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Removing Corporate Money from Politics

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REMOVING CORPORATE MONEY FROM POLITICS

More than one hundred years ago President Theodore Roosevelt started the nation down a difficult path of campaign finance regulations when he sought a legislative ban on corporate contributions made in relation to elections.¹ What followed President Roosevelt's plea were several regulations purposed toward refining a campaign finance system to prevent disproportionate influence of the wealthy, to regulate campaign spending, and to minimize abuses of the system through public disclosures.² Over the next century, Congress would pass multiple statutes in furtherance of these goals, and the Court would subsequently restrict the congressional power to regulate these areas on First Amendment grounds. This back and forth has created an intricate system of campaign finance that is in dire need of restructuring. By passing the Tillman Act, Congress made the first move banning direct corporate involvement in federal elections.³ This ban caused a century of litigation and regulation, eventually ending in 2010 when the Supreme Court held such bans on corporations were unconstitutional.⁴ Regardless of whether the Constitution protects the political speech of a corporation, it is obvious, due to the number of regulations and amount of litigation, that corporate spending on elections is highly controversial. The fear of corporate influence over elections, through deep pockets holding large sums of money, may be well grounded; but, because the Supreme Court has held the First Amendment protects a corporation's political speech there is no regulation Congress may pass restricting this right. A possible solution to this problem would be to pass legislation which proposes a trade to corporations; corporations agree not to spend any money on elections in return for the ability to vote in elections.

Background of Campaign Finance Law Regulations on Corporations

The history of campaign finance is best described by Justice Brennan in his opinion from *Cort v. Ash* that the purpose of the regulations was "to assure that

¹ *The FEC and the Federal Campaign Finance Law*, FED. ELECTION COMM'N, February 2004, <http://www.fec.gov/pages/brochures/fecfecsa.shtml> (last updated February 2017).

² *Id.*

³ Adam Cohen, *A Century-Old Principle: Keep Corporate Money out of Elections*, N.Y. TIMES (Aug. 10, 2009), <http://www.nytimes.com/2009/08/11/opinion/11tue4.html>.

⁴ Adam Liptak, *Justices, 5-4, Reject Corporate Spending Limit*, N.Y. TIMES (Jan. 21, 2010), <http://www.nytimes.com/2010/01/22/us/politics/22scotus.html?pagewanted=all&r=0>.

federal elections are free from the power of money, to eliminate the apparent hold on political parties which business interests . . . seek and sometimes obtain by reason of liberal campaign contributions.”⁵ The passage of the Tillman Act of 1907 was first believed to be a strict ban on corporate involvement in federal elections but due to loopholes⁶ Congress passed the Federal Corrupt Practices Act of 1910 (FCPA) to require disclosures on all campaign contribution sources as well as limited Party spending.⁷ Because the FCPA regulated spending by political parties, it was struck down by the Supreme Court in *Newberry v. United States* on the grounds that the Congress was not given the power to regulate parties this way by the Constitution.⁸ The fear of corporate involvement remained after this ruling and the Congress was forced to amend the FCPA in 1925 to comply with the Court’s holding by continuing the ban on corporate political contributions and disclosure but adding in a system of campaign spending for Senate and House Candidates.⁹ The provisions of the amended FCPA were not stringent enough and loopholes were exposed,¹⁰ leading to more regulations on who could contribute to political campaigns;¹¹ but, these regulations also fell short as the response to direct bans was to create political action committees (PACs) to contribute on the true donor’s behalf.¹²

The next regulation on corporate spending on elections came with the Taft-Hartley Act of 1947 which made stricter regulations for corporations contributing to candidates.¹³ Campaign finance law remained almost unchanged until the passage of the Federal Election Campaign Act of 1971 (FECA), replacing the FCPA, which sought further disclosure requirements on

⁵ Adam Winkler, *Other People’s Money: Corporations, Agency Costs, and Campaign Finance Law*, 92 UCLA PUB. L. & LEGAL THEORY RES. PAPER SERIES. 871, 878 (2004) (citing *Cort v. Ash* 422 U.S. 66, 82 (1975)).

⁶ Beth Rowan, *Campaign-Finance Regulation: History and Timeline: A Look at Early Campaign Finance Legislation and Efforts to Regulate Fund Raising for Political Campaigns*, INFOPLEASE, <http://www.infoplease.com/us/history/campaign-finance-reform-timeline.html> (last visited Apr. 2, 2017).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* (showing that required disclosures of contributions exceeding \$50 to candidates; Congressional candidate spending was limited to \$.03 per voter from last election cycle with a cap at \$25,000 for Senate candidates and a cap at \$5,000 for House candidates).

¹⁰ *Id.*

¹¹ *Id.* The Public Utilities Holding Act of 1935 banned the involvement of public utility companies; the Hatch Act of 1939 banned federal employees from contributing to campaigns; The Smith-Connelly Act of 1943 banned labor unions from direct contributions. *Id.*

¹² *Id.* (stating that union members would create PACs that acted independently of the Union to influence federal elections).

¹³ *Id.*

campaign funding to bring the money into the light and restrict spending¹⁴ while maintaining a ban on corporate contributions to candidates. This created a strict law of campaign finance with maximum contribution and spending limits¹⁵ until the Supreme Court again addressed these regulations in 1976, under First Amendment precedent, holding that spending limits were unconstitutional when the money is spent to expressly advocate or oppose a candidate.¹⁶ It became apparent that FECA was falling short of its original purpose when it was again amended in 1979 to allow corporations to contribute unlimited amounts of “soft-money.”¹⁷ Even with FECA in place, the *Buckley* holding made clear that the Congress could only regulate the money that was being directly given to candidates or was used to expressly advocate for, or oppose, a federal candidate, leaving open the door for spending on advertisements that fell short of express advocacy—using key terms like elect or defeat—notably termed issue ads.¹⁸ FECA amendments were also passed to limit soft money spending by corporations through limiting PACs to one per organization.¹⁹

Following many years of litigation over loopholes in FECA, the Congress attempted to preempt all unwanted involvement by passing the Bipartisan Campaign Reform Act of 2002 (BCRA), also known as the McCain-Feingold Act, banning unlimited soft money contributions and restricting corporate funding of issue ads within certain time periods of elections.²⁰ The Court upheld the challenged portions of BCRA restrictions in *McConnell v. FEC* the next year²¹ which, on its face, seemed to imply the law would stand as is; but, in 2007 the Court was again asked to review BCRA and this time it struck down BCRA provisions restricting advertisements focusing on issues aired shortly before elections paid for by corporations because “where the First Amendment is implicated, the tie goes to the speaker, not the censor.”²² Still at this point, campaign finance jurisprudence banned corporate spending on independent expenditures, but this was changed in 2010 when the Supreme

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court upheld contribution limits, but struck down the limit on independent expenditures which expressly advocated or opposed a candidate. *Id.*

¹⁷ *Id.*

¹⁸ Rowan, *supra* note 6.

¹⁹ *Id.*

²⁰ *Id.* (showing that political issue ads were considered electioneering communications and equated to independent expenditures made on express advocacy).

²¹ *Id.*

²² *Id.* (citing *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 474 (2007)).

Court again ruled on BCRA provisions, striking down, on First Amendment grounds, the ban on corporate expenditures in federal elections.²³ The Court held that “independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption,”²⁴ which in turn brought about the death of campaign finance law.²⁵

Government Justification of Campaign Finance Law

When FECA was challenged in *Buckley*, the government justified the regulation as an interest in preventing corruption as well as the appearance thereof.²⁶ FECA was again challenged in *Austin v. Michigan Chamber of Commerce*; the valid government interest was extended to include a prevention of distortion of the political speech marketplace by corporations with mass wealth, thus validating an equality rationale.²⁷ After FECA was replaced by BCRA, the valid government interest justifying regulations against soft money was further expanded to include preventing the opportunity to influence government actions under the prevention of corruption umbrella in *McConnell v. FEC*.²⁸ These many justifications were all upheld as valid government interests for infringing on freedom of speech until the Court ruled in *Citizens United* that the only valid government interest in regulating campaign finance spending was to prevent corruption or the appearance thereof.²⁹ Because the Court has held that the only interest the government may use when regulating campaign finance is to prevent corruption,³⁰ and corporations cannot be banned from making independent expenditures,³¹ halting corporate involvement in political spending must rely on another basis if there is a continued fear surrounding the involvement of corporations in federal elections.

²³ *Id.*

²⁴ Rowan, *supra* note 6. (citing *Citizens United v. FEC*, 558 U.S. 310, 357 (2010)).

²⁵ Michael Kang, *The End of Campaign Finance Law*, 98 VIRGINIA L. REV 1, 2 (March 2012).

²⁶ Saul Zipkin, *The Election Period and Regulation of the Democratic Process*, 18 WM. & MARY BILL RTS. J. 533, 561 (2010).

²⁷ *See id.* at 562–63 (noting that corporate independent expenditures can influence elections, and the corporate structure governed by the state can distort the electoral process).

²⁸ *See id.* at 565.

²⁹ *See* Kang, *supra* note 25, at 53.

³⁰ *Id.*

³¹ *See* *Citizens United v. FEC*, 558 U.S. 310, 357 (2010).

Fear of Corporate Participation in Federal Elections

The fear of corporate spending on federal elections stems from the idea that allowing a corporation to use its deep pockets to influence elections would cause a disproportionate influence,³² but after *Citizens United* this interest is no longer valid for governmental reliance when regulating campaign finance.³³ Because of lacking disclosure regulations for contributions, corporate spending goes vastly unknown.³⁴ The fear that arises is that shareholders do not know whether their money is being spent on elections, and if it is being spent, how much of their money is used for political spending.³⁵ The *Citizens United* holding, although allowing corporations to expend on speech, noted the importance of transparent disclosures on this spending,³⁶ and because the corporations who participate in political spending are not disclosing contributions to organizations on the dark side of campaign finance, the fear of corporate influence over federal elections has grown.³⁷ There are many who believe transparency of disclosure in corporate political spending will bring about greater trust in the system;³⁸ but, even when a corporation voluntarily discloses political spending there may still be deception. One of the companies that voluntarily agreed to be more transparent with its political spending, Boeing, failed to report \$200,000 in political contributions.³⁹ This shows that even when a corporation vows to remain transparent, there is nothing looming over its head as a punishment should it break its vow. Even the SEC has acknowledged the fact that voluntary disclosures fall far short of giving enough information relevant to ascertaining the amount of money a corporation has truly spent on politics.⁴⁰ Today, corporations spend the most money of all participants in the financing of campaigns and elections.⁴¹ Because *Citizens*

³² See *The FEC and the Federal Campaign Finance Law*, *supra* note 1; see Saul Zipkin *supra* note 26 at 579–80.

³³ See Kang, *supra* note 29.

³⁴ Lucian A. Bebchuk & Robert J. Jackson, *Shining Light on Corporate Political Spending*, 101 GEO. L.J. 923, 925 (2013).

³⁵ *Id.* at 925.

³⁶ Charles Kolb, *Corporate Political Spending: Show Me the Money!*, THE HUFFINGTON POST (Nov. 10 2015), http://www.huffingtonpost.com/charles-kolb/corporate-political-spend_b_8511218.html.

³⁷ *Id.*

³⁸ See *id.*

³⁹ Bebchuk, *supra* note 34, at 947.

⁴⁰ *Id.* at 947–48.

⁴¹ Bruce F. Freed & Marian Currinder, *Do Political Business in the Daylight: Corporations are Distorting Our Democracy and the 2016 Election with Their Dark Money*, US NEWS (Apr. 6, 2016, 6:00 AM) <https://www.usnews.com/news/the-report/articles/2016-04-06/corporate-money-is-playing-a-shadowy-role-in-2016-politics>.

United ended most of the campaign finance jurisprudence, there is no clear way to track the political spending of corporations on federal elections.⁴² The rise of 501(c)(4) corporations⁴³ and the emergence of super PACs⁴⁴ has increased valid fears because of the increased anonymous spending and the rate at how quickly these types of organizations may appear and disappear.⁴⁵ It is argued that the massive influx in political spending can only be attributable to corporations; the Washington Post reported that in the 2016 election, one out of every eight dollars used by super PACs was attributable to corporations, whether directly or indirectly.⁴⁶ Just as BCRA was passed to ban the soft money left unaddressed by FECA,⁴⁷ the ruling from *Citizens United* requires a legislative response to the striking down of BCRA provisions banning corporate exclusion, and the response should be creating a system allowing for a corporation to vote in elections only if it shows it can meet certain requirements. If the fear stemming from a corporation spending political money is so great, because the corporate voice is protected as speech under the First Amendment,⁴⁸ the next logical step would be incentivizing the corporation to abstain from spending political money to diminish that fear. The incentive would need to provide an almost equally weighty opportunity to influence elections in order to push corporations to buy into the system. After establishing a baseline figure for the amount of influence a corporation may have on an election, this variable would in turn be converted into an almost equal amount of voting power so that the corporation may still exercise its protected expressive rights without spending political money on elections.

⁴² *See id.*

⁴³ 26 U.S.C. § 501(c)(4) (2012) (stating that these corporations are nonprofit organizations that operate “for the promotion of social welfare.”).

⁴⁴ 26 U.S.C. § 527 (2012). Super PACs are 527 corporations that are organized “primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function,” 26 U.S.C. § 527(e)(1); the relevant exempt function here is “influencing or attempting to influence the election . . . of any individual to any Federal . . . office,” 26 U.S.C. § 527(e)(2).

⁴⁵ Freed & Currinder *supra* note 41.

⁴⁶ Matea Gold & Anu Narayanswamy, *How ‘Ghost Corporations’ are Funding the 2016 Election*, THE WASHINGTON POST (Mar. 18, 2016) https://www.washingtonpost.com/politics/how-ghost-corporations-are-funding-the-2016-election/2016/03/18/2446e526-ed14-11e5-a6f3-21ccdbc5f74e_story.html?hpid=hp_rhp-top-table-main_secretmoney837pm%3Ahomepage%2Fstory&utm_term=.d4fc2c27017f.

⁴⁷ Robert Kelner & Raymond La Raja, *McCain-Feingold’s Devastating Legacy*, THE WASHINGTON POST (Apr. 11, 2014) https://www.washingtonpost.com/opinions/mccain-feingolds-devastating-legacy/2014/04/11/14a528e2-c18f-11e3-bcec-b71ee10e9bc3_story.html?utm_term=.e6891d46c8c9.

⁴⁸ *See Citizens United v. FEC*, 558 U.S. 310, 357 (2010).

Giving Corporations the Right to Vote

The Constitution does not grant to any person the right to vote.⁴⁹ In its opinion in *Minor v. Hapersett*, the Supreme Court determined the right of suffrage did not fall into the class of rights protected by the Constitution.⁵⁰ The Court reasoned that regardless of a woman's status as a citizen, failing to confer upon her the right to vote did not abridge any of her privileges or immunities within the scope of the Fourteenth Amendment because suffrage was without the clause.⁵¹ This reasoning is further supported by the passage of the Fifteenth Amendment,⁵² noting that if the Fourteenth Amendment considered voting as a privilege or immunity granted by the Constitution then the Fifteenth Amendment would be superfluous.⁵³ Suffrage is protected as a negative right, one that, if granted, will be protected as a privilege and immunity.⁵⁴ This is shown by the passing of the Fifteenth Amendment in 1870 when it was legislated the right to vote could not be withheld on the basis of race or color,⁵⁵ then in 1920 with the ratification of the Nineteenth Amendment which applied the same concept as the Fifteenth Amendment but for sex,⁵⁶ and again in 1964 with the ratification of the Twenty-Fourth Amendment preventing the States from abridging the right to vote on the basis of wealth.⁵⁷ The electorate has been expanded by the Congress by constitutional amendment other times as well, the Twenty-Sixth Amendment decreased the minimum voting age to eighteen,⁵⁸ and the Twenty-Third Amendment granted voting rights to the citizens of Washington D.C.⁵⁹

Constitutional amendments are not the only way to expand the voting class. The electorate has been expanded through statute as well.⁶⁰ When Congress grants citizenship, the Fifteenth Amendment protects the right to be free from

⁴⁹ See *Minor v. Hapersett*, 88 U.S. 162, 178 (1874).

⁵⁰ See *id.*

⁵¹ See *id.* at 171.

⁵² See *id.* at 175.

⁵³ See *id.* at 175.

⁵⁴ See *id.* at 176.

⁵⁵ U.S. CONST. amend. XV, § 1.

⁵⁶ U.S. CONST. amend. XIX.

⁵⁷ See U.S. CONST. amend. XXIV, § 1.

⁵⁸ U.S. CONST. amend. XXVI § 1.

⁵⁹ U.S. CONST. amend. XXII, § 1.

⁶⁰ See Chinese Exclusion Repeal Act, 30 Stat. L. 750, 751 (1943) (removing earlier restrictions on Chinese immigrants becoming citizens, once they became citizens the Fifteenth Amendment protected voting rights on the basis of race); see Indian Citizenship Act, 8 U.S.C. §12 (2012).

voting restrictions based upon race.⁶¹ All this legislation preventing voting restrictions shows that Congress has the ability to restrict the reasons States may prevent citizens from voting. Because Congress has authority to prevent the States from withholding voting ability to certain groups, it should respond to the Court's *Citizens United* ruling by doing the same for corporations that withhold from political spending. In the wake of the 2016 election, the Electoral College continues to be scrutinized when it leads to the election of a President who did not win a majority of the popular vote. It may again be time to expand the electorate to increase the amount of possible voters, thus causing the elected officials to be a more accurate reflection of the voices they are elected to represent.

There appears to be but two ways in which a corporation may be granted the right to vote. It is unlikely the Congress would pass legislation granting United States citizenship to corporations, although corporations already possess citizenship for purposes of lawsuits,⁶² but Congress could propose an amendment similar to the Fifteenth Amendment that the right to vote may not be abridged on the account of corporate status, with a clause that allows it to pass legislation in furtherance of the Amendment. Another option would be for a corporation to attempt to register to vote in the State in which it is deemed a citizen, be denied, and then challenge the denial in federal court with a hope that the Supreme Court would grant *certiorari* in the case. The latter of these two options seems more improbable than does the former, but assuming the right to vote is given to corporations there would need to follow laws governing the process in which a corporation may exercise this right.

Because *Citizens United* removed most of the restrictions on corporate political spending,⁶³ any system created by Congress to remove corporate money from politics would need to provide enough incentive to a corporation to withhold from political spending. The Federal Election Commission (FEC), created by FECA,⁶⁴ was given authority to promulgate rules and administer advisory opinions in the scope of campaign finance law.⁶⁵ This means that following a grant of voting rights to corporations, the FEC would need to promulgate rules to govern corporate participation in elections.

⁶¹ U.S. CONST. amend. XV, § 1.

⁶² See 28 U.S.C. § 1332 (2012).

⁶³ See *Citizens United v. FEC*, 558 U.S. 310, 312 (2012).

⁶⁴ 93 P.L. 443, 88, § 310 (a)(1) Stat. 1263.

⁶⁵ 93 P.L. 443, 88, § 311(a)(7)–(8) Stat. 1263.

Framework of Corporate Voting

FEC rules on corporate voting should require a buy-in fee, as well as a size classification for the corporations able to vote. In order to do this, the FEC would need to ensure it both followed proper rulemaking procedures so the rule was controlling on the corporations and was not arbitrary and capricious.⁶⁶ Agency action is reviewed under *Chevron* when determining whether to defer to the agency's decision.⁶⁷ Requiring a buy-in fee for corporations would be justified by an interest in maintaining compliance with the requirements for participation in the vote; the fee will be held similar to a bail-bond, and at the conclusion of the election, so long as noncompliance is not discovered, it may be returned. A corporation may challenge this regulation under the protections of the Twenty-Fourth Amendment prohibiting the abridgement of voting rights due to failure to pay a tax,⁶⁸ but this would not be a tax on the right to vote because under this system the corporation is not being forced to pay the fee; the corporation would have the option to spend its money on political speech instead of voting, and could either be returned in-kind at the conclusion of the election or reflected as a tax deduction. The FEC would need to decide which of these options would provide the best incentive to corporations to participate in voting and withhold from political spending. The FEC should also restrict the class of voters to C Corporations with a large number of employees. These corporations pay an income tax,⁶⁹ and are generally larger than are other business forms,⁷⁰ so the justification of restricting the vote to large corporations would not be seen as arbitrary and capricious; further, requiring a manifest size for corporate voting would prevent a wealthy person from incorporating herself in order to increase her own voting strength.

The next question to address is a first generation voting rights assessment of who would be responsible for casting the corporation's vote.⁷¹ Should the shareholders get to decide where the votes go? The employees? Because the

⁶⁶ See *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 844 (2012).

⁶⁷ See *United States v. Mead Corp.*, 533 U.S. 218, 226 (2012). The Court granted cert. in this case to determine the limits of *Chevron* deference, showing proper review of agency determinations is assessed under *Chevron. Id.*

⁶⁸ U.S. CONST. amend. XXIV.

⁶⁹ See 26 U.S.C. § 11(b) (2012).

⁷⁰ Roy Bahat, *The Corporation is Dead, Long Live the Corporation, What's the Future?*, MEDIUM (Nov. 5, 2015), <https://medium.com/the-wtf-economy/the-corporation-is-dead-long-live-the-corporation-13b787e33b29> (pointing out the growth of large US companies since the year 2000).

⁷¹ See *Holder v. Hall* 512 U.S. 874, 954 (1994) (Stevens J. concurring) (explaining that first generation claims focus on access to the ballot).

vote is being cast by the corporation, it must be cast by the group who will do so in best interests of the corporation's future. Here, the best system would be to allow the Board of Directors to cast the votes of the corporation allowing for shareholders and employees to voice opinions but not having the power to control the vote, doing so would complicate the process. This should also allow lawsuits to be brought by shareholders against the Board only when the interests of the shareholders have been adversely affected and assessed under the business judgement rule.⁷²

The second assessment is how much a corporate vote should count towards an election. The one person one vote standard⁷³ should not apply here because the corporation represents more than just one person; it is an aggregate of the interests of the company, the shareholders, and similarly the employees. The one person one vote standard would also fail to give incentive to the corporation to withhold from spending on elections. To incentivize a corporation to stop contributing to political spending, or expending on its own, the apportioned votes would have to be sufficiently, equally weighty in influence as would the money it is allowed to expend on federal elections after *Citizens United*. To do this, a balance must be found between maintaining the one person one vote standard, preventing a Board member from doubling her own vote, and providing an incentive to push corporations to opt-out of political spending.

A college of electoral votes should be created for corporate voters; this would not only show for whom the corporations have support, shedding light on where the unknown political spending would have gone,⁷⁴ but it would limit the amount of influence corporations could have on federal elections. The Electoral College was created by Article II of the United States Constitution as a way of electing the President.⁷⁵ Its apportionment scheme is decided by the total number of Senators and Representatives entitled to the State in Congress.⁷⁶ A set number of electoral votes should be given to Corporate America and divided among the participating corporations dependent upon

⁷² Lori McMillan, *The Business Judgment Rule as an Immunity Doctrine*, 4 WM. & MARY L. REV. 521, 526 (2013) ("The business judgment rule ensures that decisions made by the directors in good faith are protected even though, in retrospect, the decisions prove to be unsound or erroneous;" meaning the Board would have to show the vote was cast reflecting business interest and not the personal interest of the Board members.).

⁷³ See *Reynolds v. Sims*, 377 U.S. 533, 558 (1964).

⁷⁴ See *Bebchuk & Jackson*, *supra* note 34 (stating corporate spending on elections is vastly unknown).

⁷⁵ U.S. CONST. art. II.

⁷⁶ *Id.*

their relative size to each other, just as is done with the States in the Electoral College.⁷⁷ In doing so, consideration would have to be given to the relative influence of corporate political spending on federal elections weighed against the fear of direct corporate influence on an election. *Arguendo*, allocating 212 electoral votes to corporations would bring the total number of electoral votes from 538⁷⁸ to 750, implying that the new number to win the Presidency increases from 270⁷⁹ to 375 electoral votes. This would give the corporations influence over elections, but not enough influence to directly elect any candidate. If this number were determined by the FEC, it would have to justify this figure by showing 212 votes fell within the zone of ambiguity of the law to receive deference on the rule.⁸⁰

The new law should also consider imposing a mandated winner-take-all system⁸¹ for the electoral votes to prevent vote splitting because that would lead down a path toward a Board member simply doubling her own personal vote. The system would also require separation from the Electoral College of the states, meaning the electoral votes would not be added on to the votes of any State; this would ensure the election could not be controlled by the states with the most electoral votes that vote similarly in elections—California and New York.

Protecting the Integrity of the System

Because the idea of granting corporations the right to vote is as controversial as was granting corporations First Amendment rights,⁸² there would need to be a governing body to oversee compliance with the law, mostly

⁷⁷ See *id.* (“[A] State’s electoral vote is equal to the entitled representation in Congress which is based mostly upon population”).

⁷⁸ *What is the Electoral College? How it Works and Why it Matters*, THE HUFFINGTON POST, (Nov. 6, 2012, 9:53 AM), http://www.huffingtonpost.com/2012/11/06/what-is-the-electoral-college_n_2078970.html.

⁷⁹ *Id.*

⁸⁰ See *U.S. v. Mead Corp.*, 533 U.S. 218, 229 (2001) (“a reviewing court has no business rejecting an agency’s . . . authority to resolve a particular statutory ambiguity. . . but is obliged to accept the agency’s position if Congress has not previously spoken to the point at issue and the agency’s interpretation is reasonable.”).

⁸¹ *What is the Electoral College? How it Works and Why it Matters*, *supra* note 78 (stating that 48 states use a winner take all system that gives all electoral votes of the State to the winner of the State’s popular vote; Nebraska and Maine use a system that splits votes between the Senators, two votes, and the remaining electoral votes are apportioned by congressional district).

⁸² See *Citizens United*, 558 U.S. 310 (2010) (granting corporations rights to political speech on First Amendment grounds), and see *Burwell v. Hobby Lobby*, 134 S.Ct. 2751 (2014) (granting companies the protection of the Religious Freedom Restoration Act of 1993 and striking down the Health and Human Services contraceptive mandate).

that the corporations which opt-in to voting are not suppressing political spending and double-dipping in campaign finance and voting. This law would fall under FEC authority because FECA gave authority to the FEC for matters of campaign finance law.⁸³ In order to be given the ability to vote, a corporation would be required to submit, along with the buy-in fee, a petition to the FEC showing it had not partaken in any political spending by disclosing its financial records, and it was of a sufficient size by certification of company population. When a petition is submitted to the FEC, the corporation will be presumed to be involved in political spending and it must prove it has not. This does not abridge the presumption of innocence granted by United States law,⁸⁴ because there is no punishment should the FEC find a corporation has participated in political spending; even though the corporation would not be allowed to vote, it would retain its ability to participate within the legal bounds of campaign finance. Should the FEC, while reviewing a petition, find a corporation has participated in political spending it would reject the petition and void the buy-in fee. This would then allow the corporation to continue spending on elections, just as it had been before petitioning for a vote.

The corporate voting system would require strict oversight from not only the FEC, but from the corporation itself. Along with the forfeiture of the buy-in fee, noncompliance after acceptance of the petition should be followed by monetary penalties as well as suspension of the ability to petition the FEC for the ability to vote in future elections. To ensure compliance, the law should provide incentive to whistleblowers who report fraud in the certified financial statement disclosed to the FEC, similar to provisions in the Dodd-Frank Act of 2010;⁸⁵ as well as provide employment protection to whistleblowers, similar to the provisions within the Sarbanes-Oxley Act of 2002.⁸⁶

A foreseeable issue with enforcement is that the FEC has become rather inefficient over the last decade or so.⁸⁷ It has not issued any new rules about corporate money in the post-*Citizens United* world,⁸⁸ so it stands unclear what the rules remain. This failure becomes more worrisome when considering a lack of enforcement against a donor using a shell corporation to contribute

⁸³ See 93 P.L. 443, 88, § 311(a)(7)–(8) Stat. 1263.

⁸⁴ See *Coffin v. U.S.*, 156 U.S. 432, 454 (1895) (“the principle that there is a presumption of innocence in the favor of the accused is the undoubted law.”).

⁸⁵ See 15 U.S.C. § 78u-6 (b)(1) (2010).

⁸⁶ See 18 U.S.C. § 1514(Sec. A)(a) (2012).

⁸⁷ See generally Gold & Narayanswamy, *supra* note 46.

⁸⁸ See *id.*

money without being forced to disclose his own identity.⁸⁹ An ineffective FEC, as we currently have, would not be able to prevent corporations from double dipping, both spending political money and voting in the election. Before any new rules are made concerning corporate money in politics it should be established that the FEC is able to effectively function the way in which it is needed for this system to work correctly; alternatively, another agency could be created to provide oversight in this small area of the law in order to lower FEC workload, and create a specialized division which could better understand and evaluate petitions and investigate whether a corporation has fully abstained from spending before it is granted the right to vote.

CONCLUSION

Passing a law allowing corporations to vote in return for exiting the market of political spending would prevent corporations from avoiding disclosure by funneling money through intermediaries,⁹⁰ bringing corporate involvement into the light. This would result in a substantial decrease in the amount of spending on federal elections because pushing corporations out of political spending would in turn deprive intermediaries of receiving contributions from significant donors.⁹¹ In the post-*Citizens United* world of campaign finance, because corporations are now able to participate in political spending,⁹² Congress must make the next move in regulating the election process to protect the integrity of, and the trust in, the United States' election process. Granting corporations the ability to participate in elections through voting would prevent corporate dark money from influencing elections, resolve shareholder concerns over whether their money is being spent on elections, and would mark the return of the strict campaign finance system dismantled by *Citizens United*, again pushing corporate money away from federal elections.

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⁸⁹ *See id.*

⁹⁰ Bebhuk & Jackson, *supra* note 34, at 930 (2013).

⁹¹ *See id.* at 931 (stating that growth of funding to intermediaries over time leads to a presumption that the money is coming from public companies).

⁹² *See Citizens United v. FEC*, 558 U.S. 310, 357 (2010).

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