct (or lack thereof) could reasonably be characterized as either gross negligence or bad faith, a smoking gun is critical to help convince a court to overcome the presumption of good faith.[139] Yet, presumably, unambiguous, direct proof of motive is unusual. Consequently, if a plaintiff claiming bad faith were required to support her argument with a smoking gun, successful bad faith claims would be rare.[140]

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132. *See id.* (manuscript at 31–33) (citing, *inter alia*, McPadden v. Sidhu, 964 A.2d 1262, 1263 (Del. Ch. 2008)).

133. *See id.* (manuscript at 31–33) (citing *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959 (Del. Ch. 1996)).

134. *See id.* (manuscript at 13–15) (citing Lyondell Chem. Co. v. Ryan, 970 A.2d 235, 243 (Del. 2009)).

135. *See id.* (manuscript at 33) (citing Lyondell Chem. Co., 970 A.2d at 243).

136. *In re* Lear Corp. S'holder Litig., 967 A.2d 640, 654 (Del. Ch. 2008).

137. Leahy, *supra* note 20 (manuscript at 34); *see also id.* (manuscript at 15) ("Only when a board engaged in essentially no conduct whatsoever to address the concern raised by plaintiffs will the board have 'utterly failed' to do its job.").

138. *See id.* (manuscript at 34–35) (citing Furlow, *supra* note 31, at 1078).

139. *See id.* (manuscript at 35–36) (comparing Sealy Mattress Co. of N.J. v. Sealy, Inc., 532 A.2d 1324 (Del. Ch. 1987) with Smith vs. Van Gorkom, 488 A.2d 858 (Del. 1985)).

140. *See id.* (manuscript at 36) (citing Gold, *supra* note 69, at 427; Lund, *supra*

Absent a smoking gun, another way to prove bad faith is to establish that the directors who approved the decision in question were not "independent." Although the Delaware courts have not said so explicitly, a board that makes material decisions while lacking independence clearly acts in bad faith.[141] (This falls within the catch-all category.) The inquiry into a director's independence "focuses on the relationship between the defendant and a person who is interested in the transaction in question":[142] A director lacks independence when she cannot "base her judgments on the corporate merits without being influenced by extraneous influences, such as personal relationships the director has with" interested persons.[143] For example, a director lacks independence when she is "beholden to" an interested director or "so under the [interested director's] influence that [her] discretion [was] sterilized."[144] Proving this is not easy: it is not enough for a plaintiff merely to show that the interested director and the director who supposedly lacked independence were friends or colleagues; the plaintiffs must establish that the former director "dominated" the latter director.[145]

Even in the absence of actual domination, Delaware courts may be influenced by power relationships that are akin to domination, such as the relationship between "an imperial CEO . . . [and] a supine or passive board."[146] This was the situation in *Disney*: although the board did not *technically* lack independence, the court concluded that it was a close call. Eisner "was a powerful CEO who had hand-picked a board that was highly unlikely to stand up to him."[147] This sort of quasi-lack of independence may be insufficient on its own to prove conscious disregard in light of the *Lyondell* court's clarification

note 31, at 413).

141. *See id.* (manuscript at 37) (citing, *inter alia*, Furlow, *supra* note 31, at 1094).

142. *Id.* (manuscript at 37) (citing E. Norman Veasey & Christine T. Di Guglielmo, *What Happened in Delaware Corporate Law and Governance from 1992–2004? A Retrospective on Some Key Developments*, 153 U. PA. L. REV. 1399, 1472 n.312 (2005)).

143. Chesapeake Corp. v. Shore, 771 A.2d 293, 299 n.4 (Del. Ch. 2000).

144. Rales v. Blasband, 634 A.2d 927, 936 (Del. 1993).

145. Leahy, *supra* note 20 (manuscript at 38) (citing Telxon Corp. v. Meyerson, 802 A.2d 257, 264 (Del. 2002)).

146. *Disney III*, 907 A.2d 693, 760 n.487 (Del. Ch. 2005).

147. Leahy, *supra* note 20 (manuscript at 41) (citing *Disney III*, 907 A.2d at 760–61).

that bad faith requires an utter failure to act.[148] However, the existence of a powerful CEO and weak board may provide additional proof of bad faith in combination with other, similarly weak proof—a not-quite-smoking gun, for example.[149]

* * * * *

Having summarized the meaning of bad faith, we can now assess whether, and under what circumstances, management acts in bad faith by causing the corporation to make a political contribution. Part III does just this, and concludes that many corporate political contributions (in public and close corporations alike) probably constitute bad faith. Part III therefore concludes that shareholder plaintiffs who challenge corporate political contributions are more likely to succeed when alleging bad faith than when alleging waste or self-dealing.

Yet, Part III also concludes that plaintiffs will have a difficult time proving that a board's dominant motive in making a political contribution was bad faith. For this reason, Part IV advances a novel argument that dispenses with the requirement of proving the board's specific intent when making a political contribution: essentially *all* political contributions made by public corporations are inherently bad faith.

III. BAD FAITH IS A SUPERIOR BASIS FOR CHALLENGING CORPORATE POLITICAL CONTRIBUTIONS

As described above, establishing that management acted in bad faith is no easy task. Nonetheless, bad faith is a better theoretical foundation for a shareholder derivative plaintiff's duty of loyalty claim than either waste or self-dealing when the shareholder is challenging a corporate political contribution. This Part will explain why.[150] But first, a brief explanation of

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148. *See id.* (manuscript at 41–42).

149. *See id.* (manuscript at 42).

150. This explanation actually spans two articles. The first part of the argument, summarized below in Part III.A—that waste claims will almost always fail and self-dealing claims will succeed only in narrow factual circumstances—appears in an earlier article. *See* Leahy, *supra* note 3, at 303–69 (assessing whether shareholder plaintiffs could successfully challenge corporate political contributions as waste or self-dealing, and, in the process, critiquing William Alan Nelson II, *Post-*Citizens United*: Using Shareholder Derivative Claims of*

waste and self-dealing is in order.[151]

A. *Waste and Self-Dealing Claims Will Rarely Succeed*

Waste occurs when a transaction is "so one sided that no business person of ordinary, sound judgment could conclude that the corporation has received adequate consideration"[152] or when a transaction "cannot be 'attributed to any rational business purpose.'"[153] Self-dealing occurs when a director (or a proxy for the director, such as a spouse or close relative living with the director[154]) receives a material[155] "personal financial benefit" from a transaction "that is not equally shared by the stockholders."[156] The personal financial benefit can either be direct, such as when a director herself "stands on both sides of" a transaction with the corporation, or indirect, such as "when someone *other* than the director" of the corporation (e.g., a proxy for the director) stands on the opposite side of a transaction with the corporation.[157] Self-dealing is a breach of the duty of loyalty unless the transaction is objectively fair to

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Corporate Waste to Challenge Corporate Independent Political Expenditures, 13 NEV. L.J. 134, 135 (2012) (urging that the corporate waste doctrine could be used to challenge political contributions) and Jonathan Romiti, *Playing Politics With Shareholder Value: The Case for Applying Fiduciary Law to Corporate Political Donations Post-*Citizens United, 53 B.C. L. REV. 737, 737 (2012) (arguing that political contributions might be challenged as self-dealing or waste)). The second part of the argument is set forth in Parts III and IV, below.

151. For a detailed discussion of these two theories of liability, see Leahy, *supra* note 3, at 303–10 (waste), 344–48 (self-dealing).

152. Brehm v. Eisner, 746 A.2d 244, 263 (Del. 2000) (quoting *Disney I*, 731 A.2d 342, 362 (Del. Ch. 1998)). This is an objective inquiry. *See* Leahy, *supra* note 3, at 304–08 (citing *Brehm*, 746 A.2d at 263).

153. *Disney IV*, 906 A.2d 27, 74 (Del. 2006) (quoting Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971)). This is a subjective inquiry. *See* Leahy, *supra* note 3, at 308.

154. *See* Leahy, *supra* note 3, at 345–46 nn.341–42 (citing, *inter alia*, Bayer v. Beran, 49 N.Y.S.2d 2, 7 (N.Y. Sup. Ct. 1944) (applying entire fairness standard to transaction between corporation and spouse of corporation's CEO)). Close friends are not generally viewed as proxies, however. *See id.* at 349–52 (explaining that no court has held that a transaction resulting in a material financial gain to a close friend of a director was deemed to be self-dealing).

155. *See* Orman v. Cullman, 794 A.2d 5, 23 (Del. Ch. 2002) ("[I]t is not enough to establish the interest of a director by alleging that he received *any* benefit not equally shared by the stockholders. Such benefit must be alleged to be *material* to that director.").

156. Rales v. Blasband, 634 A.2d 927, 936 (Del. 1993) (citing Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984)).

157. *See* Leahy, *supra* note 3, at 345–46 (citing, *inter alia*, BAINBRIDGE, *supra* note 66).

the corporation or approved by disinterested and independent directors or shareholders in accordance with a statutory "safe harbor."[158] Waste is also probably a breach of the duty of loyalty, because it is an extreme example of bad faith.[159]

Waste is a poor basis to challenge a corporate political contribution because the waste standard is nearly impossible to satisfy.[160] As a result, only a contribution to a fringe candidate who offends most Americans would qualify as waste.[161] By contrast, self-dealing may be a viable claim in some instances, such as when a candidate advocates policies that favor the financial interests of the corporation's management over those of most Americans.[162] Yet, although self-dealing is certainly a better theory than waste,[163] self-dealing claims will rarely succeed "due to the attenuated causal connection between a . . . contribution and any personal financial benefit that directors might stand to gain from such a contribution."[164]

B. *Why Bad Faith Is a Superior Theory*

Bad faith is a better argument than self-dealing or waste for a derivative plaintiff to advance when challenging a corporate political contribution. Although it is by no means guaranteed to succeed, bad faith offers derivative plaintiffs a superior chance of success because bad faith is a "broader"[165]

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158. *See id.* at 347 (citing, e.g., DEL. CODE ANN. tit. 8 § 144(a) (2014)).

159. *See id.* at 308–09 (explaining that because waste generally constitutes bad faith, and acts in bad faith constitute a breach of the duty of loyalty, waste necessarily constitutes a breach of the duty of loyalty). However, the matter is not settled. *See supra* note 13.

160. *See* Leahy, *supra* note 3, at 307, 309 (citing Kates v. Beard Research, Inc., No. 1480-VCP, 2010 WL 1644176, *5 (Del. Ch. 2010) ("[T]he standard for corporate waste [is] onerous, stringent, extremely high, and very rarely satisfied."); Steiner v. Meyerson, No. 13139, 1995 WL 441999, at *5 (Del. Ch. July 19, 1995) (Allen, C.) ("[T]he waste theory represents a theoretical exception . . . very rarely encountered in the world of real transactions.")).

161. *See id.* at 340–41.

162. *See id.* at 360–61.

163. *See id.* at 367–69.

164. *Id.* at 291.

165. JAMES D. COX & THOMAS LEE HAZEN, 2 CORPORATIONS § 10:12 (3rd ed. 2010); *accord* Hill & McDonnell, *Expanding Duty*, *supra* note 9, at 1778 (describing Stone v. Ritter, 911 A.2d 362 (Del. 2006), as "widening of the duty of loyalty"); *id.* at 1780 ("[C]lassic formulations of the duty of loyalty were much too limited. A broader formulation was needed to capture conduct that fell outside those bounds but was more than simply generic inattention . . ."—"something rather more culpable" than mere "snoozing," but not quite "stealing.").

and more "flexible"[166] theory than waste or self-dealing.

1. Bad Faith vs. Self-Dealing

Actions qualify as self-dealing only when a director conflict implicates a *material financial* interest of that director (or her proxy).[167] Bad faith, by contrast, applies *whenever* a director does not intend to act in the corporation's best interest; it is "irrelevant precisely why [the] director has chosen to act improperly."[168] No financial conflict of interest—material or otherwise—is required.[169] Bad faith therefore encompasses a far greater range of potential misconduct than self-dealing.[170]

As a result, "bad faith" is broad enough to include *any* situation where a director places her own personal interests ahead of the best interest of the corporation.[171] This opens up a

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166. Duggin & Goldman, *supra* note 31, at 270.

167. *See supra* notes 155–56 and accompanying text.

168. Gold, *supra* note 69, at 416 (citing Guttman v. Huang, 823 A.2d 492, 506 n.34 (Del. Ch. 2003)); *see also supra* Part II.B.2 (describing one definition of bad faith as an extremely broad catch-all category).

169. *See* Hill & McDonnell, *Expanding Duty*, *supra* note 9, at 1778 (describing *Stone*, 911 A.2d 362, as clarifying that "[n]o longer is loyalty only about 'financial or other cognizable fiduciary conflict of interest.' It also includes good faith"); *id.* at 1779–80 (distinguishing good faith from "classic duty of loyalty cases [that] involve directors . . . taking for themselves in a very tangible . . . way what should otherwise belong to the corporations"); Gold, *supra* note 69, at 409 (explaining that, after *Stone*, the duty of loyalty extends to "contexts where fiduciaries fail to act in good faith, even though the fiduciaries may not have pecuniary or other cognizable conflicts of interest").

170. *See* Sean J. Griffith, *Good Faith Business Judgment: A Theory of Rhetoric in Corporate Law Jurisprudence*, 55 DUKE L.J. 1, 14, 34 (2005) (observing that the Delaware courts have used good faith "as a loose rhetorical device that courts can wield to find liability or enjoin actions that do not quite fit within established doctrinal categories"); Renee M. Jones, *The Role of Good Faith in Delaware: How Open-Ended Standards Help Delaware Preserve Its Edge*, 55 N.Y.L. SCH. L. REV. 499, 510 (2011) (urging that good faith "has functioned as a vise, a tool that judges can tighten and loosen in response to economic and political controversies"); Hill & McDonnell, *Expanding Duty, supra* note 9, at 1789 ("Good faith is . . . nebulous . . . . It includes many different kinds of factual circumstances, united by the fact that we have some reason to be concerned about director objectivity . . . ."); *id.* at 1780 ("The duty of good faith thus offers a conceptual framework, under . . . the duty of loyalty, to encompass cases of culpable conduct not constituting breaches of the duty of loyalty as traditionally conceived." (emphasis omitted)).

171. *See Disney III*, 907 A.2d 693, 754 (Del. Ch. 2005) (reasoning that bad faith can result from "any emotion that may cause a director to intentionally place his own interests, preferences or appetites before the welfare of the corporation") (quoting *Guttman*, 823 A.2d at 506 n.34); *Disney IV*, 906 A.2d 27, 66 (Del. 2006) (stating that "intentional dereliction of duty, a conscious disregard for one's responsibilities" constitutes bad faith); *accord* Nagy v. Bistricer, 770 A.2d 43, 48–

wide range of possibilities. With the addition of the "new" bad faith, the scope of the duty is far more expansive than it was previously, when it was limited to intent to harm the corporation (classic bad faith) or material financial conflicts of interest (self-dealing). In short, according to Professors Claire Hill and Brett McDonnell, if all actionable conduct by directors were "arrayed on a continuum," where the single axis is the level of culpability of conduct, the "new" bad faith would cover "the vast middle ground" between less culpable conduct that constitutes a breach of the duty of care (e.g., gross negligence) and other, more culpable conduct that constitutes a breach of the duty of loyalty (e.g., classic bad faith conduct that involves ill will, dishonesty, malicious intent, etc.).[172]

Bad faith is therefore more likely to cover a transaction when a director has "a relationship with a transaction or parties . . . that is not itself sufficient to bring the conflict-of-interest rules into play" but "nonetheless . . . raises a reasonable doubt regarding that director's or officer's impartiality."[173] Essentially, bad faith is a way of describing—and proscribing—director conduct that is motivated by some improper purpose *other than* her own financial interests.[174]

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49 n.2 (Del. Ch. 2000) (The "utility" of good faith is its "constant reminder . . . that a fiduciary may act disloyally for a variety of reasons other than personal pecuniary interest . . . ."); *Guttman*, 823 A.2d at 506 n.34 ("The reason for the disloyalty (the faithlessness) is irrelevant, the underlying motive (be it venal, familial, collegial, or nihilistic) for conscious action not in the corporation's best interest does not make it faithful, as opposed to faithless.").

172. Hill & McDonnell, *Expanding Duty*, *supra* note 9, at 1770 (proposing that "traditional care cases . . . that raise no concern about the objectivity of directors" where "the only conflict . . . arises from the natural human tendency not to work as hard or carefully as one might when one is not reaping all the fruits of one's labors" appears at one end of a continuum; "traditional loyalty cases . . . in which the objectivity of directors and officers is clearly impaired" because "a decision maker has a material pecuniary interest that directly conflicts with that of the corporation" at the other end; and "cases where director or officer objectivity is impaired, but less so than in traditional loyalty cases" in "the vast middle ground").

173. 2 TREATISE ON THE LAW OF CORPORATIONS § 10:12 (3d) (2013); *see also id.* ("[I]mpartiality sufficient for the director to act in good faith requires much more than the absence of . . . a direct or indirect financial interest in the subject matter before the board.").

174. *See* Furlow, *supra* note 31, at 1087–88 ("The duty of loyalty is . . . violated when directors base their decision on a motive other than a good-faith belief that it will serve the best interests of the corporation . . . . The fact that the directors who made the challenged decision were independent and disinterested does not guarantee that they have satisfied their duty of loyalty. It merely means that their impartiality was not compromised by financial self-interest. Other

2. Bad Faith vs. Waste

Bad faith does even better by comparison to waste. Waste essentially occurs only when a transaction is objectively irrational[175] or is subjectively intended to further no plausible corporate purpose.[176] By contrast, management acts in bad faith when its conduct, although rational and plausibly for a corporate purpose, was in fact intended primarily for a purpose *other than* to benefit the corporation.[177] In essence, waste is an extreme example of bad faith conduct. It stands to reason that directors act primarily for self-serving reasons (even in the absence of self-dealing) more often than they act irrationally or without any intent whatsoever to serve the corporation.

C. Examples of Bad Faith Corporate Political Contributions

If we accept that a political contribution could, in theory, constitute bad faith, the next questions might be: what do such contributions look like and do they exist in the real world?

This section answers both questions. Unfortunately, corporate political contributions are rarely disclosed to the corporation's shareholders or the general public.[178] As a result, this section offers only one real-life example; the remaining examples are hypothetical, albeit plausible. Fortunately, however, the one real-life situation highlighted below is a paradigmatic example of bad faith.

1. From the Headlines: News Corp.'s Contribution to the RGA

a. Murdoch/Kasich as Analogous to Eisner/Ovitz

In August 2010, News Corporation (News Corp.) donated $1 million to the Republican Governor's Association (RGA).[179]

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circumstances may cause a director to base a decision on reasons other than a good-faith belief that it will serve the corporation's best interests.").

175. *See* Leahy, *supra* note 3, at 304–06 (discussing "objective waste" standard).

176. *See id.* at 308 (discussing "subjective waste" standard).

177. *See supra* note 104 and accompanying text.

178. *See supra* note 6.

179. Eric Lichtblau & Brian Stelter, *News Corp. Gives Republicans $1 Million,*

In October 2010, journalists asked News Corp.'s CEO, Rupert Murdoch, whether the contribution indicated that the company—and the news channel it operated, Fox News—was biased toward the Republican party.[180] In response, Murdoch said that the contribution had "nothing to do with Fox News."[181] Rather, Murdoch explained, the contribution was a result of his "friendship with John Kasich," a candidate for governor of Ohio.[182] In so doing, Murdoch contradicted an earlier statement by a News Corp. spokesman, who had said that News Corp. made the contribution to support the RGA's "pro-business" agenda.[183]

Here, News Corp.'s RGA contribution clearly was not direct self-dealing by Murdoch. He has no official affiliation with the RGA, and therefore there is no reason to believe that he received any personal financial benefit from the contribution. Nor was the contribution indirect self-dealing. Murdoch's friend Kasich is not Murdoch's "proxy" for self-dealing purposes.[184]

The contribution also was not waste. The contribution was not utterly irrational,[185] because it went to a major-party candidate.[186] Further, there was no basis to dispute the News Corp. spokesman's statement that the contribution was intended—at least in part—to benefit the company by supporting "pro-business" candidates. Accordingly, the contribution served a plausible business purpose.[187]

Yet, Murdoch's admission was a classic smoking gun that provided unambiguous insight into the true motivation behind a corporate political contribution. Despite the News Corp.

N.Y. TIMES (Aug. 18, 2010), http://www.nytimes.com/2010/08/18/us/politics/18donate.html, *archived at* http://perma.cc/GDE8-TFPQ.

180. *See* Keach Hagey, *Kasich Inspired News Corp.'s RGA Gift*, POLITICO (Oct. 6, 2010, 11:45 PM), http://www.politico.com/blogs/onmedia/1010/Kasich_inspired_News_Corps_RGA_gift.html, *archived at* http://perma.cc/8GR3-BHSF.

181. *Id.*

182. *Id.*

183. *See id.* (quoting "a News Corp spokesman" as saying that "News Corporation believes in the power of free markets, and the RGA's pro-business agenda supports our priorities at this most critical time for our economy").

184. *See* Leahy, *supra* note 3, at 349–52.

185. *See id.* at 304–06 (discussing objective waste standard, which is essentially an irrationality test).

186. *See id.* at 340 (arguing that contributions to major party candidates are probably never waste).

187. *See id.* at 308–09 (discussing subjective waste standard, which is a lack of any corporate purpose).

spokesman's alternative explanation, Murdoch's admission should be sufficient for a plaintiff to survive summary judgment on the question of whether News Corp. gave money to the RGA primarily to benefit Murdoch's friend Kasich and only secondarily to benefit the company. Benefitting a friend is a classic example of a motive "other than the best interests of the corporation." Indeed, the facts here closely track the facts alleged in *Disney*, where the CEO (there, Eisner; here, Murdoch) supposedly did a favor for his buddy (there, a job for Ovitz; here, a contribution in support of Kasich).[188] This is *clearly* bad faith.[189]

The composition of Murdoch's board of directors[190] at the time of the RGA contribution provides further support for a finding that the contribution was made in bad faith. Like The Walt Disney Co. under Eisner,[191] News Corp. under Murdoch was (and News Corp.'s successor entities are[192]) a classic case of an imperial CEO and a supine board.[193] Indeed, Murdoch was *far* more dominant at News Corp. in 2010 than Eisner was at his apogee at The Walt Disney Co. because Murdoch was not only CEO but also controlling shareholder of News Corp. (and its successors).[194] Thus, unlike Eisner, who *effectively*

188. *See supra* Part II.B.1.

189. *See supra* notes 105–09 and accompanying text.

190. The phrasing "Murdoch's board of directors," instead of "News Corp.'s board of directors," is intentional. *Cf. Disney III*, 907 A.2d 693, 761 (Del. Ch. 2005) ("Eisner stacked his (and I intentionally write 'his' as opposed to 'the Company's') board of directors with friends and other acquaintances . . . .").

191. *See supra* notes 146–49 and accompanying text.

192. In 2013, News Corp. divided itself into two separate entities, a new corporation named News Corp and a new corporation named 21st Century Fox. Chris Isidore, *News Corp. Split Creates Print Media Giant*, CNNMONEY (June 28, 2013), http://money.cnn.com/2013/06/28/news/companies/news-corp-split, *archived at* http://perma.cc/7EKZ-REBJ. Murdoch remains the chairman of the board and controlling shareholder of both corporations. *See* Ravi Somaiya et al., *Putting 2 Sons in Top Posts, Murdoch Guards His Dynasty*, N.Y. TIMES (Mar. 27, 2014), http://www.nytimes.com/2014/03/27/business/lachlan-murdoch-is-named-to-a-top-news-corp-position.html, *archived at* http://perma.cc/ 8E2W-LPPD; Edmund Lee & Amy Thomson, *Lachlan Murdoch Re-Emerges as Contender for Top Role at News Corp.*, BLOOMBERG (Mar. 26, 2014), http://www.bloomberg.com/news/2014-03-26/lachlan-murdoch-re-emerges-as-contender-for-top-role-at-news-corp-.html, *archived at* http://perma.cc/7JRT-TXRZ (describing Murdoch's control of the family trust).

193. *See* Nell Minow, *Rupert's Board: Too Weak to Stand Up to Him Then—or For Him Now*, CBS NEWS (July 12, 2011), http://www.cbsnews.com/news/ruperts-board-too-weak-to-stand-up-to-him-then-or-for-him-now, *archived at* http://perma .cc/3492-T2K7.

194. *Id.* (describing News Corp.'s dual-class stock structure that gives Murdoch

controlled appointments to the board due to his capacity as CEO (since shareholders tend to be rationally apathetic and approve management's slate of directors[195]), Murdoch *actually* controlled the News Corp. board of directors at the time of the RGA contribution. And he continues to do so, running his large, publicly traded empire "like a small family firm."[196]

Due to Murdoch's control, at the time of the RGA contribution, News Corp.'s board—although technically comprised of mainly outside directors—was dominated by Murdoch's flunkies.[197] The board included many directors with "deep and personal ties" to Murdoch, such as the "godfather to one of [his] grandchildren"; as well as directors who "owe[d] their careers to" Murdoch or "made millions . . . making him richer," such as an investment banker who "helped News Corporation broker mega deals."[198] This board of handpicked

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voting control of the company); *see also* Meg James, *News Corp. Investor Vote Could Renew Debate on Stock Structure*, L.A. TIMES (June 10, 2013), http://articles.latimes.com/2013/jun/10/entertainment/la-et-ct-news-corp-investor-vote-debate-on-stock-20130610, *archived at* http://perma.cc/MT9P-GUPG (same); Nathaniel Parish Flannery, *Rupert Murdoch Maintains Control of News Corp.*, FORBES (Oct. 24, 2011), http://www.forbes.com/sites/nathanielparishflannery/2011/10/24/how-rupert-murdoch-maintains-control-of-news-corp, *archived at* http://perma.cc/W6DF-MM56 (same); Kate Holton & Jennifer Saba, *Murdoch Sets Up Sons To Take Over Media Empire*, REUTERS (Mar. 26, 2014), http://www.reuters.com/article/2014/03/26/us-twentyfirstcenturyfox-appointment-idUSBREA2P0JQ20140326, *archived at* http://perma.cc/6Q2G-TM6Z (same).

195. *See* Leahy, *supra* note 3, at 288 (describing the collective action problem faced by small shareholders of large public companies) (citing ALLEN ET AL., *supra* note 8, at 154; Hill & McDonnell, *Good Faith*, *supra* note 31, at 854).

196. Somaiya et al., *supra* note 192. Shortly after breaking News Corp. into two different corporations, Murdoch installed his two sons at the helm of those two companies. *See id.* (noting that Murdoch is atypical among controlling shareholders of publicly held companies in that, for example, he recently installed his two sons as heads of News Corp.'s two successor companies, much like the controlling shareholder of a family firm might do); *see also* Holton & Saba, *supra* note 194.

197. Rachael Beck, *News Corp. Board is Far From Independent*, PHILLY.COM (July 20, 2011), http://articles.philly.com/2011-07-21/business/29798046_1_murdoch-family-news-corp-murdoch-controls, *archived at* http://perma.cc/SDK6-CNUL (describing the News Corp. board as "dominated by Rupert Murdoch's relatives, confidants and handpicked executives").

Post-*Lyondell*, the mere existence of an "imperial CEO" and a "passive board," probably is insufficient to raise an inference that any questionable board decision that favors a friend of the CEO reflects board rubber-stamping of the CEO's ideas. Yet, such a power dynamic surely provides supporting evidence of bad faith. *Cf. Disney III*, 907 A.2d at 760 n.487 (bad faith can prove "highly meaningful" when the board "is not legally beholden to the management" but there nonetheless exists a relationship of "imperial CEO" and a "passive board" as in *Disney*).

198. Jeremy W. Peters, *News Corp.'s Independent Directors Have Strong Ties*

Murdoch cronies offered no indication that it would stand up to him if he tried to spend company funds for his own purposes.[199] Indeed, News Corp.'s board was, at the time of the RGA contribution, among the *least* independent boards of *any* publicly traded company.[200]

In light of (1) Murdoch's admission about his true motives and (2) his docile board, a complaint challenging News Corp.'s contribution to RGA as bad faith surely would survive a motion for summary judgment. These two facts should be more than enough to raise a material issue of fact that News Corp.'s proffered justification for the contribution (promoting a "pro-business" agenda) was mere pretext.

b. *The Difficulty of Proving Motivation*

Yet, without Murdoch's admission, the result would be completely different. Without this important insight into Murdoch's true motives, it would be extremely difficult (even with his crony-packed board) for a plaintiff to prove that the *primary* purpose of News Corp.'s contribution to the RGA was to benefit Murdoch's friend Kasich rather than to advance the

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to Murdoch, N.Y. TIMES (Aug. 9, 2011), http://mediadecoder.blogs.nytimes.com/2011/08/09/news-corp-s-independent-directors-have-strong-ties-to-murdoch, *archived at* http://perma.cc/9N4M-S4TN (describing the close ties between Murdoch and six of News Corp.'s nine supposedly "independent" directors in 2011: Roderick Eddington, who has been "deputy chairman of Mr. Murdoch's Australian subsidiary, News Ltd.," and the head of "Ansett Australia, the airline in which News Corporation owned a 50-percent stake"; "Natalie Bancroft, the opera singer whose family agreed to sell Dow Jones and The Wall Street Journal to Mr. Murdoch in 2007, and who made a sizeable fortune of her own from News Corporation's $5 billion purchase"; "Ken Cowley, who was chief executive and chairman of News Limited for nearly 20 years in the 1980s and 1990s"; "Viet Dinh . . . godfather to a son of Lachlan Murdoch, the oldest of Mr. Murdoch's children"; "Andrew Knight, who was executive chairman of News International from 1990 to 1994"; and "John L. Thornton, the former Goldman Sachs president, who worked with News Corporation on a number of major deals").

199. *See* Andrew Ross Sorkin, *Murdoch's Board Stays on Sidelines*, N.Y. TIMES (July 19, 2011), http://query.nytimes.com/gst/fullpage.html?res=9F03E4DD153CF93AA25754C0A9679D8B63, *archived at* http://perma.cc/5NYL-TLSC (quoting corporate governance watchdog Nell Minow) (opining that News Corp.'s board of directors "is the ultimate crony board").

200. *See* Minow, *supra* note 193 (positing that Murdoch "packed the [News Corp.] board with family and friends to make sure no one would challenge him"; and pointing out that her company, GovernanceMetrics International, which "rates the effectiveness of boards . . . for . . . liability insurers" and others has "consistently given News Corp an F, only because there is no lower grade").

company's best interests.[201]

Had Murdoch simply kept his true motivations to himself when pressed by the press, he would be in a much better position to defeat a derivative plaintiff's bad faith claim. Murdoch could argue, when defending the lawsuit, that News Corp.'s political contribution serves *both* the corporation, primarily, and his friendship with Kasich, secondarily—and a plaintiff would be hard pressed to prove otherwise. Without Murdoch's admission, a plaintiff would have to contend with two difficult facts: (1) Murdoch is widely known to be a conservative Republican[202] and (2) News Corp. contributed a similar sum to another Republican-leaning organization, the U.S. Chamber of Commerce, in the 2010 election cycle.[203] Those

201. *See supra* Part II.C and accompanying text (bad faith inquiry focuses on management's primary purpose); *see also* Strassburger v. Earley, 752 A.2d 557, 581–82 (Del. Ch. 2000) (opining in dicta that an unconflicted, independent director's decision would have constituted bad faith if it had been motivated "deliberately to benefit" the corporation's president or its controlling shareholder at the at the expense of the minority stockholders).

The question of whether the board acted to benefit a friend or colleague, rather than the corporation, often presents itself in the context of a hostile takeover attempt, when outside directors move to thwart the takeover attempt by approving defensive measures that save the jobs of management. Since Delaware law does not view outside directors as having a material financial interest in remaining directors (despite the substantial fees they receive for serving on the board), these directors are technically not engaged in self-dealing. *See* Ethan G. Stone, *Business Strategists and Election Commissioners: How the Meaning of Loyalty Varies with the Board's Distinct Fiduciary Roles*, 31 J. CORP. L. 893, 909–10 (2006) ("Delaware courts do not presume that retaining a seat on the board is materially important to any director . . . ."). Further, unless the plaintiff can prove that the inside directors whose jobs were saved by the defensive measures "dominated" the outside directors in some way, the outside directors are not viewed as lacking independence under Delaware law. *See id.* Nonetheless, if plaintiffs could prove that the outside directors decided to implement the defensive measures primarily to benefit the inside directors—i.e., as a personal favor to their colleagues on the board—this would be bad faith on the part of the outside directors. Furlow, *supra* note 31, at 1089.

202. *See* Jason Horowitz, *At Derby Day With Murdoch, Rand Paul Goes Through His Paces*, N.Y. TIMES (May 4, 2014), http://www.nytimes.com/2014/05/05/us/politics/at-derby-day-with-murdoch-rand-paul-goes-through-his-paces.html, *archived at* http://perma.cc/4PGS-TB9L (describing Murdoch as "arguably the most powerful broker in Republican politics"); David Folkenflik, *Rupert Murdoch's News Corp. Gives Big To GOP,* NAT'L PUB. RADIO (Aug. 18, 2010), http://www.npr.org/templates/story/story.php?storyId=129277651, *archived at* http://perma.cc/3NQ6-JQSZ (Murdoch is "known for his conservative views").

203. *See* Jim Rutenberg, *News Corp. Donates $1 Million to U.S. Chamber of Commerce*, N.Y. TIMES (Oct. 1, 2010), http://thecaucus.blogs.nytimes.com/2010/10/01/news-corp-donates-1-million-to-anti-democrat-group, *archived at* http://perma.cc/GDE8-TFPQ ("News Corporation . . . has donated $1 million to the United States Chamber of Commerce, the business advocacy group that is among

facts would make it easy for Murdoch to argue, when defending against a derivative lawsuit, that he honestly believed that supporting Kasich (and other "pro-business" Republican gubernatorial candidates) was best for News Corp.'s shareholders in the long term.[204] Murdoch could argue that, if a "pro-business" candidate like Kasich (or any other Republican candidate supported by the RGA) were elected governor, he or she could be expected to support "pro-business" policies like reducing government regulation. Since, according to Republican dogma, government regulation harms business,[205] reducing such regulations would undoubtedly lead to greater financial returns for News Corp., and thereby increase its shareholders' returns.[206] As a staunch Republican,[207] Murdoch could plausibly argue that he believed each of these statements.

And plausibility is all that Murdoch needs here. The business judgment presumption demands that a plaintiff *prove* management acted primarily for an improper purpose; a court will not simply *assume* it.[208] Hence, a plaintiff must allege facts in the complaint (and on summary judgment, produce evidence to raise a material issue of fact) to show that the board acted in bad faith. If the board's intent is entirely ambiguous, such that its decision could have been motivated primarily by *either* a

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the heaviest anti-Democratic advertisers in this year's elections.").

204. In fact, Murdoch said something similar at News Corp.'s 2010 annual shareholder meeting: "We believe that it is certainly in the interest of . . . all the shareholders . . . [that] there be a fair amount of change in Washington." Sarah Pavlus, *AUDIO: Murdoch Says News Corp. Donations Were in Interest of "Shareholders and the Country"*, MEDIA MATTERS (Oct. 15, 2010), http://mediamatters.org/blog/2010/10/15/audio-murdoch-says-news-corp-donations-were-in/172001, *archived at* http://perma.cc/F7LP-S93M.

205. *See, e.g.*, WE BELIEVE IN AMERICA 2012—REPUBLICAN PARTY PLATFORM 32–33 (2012) [hereinafter REPUBLICAN PARTY PLATFORM], *available at* http://www.gop.com/2012-republican-platform_home, *archived at* http://perma.cc/84UE-CBLF ("Republicans believe in the Great American Dream . . . . It is the opposite of the policies which . . . have placed the federal government in the driver's seat, rather than relying on energetic and entrepreneurial Americans to rebuild the economy from the ground up. Excessive . . . regulation impede[s] economic development. [R]educing regulation encourages business formation and job creation.").

206. Further, despite Murdoch's admission that the RGA gift occurred due to his friendship with Kasich, the remainder of the board could plausibly argue that they approved the contribution not because of Murdoch's friendship with Kasich, but rather, because they, too, are staunch Republicans.

207. *See supra* note 202 and accompanying text.

208. *See supra* notes 135–38 and accompanying text.

proper motive *or* an improper one, the plaintiff must allege facts (and, on summary judgment, provide evidence) to overcome the ambiguity. Otherwise, a court must conclude that the board's motivation was proper.[209] Therefore, in the absence of strong proof of motive, a plaintiff could not raise a material issue of fact about whether News Corp.'s contribution to the RGA was made in bad faith.

2. Other Plausible Examples of Bad Faith Political Contributions

The News Corp./RGA scenario, in which a corporation makes a contribution in support of the candidacy of the CEO's friend, is just one of myriad ways in which a corporate political contribution could reflect management's bad faith. Other situations abound. Three hypothetical examples, each a slight modification of the News Corp./RGA facts, will be illustrative.

Example 1: The imperial CEO of a large, publicly traded health insurance company, InsurCorp, demands that her supine board (which is packed with her pseudo-independent cronies) cause InsurCorp to make a large political contribution in support of the Republican nominee for President of the United States. The board agrees[210] and the corporation makes a major donation to the Super PAC that supports the Republican nominee. A central plank in the Republican Party's platform is to repeal the Affordable Care Act (ACA).[211] The

209. *See supra* note 125 and accompanying text. Perhaps for this reason, although a recent shareholder derivative suit against Murdoch and the News Corp. board mentioned the RGA contribution in passing, and although the complaint alleged a bad faith claim, none of the causes of action explicitly addressed the RGA contribution. *See, e.g.*, Verified Third Amended Consolidated Complaint, *In re* News Corp. S'holder Derivative Litig., No. 6285-VCN (Del Ch., June 18, 2012), *available at* http://www.newscorpderivativesettlement.com/pdf/complaint.pdf, *archived at* http://perma.cc/M4JU-X6NM.

210. In each of the examples below, the board of directors will approve the political contribution. This is not necessarily required, however. A political contribution would be a *de minimis* expense for a large public corporation. Accordingly, many CEOs do not even bother to consult the board before causing the corporation to make a political contribution. *See* Bebchuk & Jackson, *supra* note 7, at 88.

211. *See* REPUBLICAN PARTY PLATFORM, *supra* note 205, at 32 (section entitled "Repealing Obamacare"). There is no reason, of course, to believe that Republican CEOs have a monopoly on crony boards. Thus, with a few simple changes, this hypothetical could easily be rewritten with a liberal Democrat as its "imperial CEO" protagonist. We could simply: (1) change the CEO into an outspoken liberal who heads up a large retail chain that sells consumer goods at discount prices; (2)

CEO, an archconservative, is prone to voicing her opinions. In a speech at the Republican National Convention, in support of the Republican nominee, the CEO professes outrage that the ACA will penalize Americans for failing to purchase health insurance, among other things.[212] Separately, in its public filings with the SEC, InsurCorp projects that it will gain millions of new customers as a result of the ACA's mandate.

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change the company's donation to a Super PAC that supports the Democratic nominee for president; (3) change the location of the CEO's speech to the Democratic National Convention; (4) change the content of the company's public filings to project that it would lose market share if the prevailing wage for its employees rises, because the company's supply chain is less automated than those of its key competitors; and (5) change the subject of the CEO's speech at the convention into an appeal to reduce income inequality by raising the federal minimum wage, a plank in the Democratic Party's platform. *See* Moving America Forward: 2012 DEMOCRATIC NATIONAL PLATFORM 10 (2012), *available at* http://assets.dstatic.org/dnc-platform/2012-National-Platform.pdf, *archived at* http://perma.cc/NG74-94P6. With these alterations, the CEO's speech might be sufficient evidence that the political contribution was made to support her own political views, rather than the corporation's best interests; as a result, a bad faith claim challenging this contribution might survive a motion for summary judgment. (However, like the hypothetical Republican CEO discussed above, the hypothetical Democrat CEO could offer evidence to show that the contribution at issue was in fact intended to serve the corporation's best interest. For example, the Democrat CEO could argue that a law that places more money into the hands of low-income people—all potential discount store customers—would help the company's bottom line far more than higher wages would hurt it.)

212. *Id.* When the ACA was enacted, some health insurers may have believed that the new law would decrease their profits. Thus, it would be plausible, in this hypothetical, for InsurCorp's management to oppose the ACA for fear that it would hurt the company's bottom line. Some real health insurance companies actually did oppose the ACA, possibly for this reason. *See* Jay B. Kesten, Democratizing Corporate Political Activity 20 (Mar. 20, 2013) (unpublished manuscript), *available at* http://ssrn.com/abstract=2242107, *archived at* http://perma.cc/GWY8-XLMR ("CIGNA Corp., a large health insurer, made substantial . . . contributions to a trade association to fund attack ads on health care reform."). However, the facts of this hypothetical avoid this complication. Here, InsurCorp actually projects that the ACA will *increase* its profits. This, too, is plausible. *See* Bruce Japsen, *Despite Glitches, Obamacare Profit Windfall to Insurers Well Underway*, FORBES (Oct. 26, 2013), http://www.forbes.com/sites/brucejapsen/2013/10/26/despite-glitches-obamacare-profit-windfall-to-insurers-well-underway, *archived at* http://perma.cc/PMB9-5WR2 (reporting that, despite computer glitches in the ACA's rollout, "health insurance companies still project robust revenue growth and profits from a boom in business from newly insured Americans" due to the ACA's mandate); Bruce Japsen, *Another Sign ObamaCare Works: Wellpoint Boosts Profit Forecast*, FORBES (Mar. 21, 2014), http://www.forbes.com/sites/brucejapsen/2014/03/21/another-sign-obamacare-works-wellpoint-boosts-profit-forecast, *archived at* http://perma.cc/BFU4-QH5Z (describing how Wellpoint, "one of the nation's largest health insurance companies, raised its full-year earnings forecast, citing more than 1 million new health plan members related in part to new business from the Affordable Care Act").

Further, InsurCorp's own public filings project that its profits will surge due to the ACA's mandate, because new costs stemming from the mandate will presumably be passed along to the new insureds (many of whom will receive a government stipend to help them purchase health insurance).

This is a bad faith political contribution. What's more, a derivative plaintiff alleging bad faith should survive a motion to dismiss on these facts. Unlike the News Corp./RGA contribution, where Murdoch was supporting a friend who he also supported politically, here the imperial CEO merely promoted her own political views. Yet, that is enough to constitute bad faith because the facts unambiguously indicate that the CEO's personal opposition to the ACA is actually *contrary* to the best interests of the corporation.[213] In addition, regardless of the board's own politics, its dependence on the CEO, just as the supine Disney board was dependent on Eisner, should be enough to raise the inference that it simply bowed to the CEO's iron will.[214]

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213. This argument exemplifies how proving bad faith is easier than proving waste. The objective waste standard is essentially impossible to satisfy because it requires that the board's decision be not just unreasonable but irrational. *See* Leahy, *supra* note 3, at 306–08. Here, simply proving that that the corporation contributed to a political candidate whose political platform is inimical to the corporation's best interests is not enough to establish waste. Only if a mistaken contribution is so misguided as to be irrational will it constitute objective waste. *See id.* As a result, the business judgment rule (if it applies) would protect a mistaken board decision to contribute in good faith to an unelectable candidate. By contrast, the bad faith inquiry focuses on the board's primary intent in making a contribution. *See supra* Part II.C. Here, in light of the CEO's outspoken political views, the board's decision to contribute to a political candidate whose policies are not best for the corporation is actionable bad faith—not because the contribution is irrational, but rather, because the contribution, taken together with the CEO's political speech, shows that the contribution was made for an improper primary purpose.

214. In this example, there are no facts to suggest that the board approved the political contribution for reasons other than the CEO's own political preferences. If, by contrast, the board minutes reflected that the board explicitly approved the contribution for reasons other than the CEO's political views (i.e., because they believed she would eliminate other regulations and thereby increase InsurCorp's profitability), then plaintiffs might have a more difficult time on summary judgment. When the CEO's political beliefs are the only evidence of why the corporation made the contribution, and where the contribution definitively will harm the corporation, that should be sufficient evidence of improper motive. By contrast, when the board and CEO say different things, it becomes a closer question. Yet, the combination of the CEO's political opposition to the ACA and the fact that the contribution will objectively harm the corporation would at least seem to raise a material issue of fact on summary judgment about whether the board's stated reason for approving the contribution was pretext.

Example 2: Assume the same facts as Example 1, with one change and two additions.

First, the change: Now, the large corporation with the dominating, conservative Republican CEO and passive board of buddies is Private Prisons Inc., a for-profit corporation that builds and operates prisons under contract with the prison systems in many states. As before, the CEO publicly opposes the ACA and speaks out in support of the Republican candidate for President.

Here, since the corporation's business is now prisons rather than health insurance, the CEO's views about the ACA no longer obviously oppose the corporation's best interests. Rather, the facts are ambiguous. Assuming that the Republican nominee takes the same conservative positions on crime[215] and free markets[216] that are typically found in the Republican Party platform, it is at least plausible that electing the Republican presidential candidate could somehow benefit Private Prisons Inc. Although the candidate has not promised to build or privatize more federal prisons (and the President would have only an indirect impact on state prisons), it is certainly not too difficult to envision ways in which the election of a "law and order" and "pro-free market" candidate to national office might benefit a for-profit prison provider. Since

215. *See, e.g.*, REPUBLICAN PARTY PLATFORM, *supra* note 205, at 37–38 ("Our national experience over the last several decades has shown that citizen vigilance, tough but fair prosecutors, meaningful sentences, . . . and limits on judicial discretion can preserve public safety by keeping criminals off the streets. Liberals do not understand this simple axiom: criminals behind bars cannot harm the general public. To that end, we support mandatory prison sentencing for gang crimes, violent or sexual offenses against children, repeat drug dealers, rape, robbery and murder. . . . We oppose parole for dangerous or repeat felons. . . . In solidarity with those who protect us, we call for mandatory prison time for all assaults involving serious injury to law enforcement officers.").

216. *See, e.g.*, *id.* at 1 ("Republicans will pursue free market policies that are the surest way to boost employment and create job growth and economic prosperity for all.").

Of course, Republicans are by no means unanimous in their support of prison privatization. Although several GOP governors have pushed in recent years to privatize state prison systems, *see* Suzy Khimm, *The GOP's Jail Sell*, MOTHER JONES (Apr. 27, 2011), http://www.motherjones.com/politics/2011/04/gop-prison-privatization-ohio-florida-minnesota, *archived at* http://perma.cc/Z75G-DCQK, the defection of Republican legislators was the key reason for the failure (so far) of one Republican governor's massive prison privatization plan, *see* Chris Kirkham, *Private Prisons Bill Voted Down In Florida Senate, Thwarting Massive Expansion*, HUFFINGTON POST (Feb. 15, 2012), http://www.huffingtonpost.com/2012/02/15/private-prisons-florida-senate_n_1279822.html, *archived at* http://perma.cc/8ATY-TTJL.

the contribution no longer supports a politician whose policies are obviously adverse to the corporation—rather, they support policies that could plausibly benefit the corporation—the decision whether Private Prisons Inc. should contribute to the Republican candidate is a *classic* business judgment.

Next, the additions: The board does not obtain any information about, or undertake any on-the-record deliberation with regard to, the contribution. Rather, the board follows a classic, "grossly negligent" decision-making process: the board meeting minutes reflect that the CEO orally proposed the contribution and the board approved it without any discussion.[217]

However, in a private, off-the-record conversation, the CEO's director chums inform her that they are aware of her opposition to the ACA and that they want to support her "pet" candidate as a personal favor, in light of all that the CEO has done for the company.[218]

This is a bad faith political contribution. Approving a transaction as a favor to the CEO is bad faith, whether or not that transaction provides a material financial benefit to the CEO.[219] Spending money as a favor for the CEO is undoubtedly spending money for a purpose other than advancing the best interests of the corporation.[220] Further, it is bad faith for the CEO to engage in a transaction for the primary purpose of advancing her own political views.[221]

Unfortunately for the plaintiffs, they probably will *not* survive a motion for summary judgment when challenging this contribution. Unlike with the News Corp./RGA contribution, there is no smoking gun with which the plaintiffs can prove the CEO's motive. Nor does the board technically lack independence. Further, even if the plaintiff is permitted to

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217. *See, e.g.*, Smith v. Van Gorkom, 488 A.2d 858, 874 (Del. 1985) (holding that the board engaged in a grossly negligent decision making process when the board made a hasty decision to sell the company at a brief board meeting where they heard an oral presentation about the proposed sale but reviewed no documents and sought no expert outside advice).

218. This hypothetical is all too plausible. *Cf.* Hill & McDonnell, *Good Faith*, *supra* note 31, at 859 (explaining that bad faith could be used to evaluate corporate gifts to "'pet charities' of particular directors, especially CEOs, where the director is closely identified with the charity and has much to gain personally from gifts to that charity").

219. *See supra* Part III.B.1.

220. *See supra* Part II.B.2.

221. *See* Part II.B.2.

conduct some discovery, it seems unlikely that the CEO's director buddies will divulge their off-the-record favor to the CEO. Although the power relationship between the CEO and the board here is similar to the one that helped convince Chancellor Chandler to deny the board's motion to dismiss in *Disney*, it seems unlikely after *Lyondell* that this dynamic alone is sufficient to suggest bad faith.[222]

Further, unlike in Example 1—where the contribution squarely contradicted the corporation's best interests—here, if a plaintiff were to challenge the contribution, she would have no evidentiary basis to argue that the contribution was primarily motivated to serve the CEO's political views, rather than the corporation's best interests. When the board's intent is ambiguous and there is no smoking gun, the court must presume that the board acted in good faith. That is to say, when a court is deciding between two equally plausible primary purposes, one proper and one improper, the business judgment rule demands that the court pick the proper purpose.[223]

As a result, this contribution is an example of an act of bad faith by the board that, despite the CEO's public pronouncements about the Republican candidate, probably will go unsanctioned due to the lack of a smoking gun to prove motive.

Example 3: Finally, assume all the same facts as Example 2, but with one more change.

The change: Now the board is not comprised of a majority of outside—and therefore, ostensibly "independent"—directors. Rather, the board is comprised entirely of high- and mid-level managers who work at Public Prisons Inc. Our outspoken Republican CEO controls the salary and bonus of each of these directors, and each of them reports either directly or indirectly to the CEO.

This remains a bad faith political contribution. However, this time, the plaintiff will be able to prove it. Even in the absence of a smoking gun, these directors now lack independence under Delaware's narrow, financial-focused definition of that term: these directors are so "dominated" by the CEO that their ability to make an independent decision has been "sterilized."[224]

222. *See supra* Part II.B.1.b.
223. *See supra* Part II.D.
224. *See supra* notes 144–45 and accompanying text.

Yet, this example, while plausible, is not likely to occur in a public company—and cannot exist in a company that is publicly traded on a national exchange. In recent years, inside directors have virtually disappeared from their once-majority position on the boards of public companies. Nowadays, most large public companies have only one inside director, the CEO, on their boards.[225] Further, the national exchanges require that the boards of listed corporations be composed of a majority of "independent" directors.[226] Accordingly, the chummy-but-not-technically-dominated board of outside directors at News Corp. is probably far more common at public companies today than a board that *actually* lacks independence. Therefore, plaintiffs are more likely to come across Example 2 than Example 3, and their ability to prove bad faith will suffer as a result.[227]

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As the foregoing three examples begin to show, there are numerous different ways in which management could *make* a corporate political contribution in bad faith. However, often plaintiffs will have difficulty *proving* bad faith. In the absence of a smoking gun (e.g., an outspoken CEO) or a board that is dominated by the CEO and therefore lacks independence, a plaintiff challenging a corporate political contribution will find it difficult to rebut the presumption of good faith.

What such plaintiffs need is a theory that avoids this problem of proof.

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225. *See* Lisa M. Fairfax, *The Uneasy Case for the Inside Director*, 96 IOWA L. REV. 127, 135–36 (2010) (describing the historic trend of corporate boards, once dominated by inside directors, as declining from: the 1950s, when "some 50% of board seats"; to 1989, when "it was rare for a board to have fewer than three inside directors"; to the past decade, where one survey found that "80% of directors are independent"; to 2004, where "91% of companies had boards with two or fewer insiders"; and to 2009, where "half of S&P 500 companies had only one inside director, the CEO").

226. *See id.* at 136 n.40 (citing NYSE, NASDAQ and AMEX independence rules).

227. Hence, a single change in the hypothetical—eliminating board independence—makes bad faith extremely easy to prove. Yet, the latter fact pattern will not exist in large, publicly traded corporations. This underscores the difficulty of proving that the management of such corporations has acted in bad faith.

IV. ESSENTIALLY ALL PUBLIC CORPORATION POLITICAL CONTRIBUTIONS CONSTITUTE BAD FAITH

In order to avoid having to prove that a particular corporate political contribution was made in bad faith, plaintiffs could attempt to argue that, regardless of management's motives, *essentially all* political contributions made by large public corporations today constitute bad faith due to management's conscious disregard of the shareholders' political views. This Part describes and defends such an argument in two steps. The first section describes the argument in brief and raises two possible counterarguments. The remaining sections respond to these two counterarguments.

A. *The Argument & Murdoch's Possible Counterarguments*

1. The Argument in Brief: Ignoring Shareholders' Political Views as Conscious Disregard

Absent unusual circumstances (e.g., Minnesota's unusually stringent state campaign finance statute[228]), corporations are not required to disclose their political contributions to shareholders or the public.[229] Nor is there any requirement that management consult shareholders before making a corporate political contribution.[230] As a result, large public

228. *See* Taren Kingser & Patrick Schmidt, *Business in the Bulls-Eye? Target Corp. and the Limits of Campaign Finance Disclosure*, 11 ELECTION L.J. 21, 24–25 (2012) (describing Minnesota's "nation-leading corporate disclosure" law, which requires that "independent political groups spending more than $5,000 per year on advertising for or against a candidate running for state office [to] disclose their spending and the identity of their donors . . . during election years"). In 2012, the United States Court of Appeals for the Eighth Circuit struck down another part of the Minnesota law that required organizations spending over $100 to form "a PAC-like entity" and engage in "ongoing reporting requirements even in periods of inactivity." Jennifer A. Heerwig & Katherine Shaw, *Through A Glass, Darkly: The Rhetoric and Reality of Campaign Finance Disclosure*, 102 GEO. L.J. 1443, 1462 (2014) (citing Minn. Citizens Concerned for Life, Inc. v. Swanson, 692 F.3d 864, 877 (8th Cir. 2012) (en banc)). However, the Eighth Circuit's decision was limited to the ongoing reporting requirements for entities who did not qualify as PACs under Minnesota law; groups "whose major purpose is to influence the nomination or election of a candidate or to promote or defeat a ballot question," and which therefore qualify as PACs under Minnesota law, would still have to comply with the law's disclosure requirements. *See* Swanson, 692 F.3d at 877 n.11.

229. *See supra* note 6.

230. *See* Leahy, *supra* note 3, at 287 n.17; *see also* Ciara Torres-Spelliscy,

corporations rarely disclose specific political contributions.[231] And no such corporation consults its shareholders before making a political contribution.[232] It would be a simple matter for a shareholder derivative plaintiff to prove any of these propositions in court.

Since it is uncontroverted that management never consults the shareholders before making a political contribution, a derivative plaintiff could argue that management's "utter failure" to consult the shareholders—thereby consciously disregarding their political views—constitutes a bad faith breach of the board's fiduciary duty of loyalty. This approach would allow shareholder derivative plaintiffs to avoid providing management's *actual* reasons for making a corporate political contribution and instead argue that management should either consult the shareholders before making political contributions or justify its failure to do so.

2. The Counterarguments: Shareholders Agree and Management Need Not Consider Shareholders' Views

Unfortunately for derivative plaintiffs, this seemingly simple argument faces two major hurdles—one factual and one legal. The factual question is whether management consciously disregards its shareholders' views when it fails to consult them before making a political contribution. To the contrary, a CEO like Rupert Murdoch might argue, the business judgment rule permits management to make assumptions that are incorrect, so long as they are not irrational. Hence, management is free to

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CORPORATE CAMPAIGN SPENDING: GIVING SHAREHOLDERS A VOICE, BRENNAN CENTER FOR JUSTICE 10 (2010), *available at* http://www.brennancenter.org/sites/default/files/legacy/publications/shareholdersvoice2_5_10.pdf, *archived at* http://perma.cc/VYG8-28WG (internal citations omitted) ("As U.S. law stands now, corporate managers can spend corporate money on politics without notifying shareholders either before or after the fact and . . . without any authorization from shareholders.").

231. *See* Bebchuk & Jackson, *supra* note 7, at 93–95; *see also supra* note 6.

232. *See* Thomas W. Joo, *The Modern Corporation and Campaign Finance: Incorporating Corporate Governance Analysis into First Amendment Jurisprudence*, 79 WASH. U.L.Q. 1, 57 (2001) ("Political expenditures specifically authorized by shareholders simply do not occur in large corporations."). Indeed, the management of several publicly traded corporations has successfully fought shareholder proposals requiring management to do exactly that. *See* Leahy, *supra* note 3, at 287–88 n.18.

assume that all shareholders either share its political views or do not care enough about politics to be offended by a political contribution.[233]

The second, more theoretical, issue is whether management has a fiduciary duty to know or care about individual shareholders' views in the first place. A CEO like Murdoch might argue that the political views *of shareholders* are irrelevant; all that matters is the political views *of the corporation*, which the D.G.C.L. and business judgment rule leave to the discretion of management. That is to say, Murdoch might argue that the board's exclusive statutory authority over the corporation's *financial* best interests effectively gives the board dominion over the corporation's *political* interests—because political contributions are, at bottom, simply business decisions.[234]

Let us now address each of our ersatz Murdoch's potential rebuttal arguments in turn. Part IV.B will address the factual argument and Part IV.C will address the theoretical, legal argument.

B. *Management Cannot Assume Shareholders Share Its Views or Do Not Care*

1. Shareholders Are Politically Heterogeneous

First, any attempt by our imaginary Murdoch—who controls the entire News Corp. empire—to assume that all or most all News Corp. shareholders are Republican should fail. The board of a large public corporation cannot reasonably assume that substantially all of its shareholders share management's political views. This is because "nearly half of American households own stock" and "stock owners . . . are . . . heterogeneous across multiple demographic categories and almost certainly across the political spectrum."[235] Thus, the

233. *See infra* Part IV.B (raising and addressing this argument).

234. *See infra* Part IV.C (raising and addressing this argument).

235. Elizabeth Pollman, *Citizens Not United: The Lack of Stockholder Voluntariness in Corporate Political Speech*, 119 YALE L.J. ONLINE 53, 55 (2009) (emphasis omitted); *accord* John Persinger, Note, *Opening the Floodgates?: Corporate Governance and Corporate Political Activity After* Citizens United, 26 NOTRE DAME J.L. ETHICS & PUB. POL'Y 327, 353 (2012)("[C]orporations have different constituencies, including shareholders [and others] . . . who likely all have different political ideologies" and "[w]ithin those constituencies, there may

only reasonable conclusion is that *at least some* of News Corp.'s individual stockholders are Democrats.

Indeed, since the United States electorate is almost equally divided between the two major parties,[236] it is fair to assume that perhaps close to half of the shareholders of *any* public corporation support the party that management opposes. Therefore, even if Murdoch prefers to believe that the majority of News Corp.'s shareholders are Republicans, he cannot reasonably ignore that a substantial minority are undoubtedly Democrats. Nor can he reasonably deny the *possibility* that a *majority* of News Corp. shareholders are Democrats.

Without denying this argument, our imaginary Murdoch might nonetheless dispute its relevance. The business judgment rule protects directors who make good faith assumptions, even if they are unreasonable, so long as they are not irrational.[237] In light of this, Murdoch might contend that (1) News Corp.'s management *actually believes* that most of the company's stockholders share his political views and (2) a court must defer to that belief, whether or not that belief is reasonable.

Such an argument should fail as a procedural and evidentiary matter. First, on a motion to dismiss, a court must grant all reasonable inferences to the plaintiff.[238] Since it is not reasonable for News Corp.'s management to believe that all or nearly all of its shareholders are Republicans, a court must infer, on a motion to dismiss, that management does not in fact

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also be a diverse array of political ideologies . . . ."); Joo, *supra* note 232, at 62 ("The shareholders of a corporation have diverse financial interests and diverse political preferences that can conflict with the preferences of the hypothetical, idealized shareholder who is an undiversified, long-term investor.").

236. For example, a Gallup poll concluded that "[a]n average of 47% of Americans identified as Democrats or said they were independents who leaned Democratic in 2012, compared with 42% who identified as or leaned Republican." However, the Gallup organization's polling in 2010 and 2011 showed that party affiliation for the two parties was "essentially tied." *See* Jeffrey M. Jones, *In U.S., Democrats Re-Establish Lead in Party Affiliation*, GALLUP (Jan. 9, 2013), http://www.gallup.com/poll/159740/democrats-establish-lead-party-affiliation .aspx, *archived at* http://perma.cc/LFX5-XBBB.

237. *See* Leahy, *supra* note 3, at 306–08 (citing, *inter alia*, *In re* Citigroup Inc. S'holder Derivative Litig., 964 A.2d 106, 122 (Del. 2006)).

238. *See* Century Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC, 27 A.3d 531, 535 (Del. 2011) ("When reviewing a ruling on a motion to dismiss, [the Delaware courts] accept all well pleaded factual allegations as true . . . [and] draw all reasonable inferences in favor of the non-moving party. . . .").

believe this.[239] If News Corp.'s CEO and his board honestly but unreasonably believe that all or nearly all of the company's shareholders share Murdoch's political views, management can present evidence to this effect in support of its motion for summary judgment. Yet, in light of the existence of many activist shareholders that are either unions or pension funds controlled by Democrats,[240] it seems unlikely that the News Corp. board will be able to convince a court to conclude, as a matter of law, that Murdoch had *no idea* that a large number of Democrats own News Corp. stock. Hence, Murdoch may have to wait until trial to prove that he and the board truly believe that most if not all of News Corp.'s shareholders lean Republican.

That said, our fake Murdoch might offer a different, company-specific rebuttal, due to his well-known Republican views.[241] Investors, Murdoch might argue, know his proclivities and undoubtedly avoid buying stock in "his" company if they disagree with him. Or, if not, they assume the risk that News Corp. will make political contributions they oppose. Hence, even if the shareholders of *most* corporations are split relatively evenly between the two major parties, Murdoch might argue, News Corp. is an outlier that draws shareholders that embrace the Elephant and dislike the Donkey.

This argument should fail because it ignores the rise of socially responsible investing (SRI)[242] and improperly conflates

239. That is to say, a court should find that our faux Murdoch *must actually know* that a substantial percentage of News Corp. stockholders are Democrats, because it's patently obvious that the company's stockholders are not all Republicans. This situation therefore differs from bad faith claims that courts have dismissed because the plaintiffs failed to establish that the board "*must* have known" and therefore "*actually* knew" certain facts (which, if known, would establish that the board had acted in bad faith), and instead proved only that the board "*should have* known" such facts. *See, e.g.*, *In re* BJ's Wholesale Club, Inc. S'holder Litig., 2013 WL 396202, at *12 (Del. Ch. Jan. 31, 2013) (emphases added).

240. *See, e.g.*, Mary Williams Walsh, *CalPERS Wears a Party, or Union, Label*, N.Y. TIMES (Oct. 13, 2002), http://www.nytimes.com/2002/10/13/business/calpers-wears-a-party-or-union-label.html, *archived at* http://perma.cc/VYG6-R9E9 (CalPERS); David Dayen, *Guerrillas in the Boardroom*, NEW REPUBLIC (May 14, 2013), http://www.newrepublic.com/article/113211/jamie-dimon-and-ceos-face-shareholder-activism, *archived at* http://perma.cc/8ZY8-46NA (AFSCME and AFLCIO).

241. *See* Horowitz, *supra* note 202.

242. SRI is a strategy of investing in companies that provide for both a positive impact on people or the planet in addition to the potential for bottom-line profit. *See Socially Responsible Investment—SRI*, INVESTOPEDIA, http://www.

a breach of fiduciary duty with shareholder assumption of risk. In the past few decades, the number of socially responsible investors has increased dramatically.[243] Among them are activist shareholders who attempt to change corporate policy via shareholder resolutions.[244] It is possible that such activist shareholders have actually purchased stock in News Corp. for the purpose of using the federal proxy rules to make proposals that support their own political agenda.[245]

Moreover, the mere fact that activist shareholders (or any shareholders, for that matter) bought News Corp. stock *knowing* Murdoch's Republican proclivities does not mean that he and his board can run roughshod over them under the guise of "assumption of risk." Shareholders do not assume the risk that management will breach its duty of loyalty,[246] whether by self-dealing or acting in bad faith. To the contrary, shareholders can assume that management must play by the

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investopedia.com/terms/s/sri.asp (last visited Oct. 29, 2014), *archived at* http://perma.cc/ALM7-75Z7 (defining "Socially Responsible Investment" as "[a]n investment that is considered socially responsible because of the nature of the business the company conducts" such as "avoiding investment in companies that produce or sell addictive substances (like alcohol, gambling and tobacco) and seeking out companies engaged in environmental sustainability and alternative energy/clean technology efforts"); *SRI Basics*, F. SUSTAINABLE & RESPONSIBLE INV., http://www.ussif.org/sribasics (last visited Oct. 29, 2014), *archived at* http://perma.cc/N9ZG-G95D (membership organization for those involved in SRI, defining "sustainable, responsible, and impact investing" as "an investment discipline that considers environmental, social and corporate governance . . . criteria to generate long-term competitive financial returns and positive societal impact").

243. *See, e.g.*, Tom Zeller, Jr., *Can Business Do the Job All by Itself?*, N.Y. TIMES (Mar. 28, 2010), http://www.nytimes.com/2010/03/29/business/energy-environment/29green.html, *archived at* http://perma.cc/8PU4-LHCW (discussing the increased popularity of socially responsible investing); SOC. INV. F. FOUND., 2010 REPORT ON SOCIALLY RESPONSIBLE INVESTING TRENDS IN THE UNITED STATES 8 (2010), *available at* http://www.ussif.org/files/Publications/10_Trends_Exec_Summary.pdf (executive summary of report detailing increase in funds under management by firms involving socially responsible investing from 1995 to 2010).

244. *See* Dayen, *supra* note 240; *see, e.g.*, Dashka Slater, *Resolved: Public Corporations Shall Take Us Seriously*, N.Y. TIMES (Aug. 12, 2007), http://www.nytimes.com/2007/08/12/magazine/12exxon-t.html, *archived at* http://perma.cc/AR9X-ETT3 (describing nun who makes shareholder resolutions concerning climate change at ExxonMobil Corp. annual meetings).

245. *See, e.g.*, Joo, *supra* note 232, at 61 & n.363 (citing an example).

246. Imagine that investors purchase stock in a company that is widely reputed to be run by corrupt managers, with the intent of ousting the crooked board. Management then loots the company. Could the board raise, as a defense to a claim for the breach of the duty of loyalty, that shareholders have assumed the risk of looting? Of course not.

rules—i.e., its fiduciary duties. Accordingly, it is putting the cart before the horse to suggest that the shareholders should have known that Murdoch would favor his own political views without consulting them. If failing to consult the shareholders is a breach of duty, shareholders should be able to buy News Corp. stock without any fear that they will be subject to a breach of duty.

Further, as Justice Stevens sagely observed in his *Citizens United* dissent, it seems fair to assume that the "vast majority" of shareholders invest in stock "for purely *economic* reasons,"[247] not because they agree with the CEO's political viewpoint.[248] Accordingly, a corporation's resources "are not an indication of popular support for the corporation's *political* ideas."[249] Rather, they are an indication of support for its *business* ideas and assets. Murdoch therefore simply cannot assume (and so, a court should conclude on a motion to dismiss that he *does not* assume) that investors who disagree with his politics, but like his business model, will refrain from buying the company's stock.[250] Rather, Murdoch should assume that investors who

247. Citizens United v. FEC, 558 U.S. 310, 476 (2010) (Stevens, J., dissenting).

248. *See* Randall P. Bezanson, *No Middle Ground? Reflections on the* Citizens United *Decision*, 96 IOWA L. REV. 649, 663 (2011) ("GM is owned by millions of individual stockholders . . . who presumably did not acquire the stock with any understanding about the political speech the corporation would publish or with the intention that . . . GM's corporate purposes would include the public expression of [political] views.").

249. Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 670 (1990) (Brennan, J., dissenting) (emphasis added) (citations and internal quotation marks omitted); *see also* Laurence Tribe, *Laurence Tribe on* Citizens United v. Federal Election Commission, HARV. L. TODAY (Jan., 25, 2010), http://today.law.harvard.edu/laurence-tribe-on-citizens-united-v-federal-election-commission, *archived at* http://perma.cc/6PMC-M6MH ("People who invest in business corporations . . . don't typically intend thereby to authorize the managers . . . of those corporations to use the money invested in their businesses to help some candidates win election to federal office or to hinder the efforts of others . . . . Talking about a business corporation as merely another way that individuals might choose to organize their association with one another to pursue their common expressive aims is worse than unrealistic; it obscures the very real injustice and distortion entailed in the phenomenon of some people using other people's money to support candidates they have made no decision to support, or to oppose candidates they have made no decision to oppose."); Kesten, *supra* note 212, at 6–7 ("[W]e should not assume that shareholders—by purchasing stock in a public company—grant managers the unilateral authority to engage in political speech on their behalf."); *id.* at 25 (arguing that, if shareholders had the ability to bargain, "there is no clear reason to assume that shareholders would trade away their expressive rights" to management when they purchased stock).

250. Victor Brudney, *Business Corporations and Stockholders' Rights Under the First Amendment*, 91 YALE L.J. 235, 237 (1981) ("But the number of

believe that News Corp. will provide a good return and an appropriate level of risk will invest in the company *despite* his political views, with the hope (or even the expectation) that the company will not make any distasteful political contributions.

Additionally, even if News Corp. *is* a special case, faux-Murdoch's argument would not apply to most large public corporations. Most such corporations are not overtly political, and contribute to candidates from both political parties.[251] Further, few CEOs are as outspoken politically as Murdoch.[252] As a result, it is entirely possible that most if not all shareholders purchase stock in a corporation without even knowing the political views espoused by its management.

What's more, even if a shareholder of a large public corporation happened to know the political views of upper management, that shareholder will rarely know whether the corporation has contributed or will contribute in support of a particular candidate or political party, because such corporations seldom disclose their political contributions to shareholders or the public at large.[253] Hence, the fundamental flaw in any argument that shareholders can *choose* (and therefore, either do choose or ought to choose) the corporations in which to invest based on that corporation's political contributions is that, for many large public corporations, there is simply *no way* for an investor to know the corporation's history of political contributions.[254]

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shareholders who are likely to disagree with some of management's political expenditures is not trivial . . . ."). This insight is not new. *See, e.g.*, McConnell v. Combination Mining & Milling, 76 P. 194, 199 (Mont. 1904) (holding, in a by-gone era when the ultra vires doctrine still had substantial bite, that corporate political contributions were ultra vires in part because "[t]he stockholders . . . were not unanimous in their political beliefs").

251. *See* Leahy, *supra* note 3, at 337.

252. *See* Max Nisen & Mariana Simoes, *The 19 Biggest Loose Cannon CEOs*, BUS. INSIDER (Mar. 4, 2013), http://www.businessinsider.com/most-outspoken-ceos-2013-3?op=1, *archived at* http://perma.cc/6FZH-4KCM (listing Murdoch among CEOs who, by contrast to "[m]any CEOs" who "carefully cultivate a quiet and considered public image," "make headlines with outbursts"—and, with regard to Murdoch in particular, "frequently sounds off on his conservative political views" on Twitter); Edmund Lee et al., *Murdoch's Time Warner Bid Is Fleet Street Against the Ivy League*, BLOOMBERG (July 25, 2014), http://www.bloomberg.com/news/2014-07-25/fox-time-warner-cultural-divide-stands-in-way-of-merger.html, *archived at* http://perma.cc/PJH6-EV34 (describing Murdoch as "famous for his swashbuckling manner and outspoken views" on political hot topics).

253. Bebchuk & Jackson, *supra* note 7, at 93–95; *see also supra* note 6.

254. *See* Joo, *supra* note 232, at 62 & n.371. Although *existing* shareholders could in theory seek information about political contributions via a "books &

Finally, our pretend Murdoch might argue that, even if some News Corp. shareholders are Democrats, they will gladly subvert their political views to their financial best interests. That is to say, investors who buy News Corp. stock for the purpose of making a financial return will happily accept the company's political contributions in exchange for that return.[255] Profits trump principle.

This seems doubtful. People often hold political views that squarely conflict with their own personal financial interests. For example, many wealthy Democrats support raising taxes on the rich and contribute to candidates who promise to do so.[256] Further, many lower middle class fiscal or social

records" request, *see* DEL. CODE ANN. tit. 8, § 220 (2014) (allowing such requests from shareholders if for a "proper purpose"), this would be of no assistance to a *prospective* shareholder. Further, a request for disclosure of political contributions, standing alone, probably will not succeed unless it is part of a larger attempt to unseat the board, because a court would likely deem such a request to be unrelated to the corporation's economic well-being. *See* Joo, *supra* note 232, at 51–52 n.310. Moreover, although it is possible that filing a lawsuit to enforce a books and records request would lead a corporation to disclose its political contributions to avoid the expense of litigation, *see, e.g.*, Kwak, *supra* note 6, at 262 (describing the New York State Common Retirement Fund doing exactly this to obtain disclosure from Qualcomm Inc.), this option is only feasible for shareholders with deep pockets, such as institutional investors.

255. Indeed, a proponent of the nexus-of-contracts approach to corporations law (i.e., a "contractarian") would argue that all shareholders implicitly agreed to allow management to make political contributions, without any disclosure whatsoever, simply by purchasing stock in the corporation. *See* Joo, *supra* note 232, at 62 n.369 (citing FRANK N. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 18–19 (1991)). Luckily, not everyone is a contractarian. *See, e.g., generally* Stefan J. Padfield, *Rehabilitating Concession Theory*, 66 OKLA. L. REV. 327 (2014) (describing and defending "concession theory," a theory of the corporation that competes with the contractarian view). A better assumption is that shareholders acquiesce to these rules only grudgingly, due to the huge transaction costs they would face in acting collectively to change the rules or negotiate different ones. *Cf.* Joo, *supra* note 232, at 62–64.

256. *See* Robert Frank, *CNBC Survey Shows Millionaires Want Higher Taxes to Fix Inequality*, CNBC (May 6, 2014), http://www.cnbc.com/id/101634240#, *archived at* http://perma.cc/7WQR-QWUB (describing results of survey of millionaires) ("Democratic millionaires are far more supportive of taxing the rich . . . . Among those who say inequality is a problem, 78 percent of Democrats support higher taxes on the wealthy . . . . That compares with 31 percent . . . for Republicans."); *see, e.g.*, Amy Bingham, *Warren Buffett Tells Congress To Raise Taxes On Wealthy*, ABC NEWS (Aug. 15, 2011), http://abcnews.go.com/Politics/warren-buffett-raise-taxes-wealthy-friends/story?id=14307993, *archived at* http://perma.cc/G5M-RY7U; Clare O'Connor, *As Romney Donors Pick Up Pace, Meet Obama's Biggest Billionaire Fundraisers*, FORBES (Mar. 28, 2012), http://www.forbes.com/sites/clareoconnor/2012/03/28/as-romney-donors-pick-up-pace-meet-obamas-biggest-billionaire-fundraisers, *archived at* http://perma.cc/9BZZ-B236

conservatives support Republican candidates who propose to reduce or eliminate government safety-net services, although such services financially benefit the lower middle class.[257] Accordingly, if people hold strong liberal political views and nonetheless invest in Murdoch's company, they probably will prefer News Corp. to maximize their return *without* engaging in political activity on behalf of Republican candidates.

2. Politics as a Zero-Sum Game & Hyper-Partisanship

This issue of shareholder political apathy is the foundation for a second potential rebuttal argument. Even if our imaginary Murdoch were to concede that many News Corp. shareholders do not hold his political views (and admit that many vote Democrat), he might nonetheless argue that such shareholders probably do not care enough about politics to actually *oppose* political contributions in support of Republican candidates. Perhaps they vote for Democrats, but their political views are not strongly held, he might argue, so they can stomach contributions to Republicans.

Yet, such an argument fails to capture the nature of politics under our two-party system. Two-party politics is a

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(listing billionaire donors and fundraisers to Barack Obama in 2012 Presidential election); Drew Lieberman & Andrew Baumann, Op-Ed., *Obama's Mandate: Tax Increase on Rich*, REUTERS (Nov. 16, 2012), http://blogs.reuters.com/great-debate/2012/11/16/obamas-mandate-tax-increase-on-rich, *archived at* http://perma.cc/PW8L-WMQZ (explaining that "Obama made raising taxes on people making more than $250,000 a year a centerpiece of his economic message" in the 2012 presidential election).

257. *See* Gary Younge, *Working Class Voters: Why America's Poor Are Willing to Vote Republican*, GUARDIAN (Oct. 29, 2012), http://www.theguardian.com/world/2012/oct/29/working-class-voters-america-republican, *archived at* http://perma.cc/8RXJ-RNV6 (describing working class voters, including those without healthcare, who vote Republican even though Democratic economic proposals, such as universal healthcare, would seem to benefit them); *see, e.g.*, Abby Goodnough, *In Kentucky, Health Law Helps Voters but Saps Votes*, N.Y. TIMES (Sept. 16, 2014), http://www.nytimes.com/2014/09/17/us/politics/kentucky-elections-obama-health-care-act.html, *archived at* http://perma.cc/499P-V9MX (describing Republican voters in Kentucky who approve of the ACA—and have signed up for health insurance coverage under it—but who disapprove of President Obama and plan to vote for a Republican senator who strongly opposes the ACA); Binyamin Appelbaum & Robert Gebeloff, *Even Critics of Safety Net Increasingly Depend on It*, N.Y. TIMES (Feb. 11, 2012), http://www.nytimes.com/2012/02/12/us/even-critics-of-safety-net-increasingly-depend-on-it.html, *archived at* http://perma.cc/6DC2-LNJQ (profiling recipients of federal government safety-net services in one Minnesota county who nonetheless describe themselves as opposed to such programs).

zero-sum game in which a victory for one candidate and her supporters is necessarily a loss for the other party's candidate and her supporters.[258] As a result, in a two-party system, Democrat shareholders can be expected not just to disagree, but to disagree *vehemently* with—and feel that their political goals are *negated* by—contributions to Republican candidates. And vice versa.[259]

In this regard, politics is vastly different from business. Business is not necessarily a zero-sum game. A decision to invest in the development of Product A does not necessarily negate or even set back the development of Product B, even if Product B is a direct competitor of Product A and consumers tend to use one product or the other.[260] It is plausible that a

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258. *See* Leahy, *supra* note 3, 332–33 (explaining the zero-sum nature of our two-party political system).

259. In an earlier era, populated by many conservative "Blue Dog" Democrats and moderate Republicans, the nature of electoral politics resembled a zero-sum game less than it does now. However, the two major parties are more polarized today than ever before, at least in Congress. The great bulk of congressional Democrats today fall on the liberal end of the political spectrum while almost every Republican in Congress is conservative. *See* Josh Kraushaar, *The Most Divided Congress Ever, At Least Until Next Year,* NAT'L J. (Feb. 6, 2014), http://www.nationaljournal.com/2013-vote-ratings/the-most-divided-congress-ever-at-least-until-next-year-20140206, *archived at* http://perma.cc/N56E-FVFN (discussing the leftward shift of congressional Democrats and the rightward shift of congressional Republicans on the journal's liberal/conservative index, resulting in Congress in 2013 being "more polarized than any Congress since *National Journal* began calculating its ratings in 1982"; explaining that "[f]or the fourth straight year, no Senate Democrat was more conservative than a Senate Republican—and no Senate Republican was more liberal than a Senate Democrat" and that "[i]n the House, only two Democrats were more conservative than a Republican—and only two Republicans were more liberal than a Democrat"); *see also* Derek Willis, *New House Will Be More Conservative, and More Liberal,* N.Y. TIMES (Nov. 5, 2014), http://www.nytimes.com/2014/11/06/upshot/new-house-will-be-more-conservative-and-more-liberal.html, *archived at* http://perma.cc/U8YG-ZV5U (explaining that the Democratic caucus will become more liberal and the Republican caucus will become more conservative as a result of the 2014 congressional elections). Other measures of polarization in Congress tell a similar story. *See* David Leonhardt, *The New Political Rating System That Shows the Stakes This Year,* N.Y. TIMES (Sept. 1, 2014), http://www.nytimes.com/2014/09/02/upshot/elections-2014-where-the-candidates-stand.html, *archived at* http://perma.cc/Q3J8-PQDQ (describing a new online service that uses voting history and donor information to "rank members of Congress and candidates on a liberal to conservative scale" and concludes that "moderate candidates in both parties used to win elections more frequently than they do now").

260. For example, assume that management of a massive energy conglomerate decides to invest in R&D to improve its technology for capturing and storing solar power. As a result, the corporation spends less than it would have otherwise spent on improving on its technology for extracting natural gas from the ground. While the increased spending on solar power may increase the company's capabilities

company could invest in two starkly different competing products and both products would end up being profitable.

Due to the zero-sum nature of politics, when management causes a corporation to make a political contribution in support of a candidate, even if management honestly believes that this candidate's election would maximize shareholder *value*, it cannot honestly believe that this candidate would serve all of the shareholders' *political interests*. Some shareholders may be in favor, but others will *surely* be opposed—and if they are opposed, they will be *strongly* opposed. This stands in stark contrast with most normal business decisions. While it is *possible* that some shareholders may disagree with *any* business decision, there is never any *certainty* that some shareholders will *strongly* disagree with a particular business decision. Since business is not an inherently zero-sum game like electoral politics, there presumably exist business endeavors that *every* shareholder might plausibly approve.

In addition, the United States electorate is currently highly polarized.[261] (Or, at least, our candidates are.[262]) Certainly, the media says we are.[263] And the media—including Fox News—is partly to blame for this. Today each party has its own 24-hour cable news channel (MSNBC for the Democrats and Fox News for the Republicans), on which talking heads

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with regard to that form of energy, and therefore make the company more competitive in the market for that form of energy, this does not necessarily harm the company's ability to extract natural gas from the ground, even though natural gas competes with solar power for customers' dollars.

261. *See, e.g.*, Thomas Carsey & Geoffrey Layman, *Our Politics Is Polarized on More Issues Than Ever Before*, WASH. POST (Jan. 17, 2014), http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/01/17/our-politics-is-polarized-on-more-issues-than-ever-before, *archived at* http://perma.cc/CXB3-SSYP; Alan I. Abramowitz, *How Race and Religion Have Polarized American Voters*, WASH. POST (Jan. 20, 2014), http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/01/20/how-race-and-religion-have-polarized-american-voters, *archived at* http://perma.cc/EX2-FUFZ; David Broockman, *The Real Extremists Are American Voters, not Politicians*, WASH. POST (Jan. 22, 2014), http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/01/22/the-real-extremists-are-american-voters-not-politicians, *archived at* http://perma.cc/9UYH-5L5D.

262. *Polarised Voters, or Polarised Choices?*, ECONOMIST (Aug. 10, 2012), http://www.economist.com/blogs/democracyinamerica/2012/08/presidential-race, *archived at* http://perma.cc/8ZUX-N5FV.

263. Matt Levendusky & Neil Malhotra, *The Media Make Us Think We're More Polarized Than We Really Are*, WASH. POST (Feb. 5, 2014), http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/02/05/the-media-make-us-think-were-more-polarized-than-we-really-are, *archived at* http://perma.cc/4DRU-BNNL.

cater only to the views of their supporters.[264] Neither side therefore has to listen to or confront the other side's views anymore, thereby hardening everyone's positions. As a result, it is highly likely that a Democrat shareholder who learns of News Corp.'s contribution to the RGA would be vehemently, not just mildly, opposed to that contribution. Murdoch, the controller of Fox News, should know this full well.

C. *Why Shareholders' Individual Political Views Should Matter*

One can imagine Murdoch forgoing the foregoing factual arguments in support of a more theoretical approach. He could concede that many News Corp. shareholders probably do not share his political views and adamantly oppose any support for Republican candidates—and yet, he could deem all this irrelevant to whether News Corp. may contribute in good faith to Republicans. Instead, Murdoch could simply point out that the board of directors generally owes a duty of loyalty to *the corporation*—not directly to *the shareholders*.[265] What matters, our imaginary Murdoch might argue, is the *corporation's* best interests, not the *individual shareholders'* best interests—and therefore, directors need only serve the corporation's political views, not the individual shareholders' political views.

Accordingly, Murdoch might argue, just as the business judgment rule demands that courts defer to the board's view of what is in the corporation's best *financial* interest (even when the board is somewhat conflicted, such as when it adopts defensive measures to avoid a takeover[266]), the rule also

264. *See* Matt Levendusky, *Are Fox and MSNBC Polarizing America?*, WASH. POST (Feb. 3, 2014), http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/02/03/are-fox-and-msnbc-polarizing-america, *archived at* http://perma.cc/Y47Z-4PS4.

265. *See* Edward B. Rock, *Adapting to the New Shareholder-Centric Reality*, 161 U. PA. L. REV. 1907, 1957 (2013) (describing as "the traditional view" that the board's duty of loyalty runs "to the corporation, and not directly to the shareholders"); *see also* Margaret Blair & Lynn Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 293 n.105 (1999) (quoting Restatement (Second) of Agency § 14C cmt. a (1958)); *accord, e.g.*, Paula J. Dalley, *To Whom It May Concern: Fiduciary Duties and Business Associations*, 26 DEL. J. CORP. L. 515, 524 (2001); Steven M.H. Wallman, *The Proper Interpretation of Corporate Constituency Statutes and Formulation of Director Duties*, 21 STETSON L. REV. 163, 165–66 (1991).

266. *See generally* Paramount Commc'ns, Inc. v. Time, Inc., 571 A.2d 1140 (Del. 1989).

demands that courts defer to the board's determination regarding what is in the corporation's *political* interest. In fact, our make-believe Murdoch might argue that a corporation has no political interests at all, other than to promote its *financial* interests. In short, he might urge—as some in academia have urged[267]—that all board decisions are in fact ultimately *business* decisions, to which a court must defer under the business judgment rule. The board is therefore free to utterly disregard shareholders' individual *political* views and do what is best for the company *financially*.

The remainder of this article responds to the foregoing argument by urging (1) that the policy rationales for vesting sole decision-making power in management simply do not apply to political contributions; (2) that, as a consequence, political contributions verge on being ultra vires; and (3) that, in the face of uncertainty about its authority to make corporate political contributions, management must consult the shareholders before making such contributions.

1. Inapplicability of Business Judgment Rule Policy Rationales

The problem with our faux-Murdoch's "all board decisions are business decisions" argument (other than its obviously tautological nature[268]), is that it ignores the two key policy rationales for the business judgment rule.[269] The business

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267. *See* Stephen M. Bainbridge, Citizens United, *Corporate Political Expenditures, and the Business Judgment Rule*, PROFESSORBAINBRIDGE.COM (May 24, 2012, 12:25 PM), http://www.professorbainbridge.com/professor bainbridgecom/2012/05/citizens-united-corporate-political-expenditures-and-the-business-judgment-rule.html, *archived at* http://perma.cc/M5GC-GNB6 ("[C]orporate decisions about political expenditures differ neither in kind nor degree from any other decision to expend corporate funds. As such, there is no reason to think courts will—or should—treat the former class differently than they treat the latter.").

268. *See* Joo, *supra* note 232, at 71–72 ("A shareholder suit challenging a political expenditure by management does not merely question the wisdom of a business-related decision by management. It also raises the question of whether election-related spending is a business-related decision. Remarkably, [at least one court has allowed corporate] managers themselves to answer this question . . . [by defining] 'business decision' as any decision that might benefit the corporation. As if this standard were not permissive enough, the court also defers to management's judgment as to whether any benefit exists.").

269. *See supra* Part I.B.

Other policy rationales do exist. *See generally* Gevurtz, *supra* note 72. However, most other rationales do not stand up to close scrutiny. For example,

judgment rule demands that courts defer to boards' business expertise because judges (supposedly) are not qualified to assess the risks and rewards of a business.[270] Further, the business judgment rule mandates judicial deference to board decisions because the shareholders elected the directors, not the courts, to decide what business risks the company should undertake.[271] In short, business decisions are the domain of "suits," not "robes."

These policy rationales simply do not apply to political contributions, for several reasons.

a. Directors Are Not Necessarily Experts in Policy or Politics

First, the board's purported expertise is in the realm of business, not in the realm of politics.[272] Directors are

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some argue that *any* after-the-fact review of business decisions is problematic, regardless of the reviewer's business expertise, due to potential hindsight bias and the complex, context-specific nature of business decisions. *See id.* at 308–09. The problem with this argument is that courts specialize in reviewing conduct, and regularly review the conduct of other professionals (lawyers, doctors, etc.) for negligence. There is simply no basis to conclude that hindsight bias is any worse when assessing business decisions, or that business decisions are more complex and context-specific than decisions by other professionals (lawyers, doctors, etc.) who are held to a negligence standard. *See id.* at 305–10. That is to say, if it is not feasible to review directors' decisions, then why do courts review the decisions of *any* professional? Until we eliminate the entire system of professional negligence, the business judgment rule remains a startling outlier that demands explanation. *See generally id.*

Of the remaining arguments for the business judgment rule, probably the best is that (1) shareholders can diversify their holdings while management cannot diversify its day job; (2) as a result, shareholders should be risk neutral while management is risk averse; and (3) management should therefore be insulated from liability in order to encourage risk-taking. *See* Gagliardi v. TriFoods Int'l, 683 A.2d 1049, 1052 (Del. Ch. 1996). Even if one accepts this argument, it is irrelevant here. Political contributions are not the sort of risk-taking that needs to be encouraged, nor will limiting corporate political contributions reduce critical corporate risk-taking. *See* Kwak, *supra* note 6, at 279–80.

270. *See supra* Part I.B.

271. *See supra* Part I.B.

272. *See* Joo, *supra* note 232, at 71 ("The ostensible purpose of the business judgment rule is the institutional competency concern that, unlike professional managers, '[t]he judges are not business experts.' Business judgment deference to management's political decisions . . . is inconsistent with this purpose. Managers are business experts, not political experts, and decisions regarding political expenditures are not manifestly business decisions." (citing Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919))); Ronald J. Gilson, *A Structural Approach to Corporations: The Case Against Defensive Tactics in Tender Offers*, 33 STAN. L.

supposedly good at performing tasks that are taught in business school—finance, marketing, and the like—not subjects taught at public policy graduate school. There is no reason to believe that the typical director—who may have an M.B.A., but probably does not have an M.P.P.—is better at identifying, analyzing or evaluating political ideas or issues than the typical judge or shareholder. (Indeed, judges, who attended law school, may have a leg up in this area.) Nor is the average director—whose background is in business, not politics—likely to have gained experience with analyzing complex policy issues while working in business, unless perhaps she worked mainly for companies in heavily regulated industries.[273]

Of course, experienced directors may believe that they have learned, by working in business, what policies benefit businesses in general and their own company in particular. (And they are probably correct.) But corporation law seems to reject the possibility that experts in one field (i.e., business) can

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REV. 819, 865 (1981) (urging that "management has no special expertise" concerning decisions that are "political rather than . . . economic").

273. Of course, shareholders occasionally elect "celebrity directors," including famous former politicians. *See, e.g.*, Palash Ghosh, *Apple and Al Gore: Why Are Celebrities Put on Corporate Boards?*, INT'L BUS. TIMES (Sept. 26, 2011), http://www.ibtimes.com/apple-al-gore-why-are-celebrities-put-corporate-boards-211680, *archived at* http://perma.cc/3NNE-T3CA (discussing "celebrity directors," including former U.S. Vice President Albert Gore, Jr., who served on the Apple, Inc. board). Former political office-holders presumably bring vast political or policy-making experience (or both) to corporate boards. *See id.* However, such directors appear to be the exception rather than the rule. *Cf.* Stephen P. Ferris et al., *Reaching for the Stars: The Appointment of Celebrities to Corporate Boards*, 58 INT'L REV. ECON. 337 (2010) (study that identified 700 "celebrity" directors—not all of whom were politicians—in a twenty year period out of more than 70,000 total directors elected during that period). Further, the initial results of a study conducted by this Author and a research assistant revealed that, in 2014, only about 10 percent of the directors of Fortune 200 companies and less than 3 percent of the senior officers of such companies had any significant, non-military policymaking or political experience. (Survey data on file with the Author.)

In any event, the fact that corporations bring in former politicians or policymakers as directors seems to underscore the point that the average director—whose background is in business, not politics or policymaking—does not gain sufficient political or policymaking experience in business. What's more, even companies that have one or two token former politicians or policymakers on their boards typically appoint those policymakers or politicians as *outside* directors, not executive officers. As such, regardless of their political or policy experience, former politicians or policymakers who serve as independent directors may in reality have no role in determining whether the corporation makes political contributions. *See supra* note 7 (explaining that boards of public corporations commonly delegate the decision to make political contributions to the corporation's executive officers).

be knowledgeable in another field (i.e., politics). Indeed, the business judgment rule is founded on precisely the *opposite* supposition: that judges of the Delaware courts—experienced business lawyers who have heard countless corporate cases—cannot possibly assess the merits of a business decision. If lawyers cannot possibly make business decisions then how can businesspeople possibly evaluate the merits of highly complex state or federal statutes? If the expertise rationale of the business judgment rule is taken seriously, it must go both ways.

Moreover, even if we grant that many directors do know something about policy, their understanding is likely to be both fairly general and limited to their own particular industry or business. This is because management's experience with policy will typically be from the receiving end, not the making end. Management has a poor vantage point for learning the specific nuances of policymaking—i.e., "how the sausage is made"—and, in particular, how best to achieve certain policy outcomes. Even if the directors have sufficient expertise to identify a particular policy outcome that is best for the corporation, there is no reason to conclude that they have sufficient experience in *making* policy to identify the specific mix of laws and regulations that is most likely to achieve their desired policy outcome. Therefore, even a board that is relatively savvy about policy will have little basis to pick between similar policy proposals advanced by competing candidates.[274]

In addition, no matter how much management knows about policy, it has no claim to expertise about politics. One reason corporations contribute to politicians is the hope that the candidate will, upon election to office, provide the corporation's lobbyists with "access."[275] Donating to the "wrong" candidate—i.e., the losing candidate—could mean that the corporation's lobbyists are denied "access." Yet, even if management has developed expertise about what policies

274. For example, assume that the management of a company that manufactures solar panels concludes that government support is necessary for the solar power industry to compete with oil and natural gas companies. There is some reason to trust this assessment (despite its self-serving nature), because it is based on experience. However, the government could support solar in a number of ways—tax credits, loan guarantees, subsidies for R&D, etc. It is unlikely that management's experience running a company has prepared it to assess these different options.

275. *See* Leahy, *supra* note 3, at 337.

benefit the corporation, it has no business picking winners from among the various political candidates.[276] That sort of handicapping is the realm of high-priced political consultants.

In sum, management warrants little deference in matters of policy and none in matters of politics.[277] This is starkly different from business matters, where management's expertise reigns supreme.

b. *Shareholders Did Not Choose the Directors as Political Proxies*

Second, it is unlikely that the shareholders who elect a particular board of directors are endorsing that board's ability to pick the best political candidates. While shareholders presumably view the board as their proxy for purposes of promoting the shareholders' *financial* interests, this does not necessarily hold true with regard to the shareholders' *political* interests.[278] Further, although shareholders may pick stocks

276. For example, recall that News Corp.'s spokesman asserted that the company gave to the RGA to support "pro-business" candidates. *See supra* Part III.C.1.a. While directors may be better than judges at identifying what constitutes a "pro-business" policy agenda, directors have no claim of special expertise in assessing *which* candidates are most likely to promote a "pro-business" agenda once elected or *which such* candidates are most likely to win an election. Further, even supporting politicians "on both sides of the aisle," as corporations often do, Leahy, *supra* note 3, at 337, does not necessarily guarantee success in picking winners (particularly in primary elections, which feature multiple candidates from the same party).

277. Management's lack of political expertise is of less concern when the corporation contributes to an industry association that focuses narrowly on industry-specific issues and does not contribute to political candidates.

278. *See* Bebchuk & Jackson, *supra* note 7, at 91 ("We have no reason to expect that . . . shareholders . . . share th[e] CEO's beliefs on political issues."); Gilson, *supra* note 272, at 865 (arguing there is no "reason to believe that the vision of a just society held by management will be shared by . . . shareholders"); *Corporate Governance After* Citizens United*: Hearing Before the Subcomm. on Capital Mkts., Ins., and Gov't Sponsored Enter. of the H. Comm. on Fin. Servs.*, 111th Cong. 51, 73 (2010) (statement of John C. Coffee, Jr., Adolf A. Berle Professor of Law, Columbia Law School), *available at* http://archives.financialservices.house.gov/media/file/hearings/111/coffee.pdf, *archived at* http://perma.cc/X8NH-3ZXZ ("The Center for Political Accountability has released a series of reports showing that managers have regularly used corporate funds to subsidize political causes or issues having no obvious relationship to their corporation's interests." (citing HIDDEN RIVERS, *supra* note 6)); *cf.* C. Edwin Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish's The Value of Free Speech*, 130 U. PA. L. REV. 646, 676 (1982) ("[D]emocratic theory still would not justify granting corporate executives discretionary control over . . . corporate resources, which were gathered for commercial purposes, in order to pursue their political

based on their assessment of the quality of the company's management, this undoubtedly involves only an assessment of management's *business aptitude*; it is simply not credible to suggest that shareholders pick stocks based on management's *political views*.[279]

Let us consider why, both for long-term shareholders and recent investors.

i. *Citizens United* Upended Expectations

First, consider a shareholder who invested in News Corp. many years ago. Ought she be able to demand "her money back" if she becomes upset about a business decision that the company's management makes today?[280] For most business decisions, we would say "*absolutely* not." Shareholders must understand that the money they have invested in the corporation no longer belongs to them; rather, it belongs to an artificial entity whose business decisions are made by a board of directors. A shareholder should realize that she has no say whatsoever in ordinary business decisions.[281] A shareholder who thinks otherwise is sorely mistaken, and does not warrant our sympathy, because she is deeply ignorant about how corporations work.

But this is simply not true for a shareholder who objects to a political contribution. We should be far more sympathetic if our investor, upon learning that News Corp. made a political contribution to the RGA, was shocked, enraged, and demanded her money back. We could not say that this shareholder does not understand how corporations work, generally. Rather, we

objectives.").

279. *See supra* notes 247–50 and accompanying text. Indeed, to suggest that shareholders should select corporations in which to invest based on "the directors' proclivities with respect to [political] giving, rather than for the[ir] business acumen," seems like "an unnecessary mixing of apples and oranges." *Cf.* FRANKLIN A. GEVURTZ, CORPORATION LAW 227 (2d ed. 2010) (making the same argument for charitable giving).

280. This question is not just theoretical. Shareholders are, in fact, allowed to second-guess management's business decisions to the extent that they can file derivative suits for damages against management. *See* Stephen P. Lamb & Joseph Christensen, *Duty Follows Function: Two Approaches to Curing the Mismatch Between the Fiduciary Duties and Potential Personal Liability of Corporate Officers*, 26 NOTRE DAME J.L. ETHICS & PUB. POL'Y 45, 51 (2012).

281. *See* DEL. CODE ANN. tit. 8, § 141(a) (2014) (vesting decision-making power in the board).

might say that this shareholder understands how corporations *used to* work, but fails to grasp the "*new* normal," post-*Citizens United*, in which corporations may donate unlimited sums to independent expenditure-only organizations like Super PACs that support political candidates. Yet, even if our fictional shareholder has failed to grasp the meaning of *Citizens United*, it is undeniable that the new normal is a massive change in mindset for her. In short, it is simply not part of the traditional shareholder-management compact[282] that the money a shareholder invests in a corporation can be used to make a political contribution.[283] It is not something that the shareholder would have anticipated when investing her money in the corporation in the first place.[284]

This is plainly true for buy-and-hold shareholders who purchased under the pre-*Citizens United* and pre-Super PAC regime. They literally had no idea, prior to *Citizens United*, that the money they had invested in the corporation could be

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282. The "shareholder-management compact" referred to here is not an actual agreement, but rather, a theoretical one: the business judgment rule. *See* Lamb & Christensen, *supra* note 280, at 55–56 ("The business judgment rule sets the fundamental parameters within which control can be exercised [by management]. It forms a sort of compact between the stockholders and the management. . . . The compact is that management will be permitted to use the stockholders' capital to operate the corporation in their best judgment without second-guessing . . . (using the courts as the vehicle for such second-guessing) so long as management does so in pursuit of the corporation's best interests. In other words, the stockholder gives up his wealth to the corporation and irrevocably confers discretion on management to employ that wealth profitably. Stockholders can only revoke the discretion if management . . . [does] not actually pursu[e] the best interests of the corporation."). Decisions that are not within this theoretical shareholder-management compact, if not outright ultra vires, nonetheless ought not be protected by the business judgment rule.

283. *See* Joseph F. Morrissey, *A Contractarian Critique of* Citizens United, 15 U. PA. J. CONST. L. 765, 820–21 (2013) ("An investor in a company typically views that investment as a bargain that the target company will attempt to maximize profits. . . . Unbridled participation in politics by the corporation has never been a part of that bargain. Thus, the investor might be . . . unwittingly supporting political candidates that are unacceptable to that investor.").

284. Some have argued that media corporations like News Corp. are an exception to this rule, because media corporations commonly editorialize and shareholders should know it. *See* Joo, *supra* note 232, at 6 n.16 (citing sources); Jeremy G. Mallory, *Still Other People's Money: Reconciling* Citizens United *with* Abood *and* Beck, 47 CAL. W. L. REV. 1, 31 (2010). However, editorializing is one thing—and shareholders who buy stock in a corporation that owns Fox News undoubtedly should expect editorializing—but news organizations that purport to be objective, not biased, and even "Fair and Balanced," are another. Thus, a shareholder of such a corporation arguably should expect *less* political spending, not more.

contributed to a Super PAC that supports candidates for federal political office.[285] However, many shareholders do not hold stock for five years. So, what about a shareholder who invested in News Corp. after *Citizens United*? Does she too have a basis for expressing outrage and demanding her money back? The correct answer is "yes." In light of the long history of stringent state and federal restrictions on corporate involvement in politics,[286] even shareholders who have bought stock since *Citizens United* was decided in 2010 have little reason to expect that corporations will engage in unbridled political spending.[287]

Although the federal campaign law provision that the Supreme Court struck down in *Citizens United* was less than a decade old,[288] it was enacted to fill a loophole of recent vintage[289] in a prohibition that dated back more than a *century*: the Tillman Act's[290] 1907 ban on corporate contributions to candidates for federal office.[291] This time-honored ban—not the

285. Corporations have long been able to create their own PACs—also known as "separate segregated funds"—that can contribute to and spend on behalf of federal candidates. However, corporations cannot contribute directly to their PACs; they can only pay to create, administer, and raise funds for their PACs. PAC contributions must come voluntarily from shareholders, management, officers and (sometimes) employees. Joo, *supra* note 232, at 13–14; *see also* 11 C.F.R. §§ 100.6, 114.1(a)(2)(iii) (2014).

286. *See generally* Winkler, *supra* note 4.

287. *See* Morrissey, *supra* note 283, at 821 ("[C]orporate involvement in politics has been regulated for more than one hundred years . . . . That history forms the backdrop for investors' perspectives on the bargain struck when purchasing stock in a corporation. Investors expect there to be limits . . . in the area of political spending.").

288. The federal campaign finance law struck down in *Citizens United,* Section 203 of the BCRA, was enacted in 2002. *See supra* note 3 (citing Citizens United v. FEC, 558 U.S. 310 (2010)).

289. Section 203 of the BCRA closed a loophole in FECA, which allowed corporations to pay for so-called "issue ads" that clearly were intended as electioneering communications but did not violate FECA because they did not expressly advocate the election or defeat of a candidate (e.g., they said, "Call Senator Jones and tell him you disagree with him," rather than "Vote against Senator Jones."). Although the "express advocacy" loophole dated to *Buckley v. Valeo*, 424 U.S. 1 (1976), it was not widely exploited until the mid-1990s. Hasen, *supra* note 3, at 183.

290. Tillman Act, ch. 420, 34 Stat. 864 (1907) (codified as amended at 2 U.S.C. § 441b(2) (1976)).

291. *See* Winkler, *supra* note 4, at 871. Many states have similar bans for state election campaigns; some such bans *pre-date* the Tillman Act. *See id.* at 883 (explaining that four states banned political contributions from corporations to candidates for state elective office prior to 1900); *id.* at 926 (citing EARL R. SIKES, STATE AND FEDERAL CORRUPT-PRACTICES LEGISLATION 279–83 tbl.5 (1928))

various dodges that corporations developed over the years to avoid it[292]—undoubtedly informs shareholders' views about the proper role of corporate spending in election campaigns today. After all, the Tillman Act itself was enacted due to widespread public disgust at corporations spending what was viewed as shareholders' money in politics.[293]

This pervasive public repugnance at corporation participation in electoral politics was not limited simply to direct contributions from corporations to candidates and parties, which remain prohibited today.[294] Although the ban was initially limited to such direct contributions (probably because corporations rarely speak directly on political topics and their new favorite intermediary, the Super PAC, was not yet invented[295]), the ban was extended to independent

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(explaining that, after the Tillman Act, thirty-one more states enacted such bans). Currently, twenty-one states ban all corporate contributions directly to candidates for state political office or their campaigns. NAT'L CONFERENCE OF STATE LEGISLATURES, STATE LIMITS ON CONTRIBUTIONS TO CANDIDATES (2013), *available at* http://www.ncsl.org/Portals/1/documents/legismgt/Limits_to_Candidates_2012-2014.pdf, *archived at* http://perma.cc/K45W-5DJV.

292. *See supra* note 289.

293. *See generally* Winkler, *supra* note 4. Professor Winkler's article documents the public scandal that ensued when it was revealed, in the New York life insurance controversy of 1905, that large insurance corporations contributed huge sums of money to the campaigns of candidates for national office, including then-President Theodore Roosevelt. *Id.* at 893. The public decried these contributions as theft from the rightful owners of the funds, the policyholder-owners of the life insurance corporations, who were analogous to today's shareholders. *Id.* (describing "media portrayals of company executives as thieves"); *see, e.g.*, *id.* at 894 (describing a prominent shareholder who described the use of corporate funds for partisan purposes as "a gross violation of the Commandment, Thou shalt not steal"). A key reason for this outrage was the public's understanding that the policyholders were "a diverse class" politically, and that the money that had been pooled by all policyholders had been used to "finance executives' personal politics," which "diminished . . . the opposing political voice of some" policyholders. *See id.* at 896–98 (explaining how life insurance executives favored the Republican party, to the detriment of Democrats, while policyholders held "all shades of political belief"). In light of the breadth of stock ownership today, this same concern exists for stockholders of all corporations, not just life insurance holders. *See supra* Part IV.B.1.

While it is true that the outrage in the New York life insurance scandal also stemmed in part from the view that directors used corporate funds to buy legislation to shield them from the oversight of the policyholder-owners, the resulting legislation, which prohibited all corporate political contributions to candidates for federal office, made no exception for contributions that were intended to benefit the corporation. Winkler, *supra* note 4, at 893.

294. *See* Citizens United v. FEC, 558 U.S. 310, 320 (2010).

295. *See* Leahy, *supra* note 3, at 295–96 (describing the birth of the Super PAC after *Citizens United* was decided).

expenditures nearly sixty years ago.[296] Further, the general public was not swayed a century ago by the protestations of management that its contributions were simply intended to elect candidates who are friendly to corporate interests[297]—an argument similar to the one that a CEO like Murdoch might make today.[298] Moreover, these bans are consistent with the limited and highly regulated way in which Congress has, in recent decades, allowed corporations to spend money from their treasuries in federal election campaigns: a corporation is permitted to form a political action committee (PAC), also known as a "separate segregated fund," and solicit contributions from executives, shareholders, and (sometimes) employees for that PAC.[299] This limited exception to the prohibition on corporate political spending did not come into widespread use until the 1970s, more than sixty years after the passage of the Tillman Act.[300]

In short, the average shareholder's mindset about corporate political contributions undoubtedly is framed by the ways that corporations have been essentially prohibited from spending on candidates for nearly 100 years—*not* by *Citizens United*'s recent inroad into that prohibition.

ii. Political Contributions Are Different from Ordinary Business Decisions

Yet, the problem is not simply that *Citizens United* upset the theoretical shareholder-management compact or the settled expectations of long-time buy-and-hold shareholders. Political contributions also differ so enormously from ordinary business decisions—and even gifts to charity—that shareholders might

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296. *See* Floyd Abrams, Citizens United *and Its Critics*, 120 YALE L.J. ONLINE 77, 80 (2010) ("The first law to bar corporations . . . from using their funds to make independent expenditures designed to affect federal elections was the Taft-Hartley Act, adopted in 1947." (citing Labor Management Relations (Taft-Hartley) Act of 1947, Pub. L. No. 80-101, 61 Stat. 136 (1947))).

297. *See* Winkler, *supra* note 4, at 898–900 (describing the insurance executives' explanation, in response to their public castigation, that their "campaign contributions from the company till were a proper and necessary means of protecting the interests of the companies, and by extension their policyholders"—an explanation that fell upon deaf ears in Congress).

298. *See supra* Part IV.A.2.

299. *See supra* note 285.

300. *See* Winkler, *supra* note 4, at 933–35 (describing the rise of corporate PACs).

view such contributions as outside the board's proper ambit.

Ordinary business decisions and political contributions are not just somewhat different (say, apples and oranges). They are dissimilar in the most critical way possible (call them, say, apples and orangutans). They are different to the core (or, to take the analogy too far, the heart).

For starters, almost every decision that management makes on behalf of the corporation relates to either (1) making or performing contracts to sell goods or services, or (2) producing goods or services to be sold pursuant to such contracts. Political contributions, by contrast, are not contracts; "there is no 'consideration' . . . for a political contribution."[301] Nor are political contributions overtly steps toward developing goods or services. Indeed, there "cannot be a specific bargained-for-exchange" involved in a political contribution "because that would constitute an illegal bribe."[302] Although corporations can support politicians who propose policies that the management believes will benefit the corporation's bottom line, all management receives in return for its money is the politician's word that she will actually follow through if elected.[303]

Almost no other business decisions involve simply *giving away* money in this way. The *only* closely analogous action a business might undertake is a donation to charity. Like political contributions, charitable donations may indirectly serve to bolster a corporation's bottom line.[304]

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301. *See* Leahy, *supra* note 3, at 311.

302. *See id.*

303. A cynic might urge that this is a naïve view of politics. That might be true. But restricting quid pro quo-type corruption is the only compelling state interest recognized by the Supreme Court that supports restricting political speech. *See* Citizens United v. FEC, 558 U.S. 310, 340–47, 359–60 (2010) (recognizing quid pro quo corruption as a compelling interest justifying restrictions on political speech); *id.* at 348–56 (rejecting "antidistortion" as not compelling interest); *id.* at 356–61 (rejecting other justifications for Section 203 of the BCRA proffered by the government as not compelling interests). Thus, if corporate contributors to Super PACs *do* regularly engage in implicit quid pro quo exchanges with candidates, then it makes such contributions *more* problematic, not less.

304. *See generally* Franklin Balotti & James J. Hanks, Jr., *Giving at the Office: A Reappraisal of Charitable Contributions by Corporations*, 54 BUS. LAW. 965, 967–68 (1999) (describing "three types of corporate contributions": those with "some demonstrable benefit—however intangible or difficult to measure—to the corporation . . . [; those with] no demonstrable benefit to the corporation . . . made only because it . . . aggrandizes [an] individual corporate manager . . . or because the recipient is the pet charity of the manager . . . [; and those] where there is no demonstrable benefit to the corporation but there is no personal aggrandizement or pet charity involved"). Hence, some "charitable" donations are actually

Much ink has been spilled about the important ways in which charitable donations differ from other business decisions.[305] In light of these critical differences, academics have strongly criticized Delaware's permissive attitude toward donations to charity and called for curtailment.[306]

Yet, political contributions differ considerably even from their close cousins, charitable donations. The many differences include: the binary, winner-take-all nature of elections; the aforementioned zero-sum nature of politics in the two-party system; the fact that political spending is akin to an arms race; the observation that elections are about people, not specific policy goals; the truism that politicians do not always keep their promises; the fact that elected officials rarely act alone; and the statutory oddity that charitable contributions *may* require *no* business purpose.[307]

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intended to increase profits, albeit indirectly. *See* Victor Brudney & Allen Ferrell, *Corporate Charitable Giving*, 69 U. CHI. L. REV. 1191, 1192 (2002) ("Many corporate charitable donations to . . . charities are indistinguishable from ordinary business expenditures made to realize imminent, visible corporate operating gains."). Other corporate donations are best described as "'goodwill' gifts that seek to improve the public image of the corporation . . . in a way that arguably will produce future intangible benefits from a favorable public image of the firm"—i.e., to show that the corporation is a "good citizen." *Id.* at 1192–93. Therefore, most (and perhaps all) charitable donations are not technically waste because they are not exchanged for *nothing*. *See id.* at 1193.

305. *See, e.g.*, Jayne W. Barnard, *Corporate Philanthropy, Executives' Pet Charities, and the Agency Problem*, 41 N.Y.L. SCH. L. REV. 1147, 1149 (1997) ("CEOs have often . . . spent their shareholders' money on projects that offered little, if any, benefit to the corporation while providing substantial benefits to the CEOs in the form of psychic satisfaction, increased status, and visibility in the community . . . ."); Faith Stevelman Kahn, *Pandora's Box: Managerial Discretion and the Problem of Corporate Philanthropy*, 44 UCLA L. REV. 579, 586 (1997) ("[C]orporate senior executives have had a blank check to make corporate charitable contributions independent of both business objectives and shareholder preferences."); *see also* Jill E. Fisch, *Teaching Corporate Governance Through Shareholder Litigation*, 34 GA. L. REV. 745, 765–69 (2000) ("[B]oth corporate law and tax law afford special treatment to corporate expenditures that are characterized as philanthropic. Specifically, under the laws of most states, management need not defend charitable giving as serving the interests of the corporation, no matter how those interests are defined. Indeed, some statutes . . . explicitly authorize management to make charitable donations 'irrespective of corporate benefit.' This language suggests that it is legal and, at least in some cases, appropriate for corporations to make donations that cannot be justified in business terms." (footnotes omitted)); Balotti & Hanks, *supra* note 304, at 978–80.

306. *See, e.g.*, *Symposium, Corporate Charity: Societal Boon or Shareholder Bust?*, 28 STETSON L. REV. 52, 99 (1998) (statement of Prof. Melvin Aron Eisenberg) (urging the prohibition of personal aggrandizement contributions).

307. *See* Leahy, *supra* note 3, at 329–38 (describing how political contributions differ from charitable donations).

In light of how significantly political contributions differ from ordinary business decisions—and even charitable donations—one might argue that political contributions ought to be outside of the board's ambit—i.e., "ultra vires" or "beyond the powers." (However, that question of statutory interpretation is beyond the scope of this Article.)[308] Yet, even assuming that political contributions are not ultra vires, this does not mean that the board necessarily should receive business judgment rule deference when making political contributions. Not all decisions that the board is *allowed* to make receive business judgment rule deference.[309] In theory, courts could review the decision to make a political contribution under a more exacting standard than the business judgment rule.[310]

However, even if we assume that political contributions (1) are not actually ultra vires and (2) are reviewed under the business judgment rule, they are on unsteady ground. Does this uncertainty have any ramifications for how the board approaches political contributions? This question is the focus of the next section.

2. The Board Should Tread Lightly When Its Authority Is Uncertain: The Analogy to "In the Vicinity of Insolvency"

Directors are fiduciaries of and decision makers for the corporation. Under ordinary circumstances, directors represent the shareholders' interests only indirectly, by maximizing the value of the corporation in which shareholders hold the residual interest.[311] Further, directors are direct fiduciaries of the shareholders when the corporation engages in end-of-life

308. *But see supra* note 53.

309. For example, even if a disinterested and fully informed board approves a transaction between the corporation and its controlling shareholder, that decision does not automatically receive business judgment rule deference. Rather, the entire fairness standard of review applies, with the burden of proof shifted to the plaintiff, *see* Kahn v. Lynch Commc'ns Sys., Inc., 638 A.2d 1110, 1117 (Del. 1994), unless the transaction also was approved by a majority of the minority shareholders, *see* Kahn v. M & F Worldwide Corp., 88 A.3d 635, 642 (Del. 2014).

310. *See supra* note 35.

311. *See* Bainbridge, *supra* note 66, at 141 ("It is well-settled that directors have a duty to maximize shareholder wealth." (citing Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919))); *see also* sources cited *infra* note 319.

transactions, like mergers.[312] Under the applicable corporate law statutes, directors surely have the right to assume that the shareholders have delegated to them the power to make all of the corporation's business decisions (subject to the corporation's charter and bylaws).[313] Yet, as stated above, shareholders may not agree that they have delegated to the board the power to make political contributions.[314]

In the face of this (potential) dispute, who should decide the board's authority? That is to say, if some or even many shareholders may disagree with directors about the scope of the directors' delegated power to make decisions, whose will must the directors follow—theirs or the shareholders? The best answer is that directors should not cavalierly act in the way that *they alone* believe is in the corporation's best interest. Even if political contributions are not strictly ultra vires, the fact that they are fairly viewed by shareholders as outside the shareholder-management compact should be accorded some weight. Therefore, the directors should bend over backwards to accommodate the views of shareholders who may disagree.[315] The best way to do this is to consult the shareholders.

Delaware law is sparse on the question of directors' authority in the face of uncertainty about that authority. However, if we envision this uncertainty as akin to the board acting in the vicinity of ultra vires, there is Delaware law to

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312. *See* Stone, *supra* note 201, at 912 ("Some cases seem to hold that the board owes an enforceable fiduciary duty to the shareholders." (citing Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 652 (Del. Ch. 1988))); *see also, e.g.*, Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985) (direct claim involving merger).

313. *See* DEL. CODE ANN. tit. 8, § 141(a) (2014).

314. *Cf.* Joo, *supra* note 232, at 72 ("Perhaps it is not difficult to imagine diversified, passive shareholders consenting to a contract giving management broad discretion to make political expenditures for the good of the corporation. It is implausible, however, to suggest that shareholders would assent to such an arrangement if it ensured little or no management accountability. The current regime is just such an arrangement.").

Indeed, when surveyed, shareholders opine that management gives to support its own political views, rather than in the best interest of the corporation. Leahy, *supra* note 3, at 325 & n.239 (citing shareholder surveys).

315. This is particularly true if one accepts the argument that the corporation's political speech is actually the speech of its individual shareholders, in association with each other. *See* Citizens United v. FEC, 558 U.S. 310, 392–93 (2010) (Scalia, J., concurring); Larry E. Ribstein, *The First Amendment and Corporate Governance*, 27 GA. ST. L. REV. 1019 (2010). If the corporation's speech is the shareholders' own speech, in association with each other, then the board's legitimacy to act without first consulting the shareholders becomes even more tenuous. (Thanks to Gary Rosin for this suggestion.)

which an analogy may be drawn. The doctrine in question—known as "in the vicinity" or "in the zone" of insolvency[316]—provides analogous support for the argument that the board should consider the shareholders' political views, as follows:

In the Vicinity of Insolvency: When a corporation is in the vicinity of insolvency, the proper question for the directors to ask themselves is: "Who is the residual claimant at this time–shareholders or bondholders?"[317] In such a situation, Delaware law doctrine urges (or at least allows) management to consider not only shareholders, but also other constituents such as bondholders.[318]

In the Vicinity of Ultra Vires: When a corporation is in the vicinity of ultra vires, the question is slightly different, but analogous: "Who is the proper decision maker on this issue—the board or individual shareholders?" By analogy, management should consider not only its own views, but also the shareholders' views, before acting.

The next two sections unpack this analogy. The first section describes the board's duties when a corporation is in the vicinity of insolvency; the second section explains how the board's duties could work when a corporation is in the vicinity of ultra vires.

a. *The Doctrine: In the Vicinity of Insolvency*

Although the directors have broad discretion to decide what is best for the corporation, their lodestar always must be the shareholders. That is to say, the board's primary consideration, when acting in "the best interest of the

316. *See infra* Part IV.C.2.a for a brief explanation of this doctrine. For a more detailed discussion of the rise (and potential fall) of the doctrine, see Rock, *supra* note 265, at 1961–64.

317. *See infra* Part IV.C.2.a.

318. *See id.* Not all business lawyers agree that this remains true in light of *North American Catholic Education Programming Foundation, Inc. v. Gheewalla*, 930 A.2d 92 (Del. 2007). *Compare* D.J. Baker et al., *Corporate Governance of Troubled Companies and the Role of Restructuring Counsel*, 63 BUS. LAW. 855, 858 (2008) ("When a corporation becomes insolvent, the directors' and officers' fiduciary duties expand and extend to the firm and its 'entire community of interests,' including creditors."), *with* Sabin Willett, Gheewalla *and the Director's Dilemma*, 64 BUS. LAW. 1087, 1104 (2009) (contending that *Gheewalla* requires that "where the interests of creditors in enterprise maximization and shareholders in equity preservation diverge, the board should favor . . . equity-preservation" even if it is more risky than an enterprise maximization strategy).

corporation," is to maximize the benefit to its shareholders.[319] In short, "What is best for the corporation?" is almost always proxy for "What is best for the shareholders?" As a result, if directors ever admit to acting in the interests of constituencies other than shareholders, the courts will conclude that they have violated the duty of loyalty.[320]

However, directors may expand their focus from the shareholders to encompass other constituencies when the corporation is insolvent. When a corporation is insolvent—and perhaps, in the vicinity of insolvency—its shareholders are, in theory, no longer the real party in interest.[321] Rather, the

319. This seems to be the Delaware courts' view. *See* eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34 (Del. Ch. 2010) (reasoning that directors of a for-profit corporation "are bound . . . to promote the value of the corporation for the benefit of its stockholders"); *see also* Leo E. Strine, Jr., *Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit,* 47 WAKE FOREST L. REV. 135, 136 (2012) (discussing *Newmark*); Maxwell S. Kennerly, eBay v. Newmark: *Al Franken Was Right, Corporations Are Legally Required To Maximize Profits,* LITIG. & TRIAL (Sept. 13, 2010), http://www.litigationandtrial.com/2010/09/articles /series/special-comment/ebay-v-newmark-al-franken-was-right-corporations-are-legally-required-to-maximize-profits, *archived at* http://perma.cc/NC58-4E9D. It also seems to be the dominant view among corporate law scholars. *See, e.g.*, Bainbridge, *supra* note 66, at 141 ("It is well-settled that directors have a duty to maximize shareholder wealth." (citing Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919))). Nonetheless, there is still substantial debate around this issue. *See, e.g.*, LYNN STOUT, THE SHAREHOLDER VALUE MYTH 24–32 (2012) ("The notion that corporate law requires directors, executives, and employees to maximize shareholder wealth simply isn't true.").

320. *See, e.g.*, *Dodge,* 170 N.W. at 668 (holding, possibly in dicta, that CEO Henry Ford's decision to expand production, increase worker salaries, and lower prices rather than declare a dividend, to the detriment of shareholders, the Dodges, violated the duty of loyalty); *Newmark,* 16 A.3d at 34 (holding that Craigslist founder violated the duty of loyalty by implementing a shareholder rights plan, to the detriment of minority shareholder eBay, Inc., in connection with a dispute over whether Craigslist should monetize its classified ads to maximize shareholder value).

321. *See* Carlos J. Cuevas, *The Myth of Fiduciary Duties in Corporate Reorganization Cases,* 73 NOTRE DAME L. REV. 385, 413–14 (1998) ("In theory, when a debtor is insolvent the unsecured creditors are the real parties in interest, and the debtor should be operated to further the interests of the unsecured creditors . . . . Thus, when a company is insolvent, management should pursue strategies and policies which will enhance the welfare of the unsecured creditors."); Baker et al., *supra* note 318, at 863 (explaining that creditors' "influence expands considerably in the troubled company context, as they are the holders of those economic interests most likely to be impacted by board and management decisions."); *see, e.g.*, *In re* Johns-Manville Corp., 801 F.2d 60, 65 n.6 (2d Cir. 1986) (describing shareholders of an insolvent Chapter 11 debtor as "no longer . . . real parties in interest"). However, this does not mean that the shareholders are denied basic corporate governance rights, such as the right to vote. *See* Saxon Indus. v. NKFW Partners, 488 A.2d 1298 (Del. 1984) (holding that

creditors, the remaining residual claimants, now are more akin to the real party in interest.[322]

For this reason, the Delaware courts have recognized that "where a corporation is operating in the vicinity of insolvency, a board of directors is not merely the agent" of the equity shareholders, but rather, "ha[s] an obligation to the community interest that sustained the corporation," including the creditors.[323] As a result, "creditors of an insolvent corporation"—and perhaps, creditors of a corporation in the vicinity of insolvency—"have standing to maintain derivative claims against directors on behalf of the corporation for breaches of fiduciary duties."[324] This doctrine does not substitute the interests of the creditors for the shareholders; rather, it includes the creditors among the "community of interests" that must be protected by the directors in the exercise of their fiduciary duties.[325] Nor does this doctrine evict the directors from their role as corporate decision makers or revoke the protection of the business judgment rule in assessing the best interests of the corporation.[326] It simply instructs the directors to expand the focus of their fiduciary duties.

b. The Analogy: In the Vicinity of Ultra Vires

An analogous rule should apply when the board makes decisions that a substantial number of the shareholders may reasonably believe are outside of the shareholder-management compact and possibly ultra vires. Regardless of one's view about whether shareholders should wield more power as a general matter,[327] it is clear that the board need not consult shareholders with regard to day-to-day business. Corporation

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insolvency does not cause shareholders to be disenfranchised under Delaware law).

322. *See* Cuevas, *supra* note 321, at 413–14; *Johns-Manville Corp.*, 801 F.2d at 65 n.6.

323. Credit Lyonnais Bank Nederland, N.V. v. Pathe Commc'ns Corp., 1991 WL 277613, at *1102, *1155–*57 (Del. Ch. Dec. 30, 1991).

324. N. Am. Catholic Ed. Programming Found., Inc. v. Gheewalla, 930 A.2d 92, 101 (Del. 2007).

325. *Id.* at 101–03.

326. *Id.*; *accord* Angelo, Gordon & Co., L.P. v. Allied Riser Commc'ns Corp., 805 A.2d 221, 229 (Del. Ch. 2002).

327. *See supra* note 27 (discussing director primacy versus shareholder primacy).

law envisions that the directors make decisions for the corporation and shareholders do not, except in exceptional cases (such as a merger or sale of substantially all assets).[328] By contrast, corporation law clearly prohibits directors from engaging in ultra vires actions; courts will not defer to board decisions concerning actions that the corporation is not permitted to undertake.[329] Due to the relative dearth of case law relating to management's ability to make corporate political contributions,[330] and in light of shareholders' possible objections, the board acts without a clear mandate in this area. It should therefore tread lightly.

The board also acts without a clear mandate when it is in the vicinity of insolvency. As the corporation approaches insolvency, it may be unclear at any given point whether there is any residual left for the shareholders. As a result, management will be unsure whether the shareholders or the creditors are the true party in interest. Management should therefore consider both interests.

In the vicinity of ultra vires, management is unsure who is the proper decision maker for the issue at hand, itself or shareholders. By analogy, when management is unsure whether its actions are ultra vires, it should consider the views of *both* potential decision makers. In light of this uncertainty about its own authority, management should consult the shareholders before acting whenever it makes decisions in the vicinity of ultra vires.

D. *How Management Can Avoid Making Bad Faith Contributions*

This is not to say that management should abandon its role as decision maker in such situations. Just as management must, in the vicinity of insolvency, continue to keep the shareholders' interests in mind,[331] so too must management, in the vicinity of ultra vires, continue to make decisions. The difference is simply a matter of who to consider (in the vicinity

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328. *See* DEL. CODE ANN. tit. 8, §§ 141(a), 151 (2014).

329. *See* Solomon v. Armstrong, 747 A.2d 1098, 1114 (Del. Ch. 1999) (ultra vires acts are void).

330. *Compare* Marsili v. Pac. Gas & Elec. Co., 124 Cal. Rptr. 313, 320–21 (Ct. App. 1975), *with* McConnell v. Combination Mining & Milling, 76 P. 194, 198 (Mont. 1904).

331. *See supra* notes 325–26 and accompanying text.

of insolvency) and who to consult (in the vicinity of ultra vires). The problem when making a political contribution is management's failure to consult shareholders *at all*. Management is not required to abdicate its central role in decision making and allow shareholders to have the final say.

1. Non-Binding Resolutions Polling the Shareholders

Accordingly, all management must do when acting in the vicinity of ultra vires—such as when considering whether to make a political contribution—is undertake a good faith effort to poll the shareholders about the decision. Once the board makes an effort to do this, the business judgment rule (if it applies at all[332]) should protect the board's evaluation of the data it obtains from its shareholders, its analysis of that data, and its eventual decision whether or not to proceed with the contribution. Further, management need not poll its shareholders regarding every individual campaign contribution the corporation makes; any good faith effort to inform itself about the shareholders' political views should be protected by the business judgment rule. For example, seeking a simple up-or-down vote on political contributions generally, plus a survey about party affiliation, should do the trick. Since the touchstone of good faith and conscious disregard is "utter failure," it would seem that *any* good faith effort to consult the shareholders would be sufficient.

Therefore, while the foregoing argument is novel, any resulting change would be small. Good faith probably requires only that the management of public corporations seek an annual, non-binding advisory vote of shareholders, for or against political contributions generally and as to each major party in particular. This is precisely what some scholars have proposed the SEC require of publicly traded corporations,[333] and is even less onerous than the detailed protections that others have proposed.[334]

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332. *See supra* note 35.

333. *See, e.g.*, Gilson & Klausner, *supra* note 27; Torres-Spelliscy, *supra* note 27.

334. *See* Bebchuk & Jackson, *supra* note 7.

2. Good Reason to Believe The Shareholders Consent

In addition, for some types of actions in the vicinity of ultra vires—including some types of contributions—management need not consult the shareholders because it has a good reason to believe that the shareholders would consent. Such contributions would have to be narrowly targeted to promote the corporation's core business, rather than to promote candidates or ideologies which only tangentially, theoretically, indirectly or arguably benefit the corporation. This spending will usually be limited to single-issue organizations or industry associations that do not take positions on a broad range of issues (e.g., social issues) that do not directly impact the corporate bottom line.[335]

For example, a company that operates coal mines would not need to seek shareholder approval before contributing to an organization that lobbies Congress to expand tax credits for mining companies that implement "best practices" safety procedures.[336] Nor would a corporation that refines oil be required to consult its shareholders before contributing in support of an industry organization that promotes lowering the sales tax on gasoline.

In these two examples, the organizations espouse policies that have a direct and unambiguous impact on the corporation's bottom line. Accordingly, courts should defer to the board's business expertise just as with any other business judgment. For such contributions, the directors' lack of expertise in politics will not limit their ability to understand what is best for their companies.

Moreover, the direct and unambiguous relationship between the company's bottom line and the policies espoused by the organizations receiving contributions removes any likelihood that a substantial percentage of shareholders would disapprove of these organizations' goals. Unlike contributions to a political candidate, who might hold some views that may

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335. Such contributions are not "political contributions" as defined herein. *See supra* note 11.

336. This becomes trickier if the organization supported, say, tax credits for "mountaintop removal." Although this would presumably lower the cost of mining coal, and therefore benefit the corporation, it also raises major environmental concerns. Presumably, some activist shareholders may have purchased stock in the coal mining company for the purpose of attempting to use shareholder resolutions to rally shareholders on these sorts of environmental issues.

benefit the company's bottom line and other views that may offend a large number of shareholders,[337] the views of a single-issue organization or a narrowly focused industry association are likely to align with the vast majority of shareholders who invested in the company with the hope of making a profit.

CONCLUSION

In conclusion, shareholder derivative plaintiffs who wish to challenge corporate political contributions as a breach of the duty of loyalty should consider alleging a claim for bad faith. This theory will not be an easy route to victory; even if the facts are analogous to existing bad faith precedents like *Disney* (e.g., News Corp.'s contribution to the RGA), derivative plaintiffs will have difficulty proving that management's motives were improper. Yet, in light of the low odds of success when challenging corporate political contributions as waste or self-dealing, a bad faith claim might improve the plaintiff's chance of overcoming the business judgment rule (assuming, of course, that the business judgment rule applies in the first place[338]).

In light of the difficulty of surmounting the business judgment rule, plaintiffs also should consider a novel argument: that essentially all political contributions by large public corporations today constitute bad faith. If this argument succeeds, management of large public corporations will be required to poll the shareholders before making many corporate political contributions. Absent that, management will need to show that the contribution is directly related to the corporation's core business interests.

But will this novel claim succeed? Its factual basis—that management *simply must* know that a substantial percentage of the shareholders do not share its political views—is not difficult to establish. However, the theoretical grounds for arguing that management should consider the shareholders' political views is untested. The business judgment rule evinces a strong policy that directors, not shareholders, make decisions

337. By contrast, contributions to a political candidate who espoused these views but also espoused views on social issues that might offend many shareholders would *not* provide management with a good faith basis for believing that all shareholders consent. *Cf.* Leahy, *supra* note 3, at 314–15 (discussing how Target Corporation's donation to Republican Mike Emmer, supposedly due to his pro-business views, backfired due to his opposition to gay marriage).

338. *But see supra* note 35.

about the corporation's day-to-day affairs. As a result, no Delaware case known to this Author has ever held that the directors acted in bad faith by failing to consider a shareholder's views on *any* topic, much less the shareholder's *political* views.[339]

Yet, "the business judgment rule extends only as far as the reasons which justify its existence"[340]—and the key reasons for deference to management simply do not apply with regard to political, as opposed to business, decisions. Therefore, perhaps a shareholder plaintiff could convince the Delaware courts to recognize the existence of a heretofore-unrecognized duty for directors: the duty to consider the political views of the corporation's shareholders before making a political contribution.[341]

Much ink has been spilled about whether shareholders' political views are significant as a matter of constitutional law, due to concerns about compelled speech.[342] However, the Supreme Court rejected these concerns as a matter of First Amendment law in *Citizens United*.[343] Perhaps corporate law is

339. *But see In re* Lear Corp. S'holder Litig., 967 A.2d 640, 641 (Del. Ch. 2008) (dismissing bad faith claim where a merger agreement with another corporation imposed a penalty unless the board obtained shareholder consent for the merger, which the board failed to do, and reasoning that the fact that the "stockholders might disagree with" the board's decision was not sufficient to show that the board acted in bad faith).

340. Joy v. North, 692 F.2d 880, 886 (2d Cir. 1982).

341. On one view, this is exactly the sort of way that the courts ought to use good faith: "to address new sorts of corporate governance issues that arise with evolving business practices that raise questions of . . . suspect motivation." Hill & McDonnell, *Expanding Duty, supra* note 9, at 1796.

342. Many authors have raised concerns about the risk that corporate political speech will result in coercing the speech of individual shareholders. *See, e.g.*, Pollman, *supra* note 235, at 58; Anne Tucker, *Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in* Citizens United, 61 CASE W. RES. L. REV. 497, 499 (2011); Bebchuk & Jackson, *supra* note 7, at 95; Michael R. Siebecker, *A New Discourse Theory of the Firm After* Citizens United, 79 GEO. WASH. L. REV. 161, 168 (2010). Others have argued that coerced speech is not a concern. Catherine L. Fisk & Erwin Chemerinsky, *Political Speech and Association Rights After* Knox v. SEIU, Local 1000, 98 CORNELL L. REV. 1023, 1023 (2013) ("In our view, contrary to that of most commentators, neither corporate political speech nor union political speech involves compelled speech of dissenting stakeholders, and therefore neither employees nor stockholders should be required by law to opt in or given a legal right to opt out.").

343. *See* Citizens United v. FEC, 558 U.S. 310, 361–62 (2010) ("There is . . . little evidence of abuse that cannot be corrected by shareholders 'through the procedures of corporate democracy.'" (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 794 (1978))). *But see id.* at 477 (2010) (Stevens, J., dissenting) ("In practice . . . many corporate lawyers will tell you that [the rights that the majority

a better foundation for these concerns than First Amendment law.

refers to as the "procedures of corporate democracy"] are so limited as to be almost non-existent, given the . . . authority wielded by boards and managers and the expansive protections afforded by the business judgment rule." (citation omitted)).