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Financing Corporate Elections

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Elections for corporate directorships have become more competitive and expensive in recent years, raising important questions of corporate campaign finance, such as whether an insurgent campaign must disclose the source of its funding and whether a director is permitted to receive third-party compensation during her term in office (known as a "golden leash"). These present novel and unanswered issues of corporate law, but many analogous issues have been resolved in the political sphere using the First Amendment and a well-developed line of Supreme Court case law beginning with Buckley v. Valeo *and continuing through* Citizens United *and other key precedents. This body of law, known as the "*Buckley *framework," is premised in part on the need to defend a republican form of government from incumbent officials who may seek to entrench themselves in office by imposing tight financial constraints on campaigns that seek to unseat them.*

This Article contends that the underlying logic of the Buckley *framework is transferrable to the corporate context. Corporations are organized based on a republican form of governance akin to our political democracy where shareholders vote for directors who serve a fixed term. Just as in the political arena, there is a concern that incumbent directors may seek to thwart corporate democracy and entrench themselves in office. For this reason, the famous* Blasius *doctrine of corporate law calls for searching judicial scrutiny when an incumbent board interferes with the ability of shareholders to vote them out of office. This Article argues that the* Blasius *doctrine should apply when an incumbent board of directors imposes regulations on the financing of challengers' campaigns, and that the doctrine should in such cases incorporate the teachings of the* Buckley *framework. Under the combined* Blasius-Buckley *framework developed herein, incumbent boards have authority to regulate the financing of corporate elections so long as there is a compelling corporate interest at stake. Finally, to illustrate the* Blasius-Buckley *framework, the Article analyzes corporate bylaws that regulate or prohibit the golden leash, concluding that while the so-called "Wachtell Bylaw" may go too far, a modified version would likely pass muster.*

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I. INTRODUCTION

The individuals who serve on the boards of directors of public companies wield control over a staggering amount of property that they do not personally own.[1] Apple Inc.'s cash holdings of $180 billion rivals the annual output of the State of Iowa, and its board of directors is comprised of just seven people.[2] Bank of America has as many employees as the State of New York, and it is controlled by a board of thirteen.[3] By what right do these small groups of people get all this power?[4]

The answer, in brief, is that they are democratically elected by the shareholders in a system of corporate governance modeled on the "republican" form of government practiced in the United States.[5] In the political arena, a republican form of government is one based on the idea of "popular sovereignty," meaning the people are sovereign over the government, not the other way around.[6] Government officials are elected by the people for fixed terms and can be replaced at the end of their term if the people so choose.[7] By analogy, the foundation of corporate governance is "shareholder sovereignty"—the idea that the directors of a corporation are elected by the shareholders for fixed terms and can be voted out if the shareholders so desire.[8] Like government officials, the fact that

1. *See, e.g.*, DEL. CODE tit. 8, § 141(a) (empowering the board of directors to manage the "business and affairs of every corporation"). This Article is focused exclusively on publicly traded companies with large numbers of shareholders, such as those that trade on the New York Stock Exchange or NASDAQ, and generally relies upon Delaware law. The present discussion is thus not directly relevant to director elections in companies that are closely held by a small number of shareholders or are incorporated outside of Delaware.

2. *Infra* notes 39–40.

3. *See* BANK OF AMERICA CORPORATION, ANNUAL REPORT 14 (2014), http://media.corporate-ir.net/media_files/IROL/71/71595/AR2014.pdf (noting the company boasts "more than 220,000 employees"); UNITED STATES CENSUS BUREAU, ANNUAL SURVEY OF PUBLIC EMPLOYMENT & PAYROLL (2014), http://www2.census.gov/govs/apes/14stall.xls (reporting that New York had 222,965 employees as of 2014).

4. *See* A.A. BERLE JR., ECONOMIC POWER AND THE FREE SOCIETY 16 (1957) (stating "wherever there is a question of power there is a question of legitimacy").

5. *See* WILLIAM T. ALLEN ET AL., COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION 104 (4th ed. 2012) (stating "the corporation has a republican form of government"); Leo E. Strine, Jr., *The Dangers of Denial: The Need for A Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 777 (2015) (explaining that "Delaware employs in corporate law[] a republican model of corporate democracy"); Tom C.W. Lin, *CEOs and Presidents*, 47 U.C. DAVIS L. REV. 1351, 1358 (2014) ("Corporate democracy utilizes political democracy as the governing principle for corporations."); Leo E. Strine, Jr., *One Fundamental Corporate Governance Question We Face: Can Corporations Be Managed for the Long Term Unless Their Powerful Electorates Also Act and Think Long Term?*, 66 BUS. LAW. 1, 3–4 (2010) (observing that corporate law has adopted a "republican . . . model of corporate democracy"); Alan R. Palmiter, *Public Corporation as Private Constitution*, 6 ICFAI J. CORP. & SEC. L. 8, 8 (2009) ("The large publicly-traded corporation in the United States derives its essential structure . . . from the republican form of government laid out in the US Constitution."); *see also* Blasius Indus. v. Atlas Corp., 564 A.2d 651, 659 (Del. Ch. 1988) (stating "[t]he shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests").

6. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (declaring that "Governments . . . deriv[e] their just Powers from the Consent of the Governed"); Comm. to Recall Robert Menendez From the Off. of U.S. Sen. v. Wells, 7 A.3d 720, 763 (N.J. 2010) (stating "popular sovereignty" is the "fundamental notion" that "all power resides with the people and that it is only by their consent that the people may be governed").

7. *See* U.S. CONST. art. IV, § 4 (guaranteeing to each state a "republican form of government").

8. Frank D. Emerson & Franklin C. Latcham, *Proxy Contests: A Study in Shareholder Sovereignty*, 41 CALIF. L. REV. 393, 393 (1953); *see also id.* at 438 (suggesting that "contests for proxies are but an expression of the shareholder's traditional and historic corporate sovereignty [akin to] Thomas Jefferson's political popular

corporate directors are periodically elected by a sovereign electorate keeps them accountable and renders their exercise of power legitimate, as opposed to tyrannical.[9]

Putting rhetoric aside, however, experience shows incumbent directors have long been re-elected to corporate boards without campaigning or even facing any opposition. Director-elections are generally conducted through the mail-in form of "proxy voting," where the corporation solicits proxies from shareholders to re-elect the incumbent board by mailing them a "proxy card" listing those candidates—and no others. Unsurprisingly, the candidates comprising this "management slate" do not campaign at all, for the outcome is preordained. In the 2015 election season, for instance, 98% of management-slate directors won a majority of the shareholder vote, each receiving an average of 96% of the votes cast.[10] Numbers like these have led countless commentators to dismiss proxy voting as a charade and to question whether this type of "shareholder democracy" really does confer legitimacy on the winners.[11]

But times are changing, as described in Part II below. As that Part will show, corporate elections have started to become much more competitive in recent years as so-called "activist" investors have launched lavish "proxy contests" to challenge the incumbent directors.[12] Importantly, government policy favors such insurgent campaigns: the Securities and Exchange Commission (SEC) has already enacted a "proxy access" rule and is considering a "universal ballot" rule, both of which explicitly aim to help insurgent shareholders defeat and displace incumbent directors.[13] Academic opinion is largely in accord, with leading corporate scholars presenting ideas for enhancing the competitiveness of corporate elections.[14] This convergence between corporate and political elections is a nascent trend, but a trend nonetheless. As corporate elections have become more

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sovereignty").

9. *See* ANDREW KEAY, BOARD ACCOUNTABILITY IN CORPORATE GOVERNANCE 19–30, 95–102, 209–14 (2015) ("Accountability . . . is a concept that is generally approved of by all right-minded people, whether it is in relation to those who hold public office . . . or directors of companies . . . ."). *But cf., e.g.*, Elizabeth Pollman, *Constitutionalizing Corporate Law*, 69 VAND. L. REV. (forthcoming 2016), http://ssrn.com/abstract=2661115 (explaining that "corporations are not democracies" as that concept is defined by political theorist Robert Dahl); Robert B. Thompson & Paul H. Edelman, *Corporate Voting*, 62 VAND. L. REV. 129, 130 (2009) (recommending that we "push any discussion of corporate voting away from a focus on democratic theory"); Usha Rodrigues, *The Seductive Comparison of Shareholder and Civic Democracy*, 63 WASH. & LEE L. REV. 1389, 1397 (2006) (stating that "corporations and political states are marked by differences so fundamental that it is dangerous to extrapolate lessons from one realm to the other").

10. PROXYPULSE, 2015 PROXY SEASON WRAP-UP 5, at 2, http://media.broadridge.com/documents/ProxyPulse-Third-Edition-2015.pdf; *see* Dale A. Oesterle & Alan R. Palmiter, *Judicial Schizophrenia in Shareholder Voting Cases*, 79 IOWA L. REV. 485, 506 (1994) (reporting "[i]ncumbents' success in American public corporations rivals that of former Soviet politicians").

11. *See, e.g.*, ROBERT C. CLARK, CORPORATE LAW § 3.1.1 at 95 (1986) (noting that a cynic might deride shareholder voting as "a mere ceremony designed to give a veneer of legitimacy to managerial power").

12. Activist shareholders, who represent only a small sliver of the total shareholder population, sponsored a majority of the proxy contests in the first half of 2014. Jason D. Schloetzer, *Activist Hedge Funds, "Golden Leash" Special Compensation Arrangements, and Advance Notice Bylaws*, THE CONF. BD. 1, 1–2 (Dec. 2015), https://www.conference-board.org/retrievefile.cfm?filename=TCB-DNV7N5-Activist-Hedge-Funds1.pdf&type=subsite.

13. *See infra* text accompanying notes 70–77 (discussing proxy access and the universal ballot). The SEC's proxy access regulation was subsequently invalidated, *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148 (D.C. Cir. 2011), but its adoption indicates that the Commission looks favorably on the concept.

14. *See, e.g.*, Bebchuk, *infra* note 26 (discussing how to reform corporate elections).

competitive, director candidates have begun to operate corporate campaigns that bear many similarities to campaigns for public office.[15]

Most importantly for present purposes, the increased competition in corporate elections has begun to raise important issues of campaign finance analogous to those addressed in the political arena and analyzed in landmark First Amendment opinions by the Supreme Court, especially the seminal case of *Buckley v. Valeo*.[16] These cases—and the statutes on which they are founded—have thoughtfully grappled with the government's interest in limiting the corrupting power of money in politics, the incumbent's personal interest in retaining power, and the vital importance of fair elections to a republican democracy. The fundamental issues of campaign finance regulation are similar in both the government and corporate context. In both cases, there is a concern that limits on campaign finance imposed by the incumbents are self-serving in that they impede challengers and thus perpetuate themselves in power.[17] On the other hand, there is also recognition that there are legitimate interests to limit or regulate the financing of campaigns, such as the prevention of corruption. All of this has been carefully analyzed in the public context under the First Amendment.

Corporate law, by contrast, has never really addressed the issue of financing director campaigns. The rules of corporate campaign finance have always been simple and few: Incumbents can spend reasonable amounts of corporate funds on defending a proxy contest while insurgents must finance their own campaigns (but may be reimbursed if they win).[18] Beyond that, there have never been any limits placed on how dissident campaigns are financed, by whom, how much, etc. In recent years, this lack of legal limits on the financing of director campaigns in American public companies has opened the door to practices that would constitute serious crimes if they were to be employed in a campaign for public office.

Consider the important example of the "golden leash," an agreement whereby a shareholder promises a director-candidate a substantial supplementary[19] compensation during her term in office.[20] Such a thing would be unthinkable in a political election, not to mention illegal.[21] As Section II.C explains, the golden leash represents all that is most dangerous about campaign finance. Large payments directly from one party (or a group)

15. *See* Harris, *Shareholder Campaign Funds*, *infra* note 26, at 173 (discussing how corporate elections are comparable to political elections).

16. Buckley v. Valeo, 424 U.S. 1 (1976).

17. *See, e.g.*, *id.* at 251 (Burger, C.J., concurring in part and dissenting in part) (recognizing "grave risks in legislation, enacted by incumbents . . . that tend to perpetuate those who control legislative power").

18. Levin v. Metro-Goldwyn-Mayer, Inc., 264 F. Supp. 797, 804 (S.D.N.Y. 1967); Rosenfeld v. Fairchild Engine & Airplane Co., 128 N.E.2d 291, 293 (N.Y. 1955).

19. Beyond the ordinary director fees that are paid by the company.

20. *See generally infra* Section II.C (describing the golden leash); Matthew D. Cain et al., *How Corporate Governance Is Made: The Case of the Golden Leash*, 164 U. PA. L. REV. 649 (2016). Golden leash payments are generally comprised of performance-based compensation, see *infra* text accompanying notes 103–04, and are sometimes paid even if the director-candidate loses the election and fails to win a seat on the board. *See infra* text accompanying notes 133–34. They are third-party payments from a sponsoring shareholder to an outsider; thus a payment from a sponsor to a candidate who is also an employee of the sponsor (e.g., a hedge fund manager who receives compensation from the fund) is not considered a golden leash for present purposes.

21. *See, e.g.*, LA. REV. STAT. § 18:1469 (1992) ("Bribery of a candidate" is punishable by up to five years in prison "with or without hard labor."); United States v. Grubb, 11 F.3d 426, 440 (4th Cir. 1993) (holding that federal bribery statute covers payments made to candidates). *But cf.* United States v. Manzo, 851 F. Supp. 2d 797, 799 (D.N.J. 2012) (construing state bribery statute to exclude payments made to unsuccessful candidate).

to a director-candidate rouse the obvious suspicion that the candidate, should she be elected, may be inclined to act favorably toward the donor and its interests, as opposed to serving the long-term interests of the corporation and its shareholders.[22] Despite the concern that directors may feel beholden to their sponsor, the golden leash has not only been proposed as a theoretical matter—it has actually been put into practice at major public companies.[23] While some criticize the golden leash as misguided,[24] even the critics acknowledge that its defenders hold the upper hand.[25]

The golden leash provides but one example of the broader field of corporate campaign finance, a subject that has been left largely untouched by the legislator's command, the judge's decree, and even the scholar's pen.[26] But this silence can no longer stand, for at least two reasons. First, competitive corporate elections, once quite rare, are increasing in both frequency and intensity.[27] Second, after *Citizens United*,[28] which held a corporation must be permitted, under the First Amendment, to spend as much as it wishes to speak on political matters;[29] therefore, corporate elections have the potential to bear directly on political ones.

The financing of corporate elections raises important and difficult questions of law and policy, including: (1) May a candidate raise unlimited outside funds to finance her campaign, or should there be limits, either per-donor or in the aggregate? (2) May anyone contribute to a director-candidate's campaign fund, or should this be limited to shareholders or even a subset thereof, such as long-term shareholders? (3) Should director-candidates have to disclose the source of their funding? (4) May a successful candidate receive side payments during her term in office, as with a golden leash?

These are all new questions for corporate elections, and there is no case law on point. In the public sphere, however, analogous questions have been answered using the First Amendment and the so-called "*Buckley* framework" derived from *Buckley v. Valeo*. Under this body of Supreme Court case law, described in detail in Part III below, political

22. *See infra* text accompanying note 319 (explaining that corporate law requires directors to maximize the pecuniary value of the corporation over the long term for the benefit of the shareholders).

23. *See infra* Section II.C (discussing golden leashes in proxy contests); Cain et al., *supra* note 20, at 653–54.

24. *See infra* text accompanying notes 141–48 (discussing critiques of the golden leash).

25. *See* Martin Lipton, *ISS Publishes Guidance on Director Compensation (and Other Qualification) Bylaws*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION (Jan. 16, 2014), http://corpgov.law.harvard.edu/2014/01/16/iss-publishes-guidance-on-director-compensation-and-other-qualification-bylaws/ ("In light of ISS' threat that it may issue withhold vote recommendations against boards that adopt director compensation bylaws, it can be expected that many companies will decide that discretion is the better part of valor and avoid a confrontation with ISS, despite the risks posed by 'golden leash' schemes.").

26. The very few scholars that have addressed the subject narrowly focus their discussions on ways to encourage or require corporations to finance insurgent campaigns in a manner akin to public financing for political candidates. *See generally* Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675 (2007) (discussing how the financing of insurgent campaigns should be done in a similar way to that of the financing for political candidates); Lee Harris, *The Politics of Shareholder Voting*, 86 NYU L. REV. 1761 (2011); Lee Harris, *Shareholder Campaign Funds: A Campaign Subsidy Scheme For Corporate Elections*, 58 UCLA L. REV. 167 (2010) [hereinafter Harris, *Shareholder Campaign Funds*].

27. *Infra* Section II.A.

28. Citizens United v. FEC, 558 U.S. 310, 311 (2010).

29. This freedom pertains only to "independent" corporate expenditures, as opposed to those coordinated with a campaign or candidate. *See infra* Section III.C.2.

campaign finance regulations are "subject to strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest."[30] This is a demanding test that has led courts to strike down many campaign finance laws—including contribution limits, expenditure limits, mandatory disclosure and public financing—over the years.

Because corporations are modeled on the republican form of government, with ultimate sovereignty lying with the shareholders, corporate law has a similar rule, or so I shall claim in Part IV. The *Blasius* doctrine, named after the "famous"[31] Delaware case of *Blasius Industries v. Atlas Corp.*, provides that when a corporate board acts "for the primary purpose of impeding the exercise of stockholder voting power . . . the board bears the heavy burden of demonstrating a compelling justification for such action."[32] The *Blasius* doctrine is examined in detail in Section IV.A below.

I argue in Section IV.B that *Blasius* establishes a useful doctrinal framework for campaign finance that is analogous to *Buckley* and adapted to the corporate context.[33] Under the *Buckley* framework, the incumbent government must show its campaign finance regulation furthers a "compelling interest" and is "narrowly tailored" to achieve it.[34] Similarly, under *Blasius*, the incumbent board likewise must show a "compelling justification" for its campaign finance regulation as well as a "reasonable fit" between means and ends.[35] Based on the link between *Blasius* and *Buckley*, I establish what I call the "*Blasius-Buckley* framework" for analyzing corporate campaign finance regulations imposed by an incumbent board of directors.

Sections IV.C–D describe the *Blasius-Buckley* framework in detail. Section IV.C examines which, if any, corporate interests qualify as a "compelling justification" for the regulation of corporate campaign finance. In the political context, the Supreme Court has accepted two government interests as sufficiently important to qualify as "compelling": (1) the avoidance of corruption, and (2) the prevention of outside (i.e., foreign) interference.[36] I claim in that Section that both of these concerns have direct analogs that should be recognized in the corporate sphere. I also argue that one interest that has not been found to be compelling in the political context—but may be in the corporate one—is the idea that expensive elections consume directors' time that could be better spent managing the company. Section IV.D then examines the various methods of campaign finance regulation used in the public sphere—contribution limits, expenditure limits, disclosure and collective financing—to see which may prove useful in the corporate sphere, concluding that all may play a role, depending on the compelling corporate interest at stake.

Finally, Part V applies the *Blasius-Buckley* framework to the concrete example of the

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30. *Citizens United*, 558 U.S. at 340.

31. Leo E. Strine, Jr., *The Story of* Blasius Industries v. Atlas Corp.: *Keeping the Electoral Path to Takeovers Clear*, *in* CORPORATE LAW STORIES 243, 271 (Mark J. Ramseyer ed., 2009).

32. Blasius Indus. v. Atlas Corp., 564 A.2d 651, 661 (Del. Ch. 1988) (emphases supplied). Although *Blasius* was a lower court opinion, the Supreme Court of Delaware has adopted its principles. Stroud v. Grace, 606 A.2d 75, 91 (Del. 1992) ("[W]e accept the basic legal tenets of . . . *Blasius*.").

33. The current Chief Justice of the Delaware Supreme Court made brief, oblique references to this concept during his tenure as a lower-court judge. *See infra* text accompanying notes 309–10 (discussing Chief Justice Strine's lower court decisions).

34. Buckley v. Valeo, 424 U.S. 1, 140 (1976).

35. *Blasius*, 564 A.2d at 661; Mercier v. Inter-Tel (Del.), Inc., 929 A.2d 786, 811, 819 (Del. Ch. 2007).

36. *See infra* Section III.B (discussing governmental interests under the *Buckley* framework).

golden leash. As will appear, I conclude that corporate boards have ample (but not unlimited) power to restrict golden leash payments in a variety of ways because it poses a significant threat to the corporation. Thus, while the most prominent method of golden leash regulation to date—the "Wachtell Bylaw"—may fail the test, a more-tailored version would likely pass muster.

II. CORPORATE CAMPAIGN FINANCE AND THE EXAMPLE OF THE GOLDEN LEASH

Proxy contests have heated up in recent years, as activist shareholders increasingly target even the largest and most well-established public companies. As these corporate elections have become more competitive, they have begun to resemble political elections, including their high cost. This, in turn, raises important issues relating to campaign finance—just who is paying for those phone banks and attack ads, and what might they want in return? This Part proceeds as follows: Section II.A describes the contemporary world of contested corporate elections and then Section II.B examines the financing of such campaigns. Finally, Section II.C focuses on a new and controversial method of financing corporate elections, the golden leash, which is also the subject of Part V.

A. From Coronations to Contested Corporate Elections

Republican democracy is the foundation of both political and corporate governance: just as the people elect representatives to manage the government, so too the shareholders elect corporate directors to manage the corporation.[37] This democratic process is vitally important, because it provides the legitimacy for granting a small group of people—whether government officials or corporate directors—power over "vast aggregations of property that they do not own."[38] The issue of legitimacy is exacerbated in the corporate context, where companies can be as large, in financial terms, as entire states and yet be managed by a board of directors only a fraction of the size of a state legislature. Apple's current cash pile alone is much larger than the state of Iowa's annual economic output,[39] and yet its board of directors consists of only eight people, compared with the 150-person Iowa General Assembly.[40] Thus, one might expect shareholder elections for corporate directors to be even more contentious than political elections, but this is not the case.

Corporate elections at public companies[41] have traditionally been staid, predictable affairs with no campaigning to speak of.[42] They look very different than political elections,

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37. *Supra* note 5.

38. *See Blasius*, 564 A.2d at 659 (stating the "shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests"); *see also* KEAY, *supra* note 9, at 95–102 (explaining the legitimating function of democratic accountability).

39. *See* Katie Benner, *Apple Profit Is Up 31% as iPhones Sell Briskly, but Its Forecast Is Muted*, N.Y. TIMES, Oct. 28, 2015, at B3 (reporting on statement from Apple CFO that the company held $206 billion in cash); *Broad Growth Across States in 2014*, U.S. DEPT. OF COMMERCE, BUREAU OF ECONOMIC ANALYSIS tbl.1 (June 10, 2015, 8:30 AM), http://www.bea.gov/newsreleases/regional/gdp_state/2015/pdf/gsp0615.pdf (stating Iowa's gross state product was approximately $152 billion in 2014).

40. *Apple Press Info: Board of Directors*, APPLE, http://www.apple.com/pr/bios/ (last visited Mar. 25, 2016); *Legislators*, THE IOWA LEGISLATURE, https://www.legis.iowa.gov/legislators (last visited Mar. 25, 2016).

41. This Article is addressed solely to publicly traded companies. *Supra* note 1.

42. *See, e.g.*, Paul. H. Edelman & Randall S. Thomas, *The Theory and Practice of Voting at U.S. Public Companies*, *in* JENNIFER G. HILL AND RANDALL S. THOMAS, RESEARCH HANDBOOK ON SHAREHOLDER POWER

which tend to be hard-fought and competitive in the United States,[43] with candidates and their backers running elaborate (and expensive) campaigns.[44] Rather, in a corporate election, the company mails each shareholder a proxy card listing a single slate of directors nominated by the incumbent board (generally the incumbents themselves). On occasion, an "insurgent" or "dissident" shareholder might send its own proxy card to the shareholders listing an alternative slate of directors, but proxy contests such as these have been quite rare. The overall effect, as Berle and Means famously observed almost a century ago, is that the incumbent board effectively perpetuates itself in office.[45]

This description, however true it once may have been, is now outdated.[46] A century ago, stockholders were dispersed investors, each only holding such a small stake to make them rationally apathetic about voting their proxy in a thoughtful way.[47] Over the decades, however, there has been a substantial and increasing shift away from small, dispersed share ownership to a substantial concentration among so-called "institutional" investors, including pension funds, endowments, hedge funds, and other vehicles that collectively manage trillions of dollars.[48]

If you own only 0.00018% of J.C. Penney,[49] it makes good sense to just let management perpetuate itself rather than try to figure out who could run the company better. If you are unhappy with the investment, you can simply sell your shares and exit.[50] But if you own an 18% block,[51] it would surely be worthwhile to invest the time and energy

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459, 469 (2015) ("For many years . . . shareholder voting was largely a formality.").

43. *See, e.g.*, Bush v. Palm Beach Cty. Canvassing Bd., 531 U.S. 70, 73 (2000) (recounting that, after about six million Floridians voted in the 2000 presidential election, the contenders were fewer than 1,800 votes apart); Anne Gearan & John Wagner, *A Dead-Even Clinton, Sanders are Poised for a Long Slog*, WASH. POST, Feb. 2, 2016, at A1 (reporting that the presidential primary race between Hillary Clinton and Bernie Sanders for the Democratic nomination for President was "effectively dead even").

44. *See, e.g.*, James A. Thurber, *Understanding the Dynamics and the Transformation of American Government*, *in* CAMPAIGNS AND ELECTIONS AMERICAN STYLE 9, 11 (James A. Thurber & Candice J. Nelson eds., 4th ed. 2014) ("'Money is the mother's milk of politics,' as the late speaker of the California Assembly, Jesse Unruh, said in the mid-1960s. Money has become even more important in twenty-first-century politics, as shown by the precedent-setting six-billion-dollar 2012 election cycle."); *id.* at 9 (stating that "campaigns have evolved into complex organizations featuring distinct divisions of labor and elaborate teams of (usually) outside professionals who coordinate with party organizations"); *State and Local Elections*, *in* L. SANDY MAISEL & MARK D. BREWER, PARTIES AND ELECTIONS IN AMERICA: THE ELECTORAL PROCESS 195, 210 (6th ed. 2012) (reporting that "[c]ampaigns for statewide office routinely require budgets in the millions of dollars and require professional management").

45. *See generally* ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 5 (1932) (explaining that the board of directors of a corporation with dispersed shareholders "can employ the proxy machinery to become a self-perpetuating body"); Edelman & Thomas, *supra* note 42, at 462.

46. Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 COLUM. L. REV. 863, 864 (2013).

47. *See* CLARK, supra note 11, § 9.5.1 at 390–92 (describing the rational apathy of dispersed shareholders).

48. *See* Gilson & Gordon, *supra* note 46, at 875 ("Put graphically but not metaphorically, representatives of institutions that collectively represent effective control of many large U.S. corporations could fit around a boardroom table."); Edward B. Rock, *The Logic and (Uncertain) Significance of Institutional Shareholder Activism*, 79 GEO. L.J. 445, 447 (1991) ("Over the last forty years, institutional ownership of stock has rapidly increased.").

49. Worth a few thousand dollars at current levels.

50. This is colloquially known as the "Wall Street Rule."

51. Worth hundreds of millions of dollars at current levels.

into monitoring management and even providing them with your business ideas.[52] Thus was born the "activist" investor, defined as one who acquires "a significant but non-controlling stake in a corporation and then tr[ies] to alter the company's business strategy initially through persuasion but sometimes through a follow-on proxy contest."[53]

As of the turn of the millennium, there were just a few, relatively small activist hedge funds, but their number and strength have grown by leaps and bounds in the years since. Assets under management by activist hedge funds were estimated to be about $200 billion in 2014.[54] This is not only a huge absolute figure, but also one that has grown by 269% since 2009, and more than 4000% since 2001.[55] In short, we are now living in the "heyday of institutional investor activism in proxy contests."[56]

This upsurge in the number of activist investors and in their financial firepower has led to a significant increase in the number of proxy contests,[57] as well as in their competitiveness.[58] Back in the 1960s and '70s, the average number of proxy contests for control each year was about five or six.[59] This grew to about 15 per year during the early 1980s and 30 per year in the late 1980s, with the level of insurgent success increasing all the while.[60] And while the 1990s saw something of a dip in the frequency of proxy contests to about a dozen per year,[61] the present "age of the activist investor"[62] has brought them roaring back.[63] The early 2010s have witnessed about 25 proxy contests for control per year, as well as about 65 proxy contests featuring "short slates" (where the dissident runs for just for a minority of the board seats),[64] with a very respectable combined success rate of 33%.[65] These numbers seem set only to increase, if for no other reason than the recent

52. *See* Miriam Gottfried, *The Penney Drops for Ron Johnson*, WALL STREET J., Aug. 11, 2012, at B16 (reporting that Pershing Square Capital Management, led by activist investor William Ackman, held an 18% stake in J.C. Penney and supported a new business strategy).

53. Gilson & Gordon, *supra* note 46, at 867.

54. Michael D. Goldhaber, *Marty Lipton's War on Hedge Fund Activists*, AM. LAW., Mar. 2015, at 44, 46.

55. *Id.*

56. John C. Coffee, Jr., *Shareholder Activism and Ethics: Are Shareholder Bonuses Incentives or Bribes?*, COLUM. L. SCH. BLUE SKY BLOG (Apr. 29, 2013), http://clsbluesky.law.columbia.edu/2013/04/29/shareholder-activism-and-ethics-are-shareholder-bonuses-incentives-or-bribes/.

57. Admittedly from a very low base.

58. *See generally* Locke Mfg. Cos. v. United States, 237 F. Supp. 80, 87 (D. Conn. 1964) ("A proxy contest has become a part of the corporate way of life.").

59. Oesterle & Palmiter, *supra* note 10, at 512–13.

60. *Id.*

61. Bebchuk, *supra* note 26, at 677.

62. *See* Goldhaber, *supra* note 54, at 44, 46 ("It has become a common meme that we live in the 'age of the activist investor.'").

63. *See* ARTHUR FLEISCHER, JR. & ALEXANDER R. SUSSMAN, TAKEOVER DEFENSE: MERGERS AND ACQUISITIONS § 10.01 (7th ed. 2015) (presenting empirical data suggesting that "[c]orporate America has witnessed an increase in the number of proxy contests and consent solicitations in recent years").

64. R. FRANKLIN BALOTTI ET AL., MEETINGS OF STOCKHOLDERS § 13.5 (2015) ("[W]e have witnessed in recent years a boom in the threatened or actual 'short slate' or minority board fights.").

65. FLEISCHER & SUSSMAN, *supra* note 63, § 10.01 (35% figure calculated using numbers from the years 2009–13, the most-recent data presented); *see also* Leo E. Strine, Jr., *One Fundamental Corporate Governance Question We Face: Can Corporations Be Managed for the Long Term Unless Their Powerful Electorates Also Act and Think Long Term?*, 66 BUS. LAW. 1, 23 (2010) (stating "the election process is more vibrant than ever"); Andrew Ackerman & David Benoit, *SEC Chief Tilts Again to Activists*, WALL STREET J., June 25, 2015, at C1 ("Activists have been on a winning streak lately, securing at least some of what they sought in 73% of all corporate elections last year, according to researcher FactSet.").

growth in the number of activists and the amount of money under their control.

As impressive as these statistics sound, they omit a key portion of the contemporary story, namely settlement of a threatened proxy contest by granting the activist shareholder a board seat or two in exchange for the activist promising not to run a proxy contest.[66] Rather than engaging in a full-on, drag-out proxy contest, companies and incumbent boards that nip them in the bud can avoid costly and distracting proxy fights while still giving the activist a voice in the boardroom.[67] For this reason, settlements resulting in an insurgent being granted one or more seats on the board are much more common than actual contested elections. Over the past decade, "activists have been awarded board seats at 218 companies [but only] 28 came via proxy fights," meaning that boards have collectively given up 190 seats "without having officially lost them."[68] This trend seems to be on the rise, as the number of board seats granted to activist shareholders through settlement of a threatened proxy contest has exploded in recent years, with 2015 representing the all-time high.[69]

As if this were not enough, legal and regulatory changes are afoot to encourage even more contested corporate elections in the future. The Dodd–Frank Act of 2010 expressly empowered the SEC to require companies include shareholders' nominees directly on the company proxy; an idea known as "proxy access."[70] The SEC exercised this authority shortly thereafter, enacting a proxy access rule in 2010 that would have required public companies to include on the company proxy the director-nominees of significant and long-term shareholders (individuals or groups holding at least 3% of the stock for more than three years) for up to one-quarter of the board seats.[71] Although that particular rule was struck down on administrative grounds,[72] shareholder pressure has led many leading companies, including Microsoft[73] and General Electric,[74] to voluntarily adopt proxy access in a form similar, if not equivalent, to that proposed by the SEC (i.e., 3% for three years and only for a small minority of the seats).[75]

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66. Lee Harris, *Corporate Elections and Tactical Settlements*, 39 J. CORP. L. 221, 224 (2014).

67. *See* David Benoit, *Companies, Activists Declare Truce in Boardroom Battles*, WALL STREET J., Dec. 10, 2013, at A1 ("Activist investors are increasingly encountering an unusual reception when approaching corporate targets: an open door. Instead of pulling up the drawbridge as activists approach, corporate executives and directors more often are engaging, concluding that it is easier and cheaper to negotiate rather than resist and risk a public fight . . . .").

68. Dennis K. Berman, *In Era of Activists, Look to Changes*, WALL STREET J., July 8, 2008, at C1.

69. *See* Michelle Jones, *Settlements with Activists Hit a New Record*, VALUEWALK (June 9, 2015), http://www.valuewalk.com/2015/06/settlements-activists/ (citing a report from FactSet).

70. Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 971, 124 Stat. 1915 (2010).

71. Facilitating Shareholder Director Nominations, Exchange Act Release No. 9136, 75 Fed. Reg. 56,668, 56,677–93 (Sept. 16, 2010) (to be codified at 17 C.F.R. pts. 200, 232, 240, 249); *see generally* Jill E. Fisch, *The Destructive Ambiguity of Federal Proxy Access*, 61 EMORY L.J. 435 (2012) (discussing problems associated with the federal proxy access rule).

72. *See* Bus. Roundtable v. SEC, 647 F.3d 1144, 1148 (D.C. Cir. 2011) (invalidating the proxy access rule as arbitrary and capricious, finding that the SEC had failed adequately to "apprise itself—and hence the public and the Congress—of the economic consequences" of proxy access).

73. Shira Ovide & Joann S. Lublin, *Microsoft Makes It Easier for Shareholders to Nominate Candidates to Board*, WALL STREET J., Aug. 7, 2015, at B3.

74. Gen. Elec., Annual Report (Form 8-K) (Feb. 6, 2015).

75. *See* David A. Katz & Laura A. McIntosh, *Corporate Governance Update: The Unintended Consequences of Proxy Access Elections*, N.Y. L.J. (Mar. 26, 2015), http://www.newyorklawjournal.com/id=1202721606790/The-Unintended-Consequences-of-Proxy-Access-Elections?slreturn=20160106193831

Beyond proxy access, the SEC has recently indicated an interest in a so-called "universal ballot," a new type of proxy voting that would "allow both sides to send out universal ballots, listing all candidates from management and dissident slates, allowing shareholders to split their vote."[76] The universal ballot is explicitly designed to make director elections more competitive.[77] With all this political force behind competitive corporate elections, this trend seems here to stay.[78]

B. The Financing of Corporate Elections

As discussed in the previous Section, major changes in the shareholder population and the rise of the activist investor have made contemporary corporate elections much more competitive than those in the bygone days of Berle and Means. And as they have become more competitive, corporate campaigns have begun to closely resemble traditional political campaigns for public office:[79] Director-candidates give speeches at fancy dinners[80] and publish full-page advertisements in the newspaper.[81] Corporate campaigns mail letters, fliers, and other materials to shareholder-voters, as well as solicit them on the phone.[82] They hire lawyers, consultants, and solicitors and launch sophisticated websites that feature "political-style attack video[s]."[83]

("Proxy access is the darling of the 2015 season. Shareholder-sponsored proxy access proposals are on the ballots of more than 100 U.S. public companies this spring," up from just twenty such proposals the year before.).

76. *See* Alexandra Higgins, *SEC'S Stein Backs Universal Proxy Ballots*, 2014 WL 1852985 (May 9, 2014) (reporting that SEC Commissioner Kara Stein "called for mandatory universal proxy ballots that would allow all shareholders to choose board candidates individually in proxy contests"); Ackerman & Benoit, *supra* note 65, at C1 (describing SEC Chair Mary Jo White's interest in "what is known as a 'universal ballot,' a single voting form in contested corporate elections").

77. *See* BURT NEUBORNE, MADISON'S MUSIC: ON READING THE FIRST AMENDMENT 85 (2015) ("Democracy is all about contestable elections.").

78. *See* Lucian Arye Bebchuk, *A Framework for Analyzing Legal Policy Towards Proxy Contests*, 78 CALIF. L. REV. 1073, 1082 (1990) (stating "proxy contests have reemerged as an important tool for acquiring control").

79. *See* Harris, *Shareholder Campaign Funds*, *supra* note 26, at 173 (observing that contested corporate elections "have many similarities to political elections"). This is a long-term trend. *See, e.g., Corporations—Powers of Stockholders—Stockholders Can Reimburse Victorious Insurgents from Corporate Treasury for Proxy Solicitation Expenses*, 69 HARV. L. REV. 1132, 1134 (1956) (reporting that "rival groups [in corporate proxy contests] have adopted many of the high-pressure tactics of a political campaign").

80. *See e.g.*, Kristen Grind, *Hess Chairman Cedes Title After 18 Years—Proxy Wars Put Money Managers On the Hot Seat*, WALL STREET J., May 11, 2013, at B1 (reporting that Hess Corp. hosted a meeting with a "director nominee" for about twenty significant investors "at a dinner in New Orleans's French Quarter").

81. *See, e.g.*, Ian Urbina & Sean D. Hamill, *Vote for Control of Heinz Keeps Pittsburgh on Edge*, N.Y. TIMES, Aug. 15, 2006, at A1 (reporting on proxy contest at Heinz featuring "full-page advertisements in local and national newspapers").

82. *See* Harris, *Shareholder Campaign Funds*, *supra* note 26, at 173 ("Campaign material is mailed to potential voter-shareholders, contestants set up phone-banking operations, pricey voting consultants are hired, and so forth."); *see, e.g.*, Jacob Bunge, *DuPont's Swing Voter: The Small Investor*, WALL STREET J., May 7, 2015, at B1 (reporting on proxy contest between DuPont Co. and Trian Fund Management LP in which shareholders were "inundated with pitches from both sides").

83. David Benoit & Joann S. Lublin, *Dow Chemical, Activist Strike a Deal*, WALL STREET J., Nov. 22, 2014, at B3; *see also, e.g.*, Jacob Bunge, *DuPont's Swing Voter: The Small Investor*, WALL STREET J., May 7, 2015, at B1 (reporting that a "Google search for 'DuPont Trian' brings up jousting websites created for the proxy contest: dupontdelivers.com belongs to management, and dupontcanbegreat.com is Trian's").

Campaigns like these cost money—a lot of money.[84] Even as far back as the 1950s, a proxy campaign could cost tens of thousands of dollars on each side, or even $100,000 or more in a heated contest.[85] By the turn of the 21st century, proxy contests routinely cost hundreds of thousands of dollars, and million-dollar expenses were not unheard of.[86] Today, in the heyday of the activist investor, a full-on proxy contest[87] can easily run several million dollars or even more.[88] In the recent high-profile proxy fight at chemicals giant DuPont, for example, the company spent $15 million and the (unsuccessful) challenger spent $8 million on their respective campaigns.[89] That may seem like an extreme example today, but it may prove commonplace if current trends continue.[90]

Given these massive sums at stake, who pays for all this? The rules of law are well-established and simple. On the incumbent side, the sitting members of the board may spend the corporation's money in support of their re-election campaign.[91] This is permitted because "it is in the interest of the stockholders that the management inform them concerning the policy which has been followed and the reasons therefor" before they cast their proxy vote.[92] Now, incumbents are only allowed to spend a "reasonable" amount of corporate money for this purpose, but this is a weak constraint, as the board's decisions will receive ample deference under the business judgment rule.[93] Also, incumbents may not dip into corporate treasury in support of a campaign that is merely over "personality," as opposed to corporate policy.[94] This exception is more theoretical than real, however, since "matters of policy ordinarily cannot be separated from matters of personnel."[95] Like

84. BALOTTI ET AL., *supra* note 64, § 13.2.

85. Emerson & Latcham, *supra* note 8, at 397; *see also* Daniel M. Friedman, *Expenses of Corporate Proxy Contests*, 51 COLUM. L. REV. 951, 951 n.5 (1951) (relaying that "the successful proxy contest which ousted the management of Fairchild Engine and Camera Company in 1949 cost the victorious contestants $127,556, while the incumbent management expended about $133,996").

86. *See* Harris, *The Politics of Shareholder Voting*, *supra* note 26, at 1805 n.199 ("In 2003, 2004, and 2005 the average cost to a soliciting shareholder of a proxy contest [was] $368,000.") (internal quotation mark omitted); William W. Bratton, *Hedge Funds and Governance Targets*, 95 GEO. L.J. 1375, 1403 (2007) (noting "the average cost ranges between $250,000 and $1 million") (citing a 2006 publication); *cf.* Stephen J. Choi & Jill E. Fisch, *How to Fix Wall Street: A Voucher Financing Proposal for Securities Intermediaries*, 113 YALE L.J. 269, 300 (2003) (noting a "2001 *Bloomberg Markets* article report[ing] that shareholder-sponsored proxy contests cost an average of $6.2 million each").

87. Recall that many are settled. *See supra* text accompanying notes 66–69 (discussing the increasing number of proxy contest over time).

88. *See* Nickolay Gantchev, *The Costs of Shareholder Activism: Evidence from a Sequential Decision Model*, 107 J. FIN. ECON. 610, 623 tbl.7A (2013) (modeling the waging of a proxy contest as costing an average of $5.94 million).

89. Pamela Park, *Proxy Battles Prove Costly for Companies*, 2015 WL 2364603 (May 19, 2015).

90. *See* David Reilly, *Activists Hunt Big Game, but Big Banks Remain Elusive*, WALL STREET J., Oct. 12, 2015, at C6 ("General Electric, Microsoft, Apple. All are massive companies that have come into activist investors' sights, signaling that there is almost no game too big for them.").

91. *See* Rosenfeld v. Fairchild Engine & Airplane Corp., 128 N.E.2d 291, 292 (N.Y. 1955) (stating "directors of a corporation may . . . in good faith incur reasonable and proper expenses in soliciting proxies"); Hall v. Trans-Lux Daylight Picture Screen Corp., 171 A. 226, 227 (Del. Ch. 1934).

92. Friedman, *supra* note 85, at 953; *Rosenfeld*, 128 N.E.2d at 293; *Hall*, 171 A. at 227.

93. *Rosenfeld*, 128 N.E.2d at 293.

94. *Hall*, 171 A. at 227; *Rosenfeld*, 128 N.E.2d at 292.

95. *See* Friedman, *supra* note 85, at 952 (stating "opposition to the incumbent directors is usually based upon the policy they have pursued").

politicians, directors stand for certain policies (e.g., "Obamacare"[96]) and a vote for them is a vote for the policies they support.[97] As a result, in summary, the corporation itself finances incumbent directors' re-election campaigns.

Things are a little more interesting on the insurgent side, as they are outsiders and cannot direct the company to write a check on their behalf.[98] Thus, a dissident campaign for one or more directorships must be financed by its proponents. That said, if the insurgents succeed in being elected to the board, they may be retroactively reimbursed by the corporation for their campaign expenses.[99] The rationale is that, by winning the election, their policy views have been vindicated by a majority of the shareholders and they have thus conferred a benefit on the corporation.[100] If the insurgents fail, however, they have no right of reimbursement and must simply eat their losses.[101]

That is it. Those are all the legal rules of corporate campaign finance, and they have remained unchanged for many decades.[102]

C. The Golden Leash as a Form of Campaign Finance

The very simple legal framework just described may no longer suffice in the age of shareholder activism and multi-million dollar corporate campaigns. In particular, one aspect of corporate campaign finance that recently emerged as a flashpoint is the so-called "golden leash."[103] A golden leash is a contract between an activist shareholder running a proxy contest and her director-candidates providing that the activist will pay the latter a supplemental compensation, over and above the ordinary director fees paid by the company to all directors. This is generally designed to be performance-based compensation that is linked to gains in share price during her term as a director and may amount to millions of dollars—many times the regular director fees paid by the corporation. For perspective, the

96. *See, e.g.*, Colleen McCain Nelson, *Obama Legacy Staked to Affordable Care Act's Outcome*, WALL STREET J., Sept. 27, 2013, at A4 (reporting that Republicans and President Obama alike refer to the "Affordable Care Act" as "Obamacare").

97. *See* Steinberg v. Adams, 90 F. Supp. 604, 608 (S.D.N.Y. 1950) ("[P]olicy and personnel do not exist in separate compartments. A change in personnel is sometimes indispensable to a change of policy. A new board may be the symbol of the shift in policy as well as the means of obtaining it."); *Hall*, 171 A. at 228.

98. *See* CA, Inc. v. AFSCME Emps. Pension Plan, 953 A.2d 227, 237 (Del. 2008) ("Generally, and under the current framework for electing directors in contested elections, only board-sponsored nominees for election are reimbursed for their election expenses. Dissident candidates are not . . . .").

99. *Steinberg*, 90 F. Supp. at 608.

100. *See* Friedman, *supra* note 85, at 956 ("If the opposition is successful—which means that the stockholders reject the incumbent management and/or its policies and elect a new group to succeed it, or defeat the management's proposals—the victorious group would appear to have as strong, if not a stronger, claim to reimbursement than the defeated management had a right to use corporate funds.").

101. *Id.* at 958; *see also id. at* 958–61 (reporting on "the absence of any reported decisions" where an unsuccessful dissident group was reimbursed by the corporation, even though at least some conferred a corporate benefit by providing shareholders with relevant information).

102. Thus, leading corporate law casebooks continue to employ cases from the 1950s and '60s on this point. *See, e.g.*, WILLIAM A. KLEIN ET AL., BUSINESS ASSOCIATIONS: CASES AND MATERIALS ON AGENCY, PARTNERSHIP, LLCS, AND CORPORATIONS 504–10 (9th ed. 2015) (reprinting Levin v. Metro-Goldwyn-Mayer, Inc., 264 F. Supp. 797 (S.D.N.Y. 1967), and Rosenfeld v. Fairchild Engine & Airplane Corp., 128 N.E.2d 291 (N.Y. 1955)); WILLIAM T. ALLEN ET AL., COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION 163–64 (4th ed. 2012) (reprinting Rosenfeld v. Fairchild Engine & Airplane Corp., 128 N.E.2d 291 (N.Y. 1955)).

103. *See* Cain et al., *supra* note 20, at 666–71 (describing the golden leash).

average annual director compensation at an S&P 500 company is about $250,000.[104]

The golden leash provides clear benefits to the corporation, including an increased ability to recruit talented, world-class directors to serve on its board.[105] And yet placing directors on the payroll of a third party in this way has led some to criticize the golden leash as a "bribe" that could corrupt the director and ultimately the entire corporation.[106] This concern has led some corporations to amend their bylaws to prohibit golden leash payments,[107] although many such bylaws were later retracted.[108]

The concept of a golden leash seems to have first emerged in 2013, when two activist investors ran proxy contests with golden leash payments in place.[109] In the first one, hedge fund Elliot Management commenced a short-slate proxy contest to elect five directors for the board of the energy company, Hess Corp., and promised each candidate a "a fifty-thousand-dollar retainer by Hess regardless of performance, [plus] an additional thirty thousand dollars for every percentage point the stock price outperformed industry peers, up to a maximum of nine million dollars."[110] Eventually, Elliot and Hess's incumbent board settled the matter by appointing three of Elliot's director-candidates to Hess's board, but only after they foreswore any golden leash payments.[111] In the second one, hedge fund Jana Partners also ran a short-slate proxy contest at agricultural-supplier Agrium Inc. and promised candidates a performance-based golden leash that was potentially worth tens of millions of dollars.[112] Jana declined to settle, but its candidates ultimately lost the election to the incumbent slate.[113]

The year 2014 marked the first instance of a golden leash actually being put into practice, specifically at Dow Chemical Co. In that case, as in the others, hedge fund Third Point threatened to launch a short-slate proxy contest with a golden leash contract for its director-candidates.[114] In a settlement, Third Point agreed not to commence the proxy contest and Dow Chemical added a few of the hedge fund's directors to the board, without

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104. Jeff Green & Hideki Suzuki, *Board Director Pay Hits Record $251,000 for 250 Hours*, BLOOMBERG (May 30, 2013), http://www.bloomberg.com/news/2013-05-30/board-director-pay-hits-record-251-000-for-250-hours.html.

105. For example, in its proxy contest at Agrium, a giant Canadian distributor of fertilizer, which included golden leash payments, one of Jana's director-nominees was a former Canadian Minister of Agriculture. In a presentation filed with the SEC, Jana specifically stated that its golden leash payment was necessary to "get the most qualified people to stand as nominees." Jana Partners, LLC, Supplemental Presentation to Proxy Advisors, (Mar. 21, 2013), www.sec.gov/Archives/edgar/data/943003/000110465913023600/a13-6908_3ex99dh.htm.

106. *See* Coffee, *supra* note 56 (analyzing whether golden leash payments are "Incentives or Bribes?").

107. Such a bylaw is known as a "Wachtell Bylaw," Cain et al., *supra* note 20, at 652, and is addressed *infra* Section V.B.1.

108. *See* Cain et al., *supra* note 20, at 653, 677 (discussing retracted bylaws); *infra* Section V.B.1.

109. Cain et al., *supra* note 20, at 663–71 (recounting the history of the golden leash); Adam Prestidge, *Activist Compensation of Board Nominees and the Middle Ground Response*, 11 HASTINGS BUS. L.J. 307, 308–09 (2015).

110. Prestidge, *supra* note 109, at 315.

111. *Id.* at 309.

112. *Id.*

113. *See* Ben Dummett & Chester Dawson, *Agrium Defeats Jana Slate*, WALL STREET J., Apr. 10, 2013, at B2 (reporting that after a "bitter proxy fight," "Agrium Inc. quashed an attempt by New York hedge fund Jana Partners LLC to install a slate of directors on the board of the Calgary-based fertilizer company").

114. Donna Dabney, *Maintaining Integrity: Golden Leashes Back on the Board Table*, CONFERENCE BD. GOVERNANCE CTR. BLOG (Dec. 8, 2014), http://tcbblogs.org/governance/2014/12/08/maintaining-integrity-golden-leashes-back-on-the-board-table.

requiring them to abandon their golden leashes.[115]

Thoughtful commentators have expressed their support for the golden leash, importantly including the well-known proxy advisors, Glass Lewis and Institutional Shareholder Services (ISS), both of whom have threatened to withhold support for any incumbent director who tries to ban the golden leash without shareholder approval.[116] Proponents of the practice argue that the golden leash benefits all shareholders by getting highly qualified people to join dissident slates and, once on the board, to push for business decisions that will result in a higher share price.[117] The golden leash's supporters see it as an innovative tool for activist investors to employ in order to recruit great candidates, and to incentivize such directors to raise the share price.[118] Not only that, but the golden leash payment is "borne entirely by the activist, not the company itself," or so the argument goes.[119] In this way, shareholders are "put in the position of free-riders, enjoying the positive externality of the nominees' incentive to perform without bearing any of the cost."[120] In short, the activist investor spends huge sums of its own money—both the cost of the insurgent campaign (several million dollars)[121] and the cost of the golden leash (millions of dollars per director)[122]—to benefit the corporation and all of its shareholders.

To critics of the golden leash, however, this all sounds a little too good to be true.[123] To them, it is naïve to presume that the activist investor expects to get nothing more than any other shareholder out of the corporation once her favored directors are on the board. Rather, according to critics of the structure, the golden leash is more likely designed to yield a personal benefit for the sponsoring shareholder, potentially at the expense of the corporation or the other shareholders.[124] To understand why, it makes sense to recall corporate law scholarship has long taken it for granted that rational shareholders at large public companies will not launch a proxy contest because of the "free-rider problem."[125] The idea is that the dissident shareholder that runs a proxy contest must personally incur the expense and uncertainty of the campaign, but the benefits that she provides (e.g., electing more-effective directors to the board) will be spread among all shareholders

115. Cain et al., *supra* note 20, at 653–54.

116. Jack Ferdon, *Restrictions on Compensation for Dissident Nominees Encounter Shareholder Opposition*, GLASS LEWIS & CO. (Feb. 6, 2014), http://www.glasslewis.com/blog/restrictions-compensation-dissident-nominees-encounter-shareholder-opposition; INSTITUTIONAL SHAREHOLDER SERVICES, *Director Qualification/Compensation Bylaws FAQs* (Jan. 13, 2014), www.issgovernance.com/files/directorqualificationcompensationbylaws.pdf; *see also* David Benoit, *ISS Backs Director Pay Plan—The two members placed by Third Point are to be paid based on Dow's share performance*, WALL STREET J., Apr. 23, 2015, at C2 (reporting that "Institutional Shareholder Services Inc. gave 'cautious support'" to the golden leash).

117. *See* Yaron Nili, *Servants of Two Masters? The Feigned Hysteria over Activist-Paid Directors*, 18 U. PA. J. BUS. L. 509, 522–23, 569–70 (2016) (presenting these arguments); Prestidge, *supra* note 109, at 333; Jana, *supra* note 105, at 18–24.

118. Jana, *supra* note 105.

119. Cain et al., *supra* note 20, at 670.

120. *Id.*

121. *Supra* notes 86 & 88.

122. *See, e.g.*, Cain et al., *supra* note 20, at 667 (observing that Jana's nominees in its proxy fight at Agrium stood to earn "millions of dollars" from their golden leashes, amounts "far greater than standard directors' fees").

123. *Cf., e.g.*, Neonatology Assocs., P.A. v. C.I.R., 299 F.3d 221, 235 (3d Cir. 2002) (observing, "experience shows that when something seems too good to be true that probably is the case").

124. Coffee, *supra* note 56.

125. *See, e.g.*, Bebchuk, *supra* note 26, at 689 (discussing proxy contests and the free rider problem).

equally.[126] Given that she internalizes the costs but shares the gains, a rational shareholder would not launch a proxy contest even when the expected benefit to the corporation and its shareholder body is significant.[127] This is an intuitive idea and one borne out by decades of very few proxy contests. So why now, all of a sudden, are activist shareholders interested in running proxy contests (and paying golden leashes)? Are they really willing to let other shareholders free ride on their efforts?[128]

Opponents of the golden leash think not. In their view, the old story is still true and it remains irrational for a single shareholder to run a proxy contest in order to confer a general benefit on the corporation as a whole, or to the shareholders as a body. That said, it could be perfectly rational for a lone shareholder to run a proxy contest to achieve some sort of personal or private benefit for herself. To critics of the practice, this is where the golden leash comes in: The payment creates "an incentive for the director to favor the interests of the shareholder that is paying him or her rather than the interests of all shareholders," or the corporation itself.[129] For this reason, other thoughtful commentators have criticized the golden leash and sought to ban it or at least limit it in some way.[130]

Both sides make strong arguments, but this author thinks that neither side has focused sufficient analytical attention to the nature of the golden leash: What is it? Before deciding whether the golden leash merits one's support, it is surely vital to first endeavor to understand it, and the golden leash can be categorized in a number of ways. It is, as it is commonly understood to be, a form of compensation for service as a director. But I think it is important to recognize that the golden leash is also a campaign contribution paid by one shareholder to a director-candidate in a contested proxy contest.

Proponents of the golden leash make no secret that the purpose of the payment is to induce the candidate to launch a campaign. The hedge funds that have pioneered its use expressly claim that they pay golden leashes in order to get "highly-qualified people to join dissident slates."[131] It is true that in most cases to date, golden leash agreements call for the bulk of the payments to be paid out after the director wins her election and commences service on the board. Even so, the promise to make the payment is made, and becomes binding as a contract, during or prior to the campaign.[132] And this method is not necessary to the concept of a golden leash. In Jana's proxy fight at Agrium, for instance, the candidates on Jana's dissident slate were paid just for running.[133] The sponsoring hedge fund promised its director-candidates a sizeable golden leash payment even if they lost the

126. *See id.* ("Although challengers must bear their full costs, they can capture only a fraction of the benefits that the contest confers on the shareholders collectively.").

127. *See id.* at 690 ("[E]ven though mounting a challenge would be beneficial in [certain] circumstances from the perspective of the shareholders collectively, it would not be worthwhile from the potential challenger's private perspective . . . . ").

128. *See* Cain et al., *supra* note 20, at 670 (describing shareholders as "free riders" on activists' efforts).

129. *Id.*

130. *See, e.g.*, Coffee, *supra* note 56 (reciting criticisms of the golden leash). The very term "golden leash" is said to be "perjorative." Gelles, *infra* note 142.

131. *See* Jana, *supra* note 105, at 19 (noting "shareholders often need to provide additional incentive to get highly-qualified people to join dissident slates").

132. Part of the payment is commonly made upfront, at the outset of the directorial campaign. *See, e.g.*, Cain et al., *supra* note 20, at 668 (discussing an example of an upfront payment). This is typically a small component of the overall golden leash payment, however, and the present analysis does not depend on it.

133. *Supra* text accompanying notes 112–13.

election—which they did.[134]

At its most basic, then, the golden leash is a transfer of consideration, contingent as it may be, from a shareholder to a director-candidate in support of her about-to-be-launched campaign. The same shareholder who is willing to pay a golden leash is also willing to bear all the costs of running the campaign. The point is that such a shareholder fits well into the conceptual framework of third-party campaign finance, where one party pays the expenses of the political campaign of another.

Accepting the golden leash as a campaign contribution, is it normatively desirable? Supporters might accurately point out that individual shareholders have always funded their insurgent campaigns themselves, and that the law has never taken the view that dissident directors elected to the board are beholden in some sense to the shareholder funding the campaign. Furthermore, experience shows directors elected as part of a dissident slate can act independently of their benefactor, as in the attempted hostile takeover of Airgas by Air Products.[135] In that case, Air Products made several premium bids for Airgas, but the incumbent board opposed the takeover and took steps to defend against it.[136] Air Products then commenced a successful proxy contest at Airgas in which its dissident candidates took over one-third of the board seats.[137] Upon joining the board of Airgas, and apparently learning new information known only to the board, however, these new "dissident" directors sided with the incumbents and continued defending against the takeover.[138] Thus, law and experience demonstrate that a director whose campaign is funded by a given shareholder does not thereby become beholden to her sponsor and can remain independent of that shareholder.

Without questioning that proposition, critics would say that the golden leash presents something new and different. Indeed, the golden leash can potentially be seen as a direct response to the independence of dissident directors as shown in cases like Airgas. If paying for her campaign is not enough to guarantee that a dissident director will follow through on a favored business plan, then perhaps paying the director directly would do the trick. Hence the name golden leash.

It bears noting that by paying a candidate directly, the golden leash goes beyond the usual conception of campaign finance, in the sense of financing the expenses of a campaign. Dissident shareholders, like those who finance political campaigns, have always paid for things like a candidate's travel expenses incurred during the course of the campaign. What is new in the golden leash is that the insurgent pays compensation directly to the director as consideration for her to stand for election or serve on the board. In this way the golden leash, while similar to political campaign finance, goes much farther than a political backer ever could. In the political sphere, people may contribute money to a

134. *See* Dummet & Dawson, *supra* note 113 (discussing Jana's failed bid at Agrium).

135. *See generally* Air Prods. & Chems., Inc. v. Airgas, Inc., 16 A.3d 48, 55 (Del. Ch. 2011) (discussing the attempted takeover); Steven M. Davidoff, *A Case Study: Air Products v. Airgas and the Value of Strategic Judicial Decision-Making*, 2012 COLUM. BUS. L. REV. 502 (2012) (same).

136. Davidoff, *supra* note 135, at 515–16.

137. Only one-third of the seats were up for election that year because Airgas had a staggered board with three classes. Davidoff, *supra* note 135, at 509.

138. *See Oral Arguments in A Hypothetical Appeal of* Air Products v. Airgas *to the Delaware Supreme Court*, 116 PA. ST. L. REV. 811, 812 (2012) ("The Airgas board, including the three new members who had been elected at Air Products' urging, unanimously rejected this offer as inadequate.").

candidate's campaign, but not to the candidate herself. Campaign expenses—printing, travel, consultants, etc.—may be funded by outside parties, but payments to a candidate herself are forbidden.[139] The law is obviously—and rightfully—concerned about the possibility that direct payments to a candidate will breed corruption among government officials whom we should reasonably fear might act to favor their benefactor once in power.[140]

The potential for corruption that the golden leash creates is almost too simple to put into words,[141] and a number of commentators have voiced their concern.[142] Professor Stephen Bainbridge has weighed in against them,[143] as has famed investor Warren Buffett.[144] The leading corporate law firm Wachtell, Lipton, Rosen and Katz (Wachtell Lipton), for its part, has enumerated no fewer than six distinct "threats" posed by the golden leash.[145] And Professor John Coffee has analogized the golden leash to a bribe intended to advance the goals of the sponsor at the potential cost to the corporation.[146] He fears that large golden leash payments "can give rise to a conflict of interest that induces a director to subordinate his or her own judgment to that of the institution paying the director."[147] Such arrangements "create the wrong incentives, fragment the board, and imply a shift towards both the short-term and greater risk."[148]

139. If Ben or Jerry were to hire Bernie Sanders at $1000 per hour to work at their ice cream shop for a forty-hour week, that would appear to represent either a $39,000 contribution to the Sanders for President campaign (well over the legal limit of about $2000), or an illegal bribe to Sanders.

140. *See, e.g.*, COLO. CONST. art. XXVIII, § 1 ("The people of the state of Colorado hereby find and declare that large campaign contributions to political candidates create the potential for corruption . . . .").

141. *See* Stephen Bainbridge, *Can Corporate Directors Take Third Party Pay from Hedge Funds?*, PROFESSORBAINBRIDGE.COM (Apr. 8, 2013), www.professorbainbridge.com/professorbainbridgecom/2013/04/can-corporate-directors-take-third-party-pay-from-hedge-funds.html ("If this nonsense is not illegal, it ought to be.").

142. *See, e.g.*, David Gelles, *Debate Over Activists' Paying of Board Nominees*, N.Y. TIMES, Nov. 26, 2013, at B1 ("[C]ompanies say that it is not clear who the activist[-compensated] director is really working for—its shareholders, or the hedge fund."); David A. Katz and Laura A. McIntosh, *Corporate Governance Update: Boardroom Confidentiality Under Focus*, N.Y.L.J. 1, 5 (Jan. 23, 2014) (describing the golden leash as "deeply problematic" and "an unfortunate practice"); Neil Whoriskey, *Golden Leashes, Honest Brokers, Risk Tolerances & Market Imperfections: Incentive Schemes for Activist Investor Nominees*, 21 CORP. GOV. ADVISOR 4, 2013 WL 8711390 (July 9, 2013) (noting that the golden leash is seen by some as an "atrocity" but finding comfort in the fact that courts "will always scrutinize these arrangements").

143. Bainbridge, *supra* note 141.

144. Mark Rogers, *GM, Harry Wilson, and the Disturbing Rise of the Golden Leash*, FORBES (Mar. 11, 2015), www.forbes.com/sites/forbesleadershipforum/2015/03/11/gm-harry-wilson-and-the-disturbing-rise-of-the-golden-leash/#768208df2083 (reporting on comments by Warren Buffett critical of a proposed golden leash at General Motors); Mike Spector et al., *GM Sets Buyback, Averting Proxy Fight*, WALL STREET J., Mar. 9, 2015, at B1 (reporting that "Warren Buffett . . . suggested the [golden leash at GM] created a short-term incentive. 'It's just not the way to run a business,' said Mr. Buffett . . . .").

145. Wachtell, Lipton, Rosen & Katz, *Shareholder Activism Update: Bylaw Protection Against Dissident Director Conflict/Enrichment Schemes*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (May 10, 2013), https://corpgov.law.harvard.edu/2013/05/10/bylaw-protection-against-dissident-director-conflictenrichment-schemes/.

146. Coffee, *supra* note 56; *see* Gelles, *supra* note 142 ("When boards disagree, it's better that they not think it's being done because certain directors are being bribed" through a golden leash compensation scheme.) (quoting John Coffee).

147. Coffee, *supra* note 56.

148. *Id.*

One way a golden leash may lead to pernicious results is in the context of a takeover offer made at a premium, but where the corporation may be worth more over the long run if the offer is rejected. In the past, the board could conclude that the company should reject such an offer, even if the shareholders are strongly in favor of it.[149] The board has the power to block a deal in order to protect the long-term value of the company, as they did in Airgas, even if a majority of the shareholders are "so focused on the short-term that they would take a smaller harvest in the swelter of August over a larger one in Indian Summer."[150] But if golden leashes are in place, and one or more directors are receiving a side payment from a shareholder with a relatively short time horizon, there is a legitimate concern that the board will feel internal pressure to accede to the deal despite their misgivings.[151] In short, the critics' concern that the golden leash can engender a short-term focus appears valid.

In response to the concern over short-termism, golden leash supporters point out that directors and officers are commonly paid on the basis of share-price performance over a few years and thus a golden leash with a similar design is not a cause for worry.[152] Be that as it may, the source of the compensation is different. Directors fees have always been paid out by the corporation, itself a perpetual entity.[153] By contrast, recipients of a golden leash would be predominantly paid by an activist shareholder, whose average holding period is relatively short.[154] It is easy to imagine that a director subject to a golden leash might feel beholden to the patron and be more inclined to pursue a plan designed to generate a short-term increase in the share price (e.g., cutting research and development) regardless of the long-term effects of such a course.[155]

In response to the corruption concern, defenders of the golden leash claim that it cannot cause harm to the company, even if a director becomes beholden to the sponsor of her golden leash. Since she is just one director, any harmful proposal she makes will easily

149. *See* Air Prods. & Chems., Inc. v. Airgas, Inc., 16 A.3d 48, 111–13 (Del. Ch. 2011) (holding in the affirmative on the question of whether, "if a majority of stockholders want to tender into an inadequately priced offer, is that . . . a threat that justifies continued maintenance of the poison pill?: where a majority of shareholders 'would be happy to tender their shares' . . . regardless of the potential long-term value of the company," this "is a clear 'risk' under the teachings of *TW Services* and *Paramount*."); Martin Lipton, *Just Say No: the Long Term-Value of the Poison Pill*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Dec, 18, 2015), https://corpgov.law.harvard.edu/2015/12/18/the-long-term-value-of-the-poison-pill/ ("Nearly six years ago, Air Products made an unsolicited all-cash bid to acquire Airgas for $60 per share (later increased to $70), to which the board of directors of Airgas said 'no.' [Last month,] Airgas agreed to be sold to Air Liquide at a price of $143 per share, in cash, nearly 2.4x Air Products' original $60 offer and more than double the final $70 offer . . . .").

150. *Air Prods. & Chems., Inc.*, 16 A.3d at 111 (citations and internal quotation marks omitted).

151. *See* Cain et al., *supra* note 20, at 671 ("Normally, the board of directors is thought to counterbalance the short term interests of such shareholders. However, if [activist] shareholders are able to put their nominees on the board and use potentially lucrative pay packages to ensure that those nominees continue to focus on short-term rewards, the activists damage the long term health of the corporation," according to critics of the golden leash.).

152. Jana, *supra* note 105, at 23.

153. *See, e.g.*, DEL. CODE tit. 8, § 102(b)(5) (2010) (providing that a "corporation shall have perpetual existence" unless otherwise provided in its certificate of incorporation); Andrew A. Schwartz, *The Perpetual Corporation*, 80 GEO. WASH. L. REV. 764, 812 (2012) (discussing the perpetual nature of the corporate form).

154. Alon Brav, et al., *Hedge Fund Activism: A Review*, 4 FOUND. & TRENDS FIN. 185, 205 (2009) (reporting that activists hold large blocks (greater than 5%) of target stock for about nine months, on average); *cf. id.* (reporting that activists' total average holding period is "close to two years").

155. *See* Cain et al., *supra* note 20, 667–68, 670–71 (taking note of this concern).

be voted down by the rest of the board.[156] But this line of argument cannot be correct. In the political context, even one corrupt government official is too many. Imagine a U.S. Senator who accepted bribes and then defended her behavior on the ground that she had only one vote out of 100! The idea is laughable because the law is and should be concerned with the corruption of individual politicians and directors, and it is not necessary that an entire majority become corrupt before we take action. For one thing, one rotten apple can spoil the bunch. If non-corrupt directors see their corrupt brethren are getting rich without consequences, they may give up their morals and join them in their corrupt ways. For another, individual directors can clearly influence the board's agenda and deliberations, as well as act on board committees.[157] These represent real sources of power that could be used to corrupt ends.

In conclusion, the age of the activist has brought with it proxy contests that look like political campaigns—and present analogous issues of campaign finance. The golden leash is a novel idea that has the potential to benefit corporations and shareholders alike by enhancing the ability of dissidents to challenge incumbents and by placing talented individuals on the board. But the large direct payments from one shareholder to a favored director also clearly raises the specter of corruption. A director-candidate who receives financial support, such as a golden leash, may be tempted to advance the interests of her sponsor over those of the corporation or the shareholders at large. She is only human, after all.[158]

The debate over the golden leash has a familiar ring to it. The interests and issues at stake in corporate campaign finance closely parallel those at stake in political campaign finance. The legitimacy of the electoral process is paramount in both political and corporate governance, making it vital to ensure that a dissident campaign can obtain sufficient financial support to present a real threat to the incumbent. On the other hand, there are very good reasons to worry about the corrupting power of money.[159]

In the political sphere, these difficult issues have been thoughtfully analyzed by the Supreme Court in a series of cases over the past 40 years, commencing with *Buckley v. Valeo* and continuing through *Citizens United* and other key precedents that collectively establish the so-called "*Buckley* framework." With this in mind, rather than analyzing the golden leash and other forms of corporate campaign finance in a vacuum, Part III looks to the political arena and the *Buckley* framework for guidance. After that, Part IV will adapt

156. *See* Nili, *supra* note 117, at 554 ("As a minority, even if we assume the worst of intentions, these directors would still need to convince enough of their peers to gain majority. [If a proposal would] clearly benefit the activist [at] the expense of the firm and other shareholders, such persuasion would be extremely unlikely.").

157. *Cf.* Joann S. Lublin, *Inside America's Boardrooms: Two-Person Board Panels Live On*, WALL STREET J., Jan. 28, 2016, at B1 (reporting that two-member board committees are found at "some of America's biggest companies").

158. *See* Merritt v. Colonial Foods, Inc., 505 A.2d 757, 765 (Del. Ch. 1986) (observing that corporate law is "sensitive to the weakness of human nature").

159. *See, e.g.*, William K. Rashbaum & Susanne Craig, *Skelos and Son Are Found Guilty in U.S. Graft Case*, N.Y. TIMES, Dec. 12, 2015, at A1 (relaying that Dean Skelos, the former majority leader of the New York Senate, was found guilty of federal corruption charges; "[e]vidence and testimony showed how some lawmakers can wield their considerable power to extort benefits for themselves or others"); Benjamin Weiser & Susanne Craig, *Silver Convicted on All 7 Counts in U.S. Graft Case*, N.Y. TIMES, Nov. 30, 2015, at A1 (reporting that Sheldon Silver, who spent "more than two decades as the [New York] State Assembly speaker," was found guilty of corruption; "he obtained nearly $4 million in exchange for [ab]using his position").

the *Buckley* framework to the corporate context. Part V will then apply that mode of analysis to the specific example of the golden leash.

III. THE *BUCKLEY* FRAMEWORK FOR POLITICAL CAMPAIGN FINANCE REGULATION

Campaigns for public office cost a tremendous amount of money.[160] The price of advertising, polling, hosting events, etc. adds up to vast sums. A typical successful U.S. Senate race, for instance, costs about $10 million,[161] and even smaller campaigns, such as a local election in a small city, can easily exceed $10,000.[162] Since very few candidates possess sufficient wealth to finance such campaigns on their own, politicians tend to have to count on others to finance and support their campaigns.[163] This mixture of money and politics, however, raises important concerns, including that those who finance a campaign may unduly affect the outcome of the election or the behavior of the politicians once elected.[164] Hence the financing of campaigns for political office have been the subject of state and federal regulation for more than a century, including the Federal Election Campaign Act in the 1970s and the Bipartisan Campaign Reform Act in the 1990s.[165] But the government's power to limit or regulate campaign finance is subject to stringent review under the First Amendment, as explained in this Part.

A. The Constraint of the First Amendment: The Buckley *Framework*

In the landmark 1976 case of *Buckley v. Valeo*, the Supreme Court held that the government's power to promulgate campaign finance laws is constrained by the First Amendment.[166] The Court's theory was this: the nature of our vast country and huge population renders it impossible to shout from a street corner and have the entire electorate hear one's message. To reach a nationwide (or even a statewide or citywide) audience, it is vital to spend money.[167] In shorthand, "money is speech."[168] Therefore, any

160. DANIEL P. TOKAJI, ELECTION LAW IN A NUTSHELL 273 (2013).

161. Paul Steinhauser & Rober Yoon, *Cost to Win Congressional Election Rockets*, CNN (July 11, 2013, 4:03 PM), http://www.cnn.com/2013/07/11/politics/congress-election-costs/.

162. *See, e.g.*, *City of Boulder Election Reports*, CITY OF BOULDER COLORADO, https://bouldercolorado.gov/elections/election-summary-reports (last visited Mar. 25, 2016) (indicating that nine separate campaigns spent more than $15,000 each in the 2015 election for city council of Boulder, Colorado).

163. *See* Buckley v. Valeo, 424 U.S. 1, 26 (1976) ("Under a system of private financing of elections, a candidate lacking immense personal or family wealth must depend on financial contributions from others to provide the resources necessary to conduct a successful campaign.").

164. TOKAJI, *supra* note 160, at 273.

165. The first major federal campaign finance law was the 1907 Tillman Act, which banned federal campaign contributions from nationally chartered banks and corporations. R. Sam Garrett, *The State of Campaign Finance Policy: Recent Developments and Issues for Congress*, CONG. RES. SER. 1 n.1 (Apr. 30, 2015).

166. *Buckley*, 424 U.S. at 19 (per curiam); *see also* NEUBORNE, *supra* note 77, at 234 n.33 ("The fragmented series of per curiam and individual opinions in *Buckley* usually shake out to seven to one, with Chief Justice Burger dissenting and Justice Stevens not participating.").

167. *See Buckley*, 424 U.S. at 19 ("[V]irtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.").

168. *See* MARK TUSHNET, IN THE BALANCE: LAW AND POLITICS ON THE ROBERTS COURT 250–51 (2013)

government-imposed limit on campaign finance necessarily constrains the First Amendment right to free speech.[169] Accordingly, the *Buckley* court concluded that courts must strictly scrutinize campaign finance laws and require the government to show that its law or regulation furthers a "compelling interest" and is "narrowly tailored" to achieve that interest.[170] This mode of analysis is known as the "*Buckley* framework" and it is still good law today.[171]

The *Buckley* decision itself grounded its holding on the idea that the speech at issue in political campaigns—"You should cast your vote for A because of x and y"—is simply so core to the First Amendment that the courts must guard it vigilantly against legislative infringement.[172] A close read of the per curiam opinion, however, reveals an additional rationale for the strict rule imposed by *Buckley*, one premised on the foundational importance of preserving popular sovereignty and a republican form of government.[173] As discussed above in the Introduction, a "republican" form of government is one in which the people elect representatives to govern on their behalf.[174] The related concept of "popular sovereignty" is the idea that "all power resides with the people and that it is only by their consent that the people may be governed."[175] They are foundational to our national charter as can be seen by the fact that they are discussed at length in both The Federalist Papers[176] and the Declaration of Independence.[177] The U.S. Constitution specifically guarantees a "republican form of government" to each state,[178] and its Preamble begins with the words "We the people . . ." thus demonstrating the paramount importance of these

("'Money is speech.' Not literally, of course . . . . 'Money is speech' means that the First Amendment has something to say about the constitutionality of the use of money in connection with speech.").

169. *See Buckley*, 424 U.S. at 19 ("A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."); *id.* at 19 n.18 ("Being free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline.").

170. Citizens United v. FEC, 558 U.S. 310, 340 (2010) (internal quotation marks and citation omitted).

171. *See, e.g.*, J. Robert Abraham, *Saving* Buckley*: Creating a Stable Campaign Finance Framework*, 110 COLUM. L. REV. 1078, 1081 (2010) (employing the term).

172. *See Buckley*, 424 U.S. at 15 ("It can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.") (quoting Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971)); *Buckley*, 424 U.S. at 14–15 (stating "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs . . . of course includ(ing) discussions of candidates.") (citing, inter alia, Mills v. Alabama, 384 U.S. 214, 218 (1966); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (discussing our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open")).

173. *See Buckley*, 424 U.S. at 154 ("In a republic . . . the people are sovereign."); *Sullivan*, 376 U.S. at 270 ("Debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution.").

174. *See Ex parte* Yarbrough, 110 U.S. 651, 666 (1884) ("In a republican government, like ours, . . . political power is reposed in representatives of the entire body of the people. . . .").

175. Comm. to Recall Robert Menendez From the Off. of U.S. Sen. v. Wells, 7 A.3d 720, 763 (N.J. 2010).

176. *See, e.g.*, THE FEDERALIST NO. 39, at 244 (James Madison) (stating that the House of Representatives would "derive its powers from the people of America").

177. *See* THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776) ("Governments . . . deriv[e] their just Powers from the Consent of the Governed.").

178. U.S. CONST. Art. IV, § 4. Our national government is likewise republican in form. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 839 (1995) (Kennedy, J., concurring).

foundational importance of popular sovereignty.[179] In the years since the founding, countless judicial opinions, including many by the Supreme Court, wax poetic on this aspect of our government.[180] In short, there can be no doubt that popular sovereignty and a republican form of government are among the most important principles upon which the United States was founded, and they remain paramount today.

The republican concept, however, suffers a serious flaw in that the "machinery of democracy"—such as ballot boxes and voting days—is controlled by the government itself, thereby creating "a risk that those who currently hold office—current legislators—can regulate elections in a way that insulates themselves improperly [from] competition and . . . undermines the integrity and accountability that should be central to democracy and democratic elections."[181] One aspect of the machinery of democracy is the regulation of campaign finance, and it is easy to see that the incumbent government officials can use campaign finance laws to hamstring the competition and perpetuate themselves in office.[182] If such behavior were allowed, legislators could negate popular sovereignty and undermine the republican form of government; and they have every incentive to do so.[183] Hence, one rationale for the strict *Buckley* framework is that the courts must defend the republican form against the legislature's inherent interest in self-perpetuating government.

This "republican rationale" for the *Buckley* framework is widely discussed in the scholarship[184] and has become an important component of the Court's *Buckley* framework

179. U.S. CONST. Art. IV, § 4.

180. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 14 (1976) ("In a republic . . . the people are sovereign . . . ."); Duncan v. McCall, 139 U.S. 449, 461 (1891) (stating "the people are . . . the source of political power"); McCulloch v. Maryland, 17 U.S. 316, 404–05 (1819) ("The government of the Union . . . is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit."); Chisholm v. Georgia, 2 U.S. 419, 479 (1793) (opinion of Jay, C.J.) (referring to the "great and glorious principle[], that the people are the sovereign of this country").

181. Richard L. Hasen, *The Newer Incoherence: Competition, Social Science, and Balancing in Campaign Finance Law After* Randall v. Sorrell, 68 OHIO ST. L.J. 849, 869 (2007).

182. *See* Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 522 (1997) ("Legislators drafting campaign finance reform legislation have an obvious incentive to advantage incumbents vis-à-vis challengers.").

183. *See* LAURENCE TRIBE & JOSHUA MATZ, UNCERTAIN JUSTICE: THE ROBERTS COURT AND THE CONSTITUTION 101 (2014) (stating the *Buckley* framework protects the people against "self-serving behavior" on the part of the government "and, ultimately, tyranny"); *see also* Austin v. Mich. Chamber of Comm., 494 U.S. 652, 692 (1990) (Scalia, J., dissenting) ("The premise of our Bill of Rights, however, is that there are some things—even some seemingly desirable things—that government cannot be trusted to do. The very first of these is establishing the restrictions upon speech that will assure 'fair' political debate. The incumbent politician who says he welcomes full and fair debate is no more to be believed than the entrenched monopolist who says he welcomes full and fair competition."); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 470 (1996) ("Campaign finance laws like those in *Buckley* easily can serve as incumbent-protection devices, insulating current officeholders from challenge and criticism.").

184. *See, e.g.*, TRIBE & MATZ, *supra* note 183, at 99–101; Hasen, *supra* note 181, at 869 (quoting Richard H. Pildes); Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 817 (1999) (observing that, with respect to campaign finance laws, "we must always be wary of the ways that incumbents will try to draft rules that handicap their challengers"); Klarman, *supra* note 182, at 522; Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1577 (1988) ("There are large difficulties in designing a system of campaign finance regulation that achieves its intended purposes and that does not serve as an incumbent protection measure."). *But see* Michael S. Kang, *To Here from Theory in Election Law*, 87 TEX. L. REV. 787, 789–90 (2009) (suggesting

over time. *Buckley* did not primarily ground its decision on the republican rationale (although the Court did make reference to the United States being "a republic where the people are sovereign"[185]). On the whole, the per curiam opinion in *Buckley* "approached federal regulation of campaign finance predominantly as a question of individual rights and free speech under the First Amendment," and did not put much weight on the concern over a republican form of government.[186] Indeed, the clearest exposition of the idea within *Buckley* can be found in a portion of Chief Justice Burger's separate opinion, where he expressed concern over the "grave risks" posed by "enactments that tend to perpetuate those who control legislative power"—but that opinion garnered no votes beyond his own.[187]

As the doctrine developed, however, the republican rationale came to the fore. At first, the idea that the *Buckley* framework either is or should be premised on the protection of popular sovereignty was embraced by individual Justices in their separate opinions[188] and scholarly publications.[189] Then, in the 2006 case of *Randall v. Sorrell*, a plurality of the Court expressly relied on the republican rationale to strike down a campaign finance law under the *Buckley* framework.[190] Two years later, the Supreme Court's majority opinion

that "entrenchment . . . has not been a prominent element of scholarship or jurisprudence about . . . campaign finance"); *id.* at 804 (observing that "courts and commentators do not necessarily frame campaign-finance problems . . . in terms of incumbent entrenchment").

185. *Buckley*, 424 U.S. at 15; *see also id.* at 14 ("Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution.")

186. Kang, *supra* note 184, at 804.

187. *Buckley*, 424 U.S. at 251 (Burger, C.J., concurring in part and dissenting in part).

188. *See, e.g.*, McConnell v. FEC, 540 U.S. 93, 306 (2003) (Kennedy, J., concurring in judgment in part and dissenting in part) (describing the campaign finance law at issue as "an incumbency protection plan"); *id.* at 263 (Scalia, J., concurring in part, concurring in judgment in part, and dissenting in part) ("The first instinct of power is the retention of power, and, under a Constitution that requires periodic elections, that is best achieved by the suppression of election-time speech."); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 404 (2000) (Breyer, J., concurring) (opining that the Supreme Court should not defer to a legislature that enacts a campaign finance law that "insulates legislators from effective electoral challenge"); Colo. Fed. Campaign Comm. v. FEC, 518 U.S. 604, 644 n.9 (1996) (Thomas, J., dissenting) (taking note of "the potential for legislators to set the rules of the electoral game so as to keep themselves in power and to keep potential challengers out of it"); *Buckley*, 424 U.S. at 251 (Burger, C.J., concurring in part and dissenting in part) (focusing attention on the "grave risks" posed by "enactments that tend to perpetuate those who control legislative power"); *see* Randall v. Sorrell, 548 U.S. 230, 248 (2006) (observing that "individual Members of the Court have expressed concern" that campaign finance laws can "insulat[e] legislators from effective electoral challenge"); Nathaniel Persily, *Fig Leaves and Tea Leaves in the Supreme Court's Recent Election Law Decisions*, 2008 SUP. CT. REV. 89, 105–06 (2008) ("Campaign finance is the one context in which a majority of the current Court (though not in a single decision) has signed on to the principle that the Constitution requires an inquiry into a regulation's effect on political competition.").

189. *See* Kagan, *supra* note 183, at 470 ("Campaign finance laws like those in *Buckley* easily can serve as incumbent-protection devices, insulating current officeholders from challenge and criticism."); *id.* at 467–68 (viewing "the *Buckley* principle as an evidentiary tool designed to aid in the search for improper motive" on the part of the government, such as "self-interest"); *id.* at 468 (asserting campaign finance laws "pose a significant danger of arising from the . . . desire on the part of officials to insulate themselves or their ideas from challenge").

190. *See* Randall v. Sorrell, 548 U.S. 230, 232 (2006) ("Contribution limits that are too low also can harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability."); Persily, *supra* note 188, at 106 ("In *Randall v Sorrell*, a controlling opinion for the Court, for the first time, struck down a campaign finance law—Vermont's stringent limit on contributions—because of its anticompetitive impact on challengers."). Justice Breyer's plurality opinion in *Randall* is commonly referred to as the lead or "controlling" opinion in the case. *See, e.g.*, Republican Nat'l Comm. v. FEC, 698 F. Supp. 2d 150, 156 (D.D.C.), *summarily aff'd*, 561 U.S. 1040 (2010)

in *Davis v. FEC*, tacitly observed that popular sovereignty is a driver of the *Buckley* framework.[191] And then, in the *Citizens United* case of 2010, a majority of the Supreme Court finally expressly recognized the republican rationale as the conceptual foundation for the strict *Buckley* framework: "[s]peech is an essential mechanism of democracy," held the Court, "for it is the means to hold officials accountable to the people."[192] In light of this case law, it is clear that the republican rationale is a central theoretical underpinning of the *Buckley* framework as currently understood.

To summarize, the *Buckley* framework protects freedom of speech and popular sovereignty by imposing strict scrutiny on laws that limit or regulate campaign finance. Under this legal test, the government must show that its campaign finance law furthers a "compelling interest" and is "narrowly tailored" to achieve that interest.[193] Over the years, various types of campaign finance laws have been reviewed by the courts using the *Buckley* framework, as have various rationales for such laws. This body of case law has established clear guides to which government interests qualify as "compelling" and which modes of regulation are sufficiently "narrowly tailored" to satisfy the "exacting," "strict" and "critical" scrutiny demanded by *Buckley*.[194] Section III.B will discuss compelling interests; Section III.C will discuss narrow tailoring.

B. Government Interests

The government has regulated political campaign finance for many years and in many ways, and legal challenges to those laws have generated a body of case law that delineates those government interests that are "compelling" from those that are not. As will appear, most rationales for campaign finance regulation have been rejected as insufficiently weighty to pass muster under the First Amendment.

(referring to the "controlling opinion of Breyer, J." in *Randall*); Richard L. Hasen, Citizens United *and the Illusion of Coherence*, 109 MICH. L. REV. 581, 623 n.239 (2011) (describing *Randall* as a "fractured decision" and referring to the "controlling opinion" by Justice Breyer); *Campaign Finance Regulation*, 120 HARV. L. REV. 283, 290 (2006) (discussing Justice Breyer's "controlling opinion in *Randall*"). *But cf.* Lair v. Bullock, 697 F.3d 1200, 1204, 1206 (9th Cir. 2012) (finding that Justice Breyer's plurality opinion in *Randall* is "persuasive" but "not binding authority").

191. *See* Davis v. FEC, 554 U.S. 724, 742 (2008) ("The Constitution . . . confers upon voters, not Congress, the power to choose the Members of the House of Representatives, Art. I, § 2, and it is a dangerous business for Congress to use [campaign finance] laws to influence the voters' choices."); *see also* Rick Pildes, *When Do Campaign Finance Laws Become a Way to Protect Incumbents*, BALKINIZATION (June 26, 2008, 11:37 AM), http://balkin.blogspot.com/2008/06/sympathy-for-millionaire-self.html ("The specter of incumbent self-entrenchment is central to today's decision [*Davis*], in my view.").

192. *See* Citizens United v. FEC, 558 U.S. 310, 339 (2010) ("In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential.") (citing and quoting *Buckley*, 424 U.S. at 14–15); *see also Citizens United*, 558 U.S. at 460–64 (Stevens, J., dissenting) (explaining that concerns over incumbent self-interest underlay the majority's decision).

193. *See* NEUBORNE, *supra* note 77, at 65, 79, 120, 121 ("The Supreme Court's pervasive mistrust of government speech regulation is reflected in the three elements of First Amendment strict scrutiny. . . . [T]he government must demonstrate: (1) a 'compelling' governmental interest in regulating the speech immediately, (2) that the regulation will actually advance the government's compelling interest, and (3) that 'less drastic alternatives' do not exist for dealing with the government's concern. It is a rare government regulation that survives strict scrutiny.").

194. *Buckley*, 424 U.S. at 11 ("critical scrutiny"); *id.* at 16, 44, 64 ("exacting scrutiny"); *id.* at 25 ("closest scrutiny"); *id.* at 75 ("strict . . . scrutiny").

1. Corruption

The first and most important basis for campaign finance regulation is that "the integrity of our system of representative democracy is undermined" by campaign contributions "given to secure a political quid pro quo from current and potential office holders."[195] For instance, "I'll give you $500,000 if you make me an ambassador."[196] Preventing corruption is a compelling government interest that can legitimately be used to limit campaign finance even in the face of the First Amendment.[197]

Moreover, avoiding even the appearance of corruption has also been held to be a compelling government interest for purposes of First Amendment strict scrutiny.[198] Clearly, most large campaign contributors make their donations without any expectation of a direct favor in return. They just support the candidate and her policy goals. But the Supreme Court found that the government has an interest in avoiding even the appearance that large donations improperly influence politicians.[199]

The concept of corruption adopted by the Supreme Court is a narrow one that only goes to "quid-pro-quo" corruption and expressly excludes mere "influence," "favoritism," or "access."[200] The nature of democratic politics is that elected representatives will favor certain policies and hence the voters that support them as well. This is not "corrupt" in the quid-pro-quo sense that the Supreme Court has recognized as a compelling interest for regulating the campaign finance area.

2. Outside Interference

A second important interest that the government may properly invoke to regulate campaign finance is the need to protect the domestic election process from outside interference. Hence, a recent federal case, affirmed by the Supreme Court, expressly upheld the government's authority to prohibit foreigners from attempting to influence American elections.[201] The court held that the government has a compelling interest under *Buckley* in "limiting the participation of foreign citizens in activities of American democratic self-government, and in thereby preventing foreign influence over the U.S. political

195. *See id.* at 26–27; FEC v. Nat'l Conservative Pol. Action Comm., 470 U.S. 480, 497 (1985) ("The hallmark of corruption is the financial quid pro quo: dollars for political favors.") (emphasis omitted).

196. TRIBE & MATZ, *supra* note 183, at 97.

197. *Citizens United*, 558 U.S. at 359; *Buckley*, 424 U.S. at 45.

198. *Citizens United*, 558 U.S. at 356; *Buckley*, 424 U.S. at 25.

199. *See Buckley*, 424 U.S. at 28–29 ("Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.").

200. *See Citizens United*, 558 U.S. at 359 ("When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption. The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt: 'Favoritism and influence are not . . . avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies. It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness.'") (quoting McConnell v. FEC, 540 U.S. 93 (2003)).

201. Bluman v. FEC, 800 F. Supp. 2d 281, 281 (D.D.C. 2011), *summarily aff'd*, 132 S. Ct. 1087 (2012).

process."[202] The political process is a domestic affair and the government is on sound footing if it acts to prevent foreign interference in our electoral process. Another type of outside influence would be the influence of legal persons, such as corporations or unions. And here too the government has been held to have the power to ban such entities from making campaign contributions.[203]

3. Equality/Anti-Distortion

Another potential governmental interest in regulating campaign finance is the promotion of equality or the avoidance of distortions based on wealth.[204] The idea is that unfettered spending on campaigns allow wealthy people (and companies) to wield disproportionate influence on election outcomes and policymaking.[205] To some, this amounts to a "distortion" of political discourse that undermines equality by drowning out the voices of the less well-off.[206] In their view, the First Amendment should allow the government to enhance political equality by limiting the ability of the wealthy to use their fortunes to affect elections.[207]

This theory, however, was squarely and expressly rejected by the Supreme Court, most notably in *Citizens United*.[208] The problem is that the basic goal of the First Amendment is to enhance political dialogue, not limit it; "it is our law and our tradition that more speech, not less, is the governing rule."[209] The First Amendment "was designed 'to secure the widest possible dissemination of information from diverse and antagonistic sources,' and 'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"[210] Thus, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[211] Rather, ideas must fight it out on the

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202. *Id.* at 288.

203. *See, e.g.*, Garrett, *supra* note 165 (discussing the Tillman Act as the first of its kind).

204. *See, e.g.*, Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204, 1204 (1994) (advocating for a constitutional guarantee that "each eligible voter [possess] equal financial resources for purposes of supporting or opposing any candidate or initiative on the ballot in any election held within the United States," on the theory that "wealthy citizens should not be permitted to have a greater ability to participate in the electoral process simply on account of their greater wealth").

205. Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 660 (1990) (referring to "the corrosive and distorting effects of immense aggregations of wealth"); *see* Hasen, *supra* note 190, at 588 (discussing *Austin*).

206. *See Austin*, 494 U.S. at 660 (expressing concern over "the corrosive and distorting effects of immense aggregations of wealth"); David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1369 (1994) (observing than one "objective" of campaign finance regulation is "to promote equality: people who are willing and able to spend more money, it is said, should not have more influence over who is elected to office").

207. *See* Hasen, *supra* note 190, at 588 (suggesting that "*Austin*'s emphasis on preventing 'distort[ion]' of the electoral process through large corporate spending suggested the Court in fact was espousing an equality rationale").

208. *See* TRIBE & MATZ, *supra* note 183, at 100 ("*Citizens United* decisively rejected the anti-distortion justification for campaign finance laws. . . . This is likely for the best."); *see also* Strauss, *supra* note 206, at 1369 (observing that "the Supreme Court's view . . . can be summarized quickly: Corruption is a permissible target of [campaign finance regulation]; inequality is not").

209. Citizens United v. FEC, 558 U.S. 310, 361 (2010).

210. Buckley v. Valeo, 424 U.S. 1, 49 (1976) (quoting N.Y. Times v. Sullivan, 376 U.S. 254, 266 (1964)).

211. *Id.* at 48–49; *see also* TRIBE & MATZ, *supra* note 183, at 101 ("[I]t would be a mistake to leave

battlefield of public opinion, even though the fight is not completely fair:

> Even if opportunities to engage in influential speech are unfairly distributed because of income inequalities, and even if government can directly redistribute wealth, the cure of allowing government to directly 'adjust' the distribution of speech is worse than the disease. We are not a symphony for Congress to conduct according to its view of fair speech rights.[212]

Moreover, if politicians were allowed to muzzle some speakers to favor others, "they might use that power to secure their own positions—hardly an equality-enhancing outcome."[213] For all these reasons, the *Buckley* framework holds that equality/anti-distortion is not a compelling government interest and may not be used as a basis for regulating campaign finance.[214]

4. More Competitive Elections

An additional possible government interest behind regulating campaign finance would be to enhance the competitiveness of elections. When one candidate has access to much greater financial resources than another, this could give the former an advantage.[215] This advantage can be neutralized through the use of certain types of campaign finance regulation, such as "matching funds" that are triggered by expenditures on the other side.[216]

This potential interest has not been found to be compelling, however, for the law is clear that the government has no legitimate interest in reducing the advantage that a well-financed candidate may have.[217] Different candidates have different strengths—some are celebrities; some are good looking; some are wealthy. The government does not have the power, under the First Amendment and the *Buckley* framework, to "mak[e] and implement[] judgments about which strengths should be permitted to contribute to the outcome of an election."[218] It is for the voters, not the incumbent politicians, to choose

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judgments about the 'proper' distribution of speech to politicians. Arming them with a roving license to level the playing field by silencing or adjusting the volume of disfavored speakers is an invitation to self-serving behavior and, ultimately, tyranny. The anti-distortion argument can too easily lead down this dangerous path, and *Citizens United* rightly discarded it.").

212. *See* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2826 (2011) ("The First Amendment embodies our choice as a Nation that, when it comes to such speech, the guiding principle is freedom—the 'unfettered interchange of ideas'—not whatever the State may view as fair."); TRIBE & MATZ, *supra* note 183, at 99.

213. TRIBE & MATZ, *supra* note 183, at 99.

214. *Citizens United*, 558 U.S. at 365; TRIBE & MATZ, *supra* note 183, at 99; *see also id.* at 101 ("[I]t would be a mistake to leave judgments about the 'proper' distribution of speech to politicians. Arming them with a roving license to level the playing field by silencing or adjusting the volume of disfavored speakers is an invitation to self-serving behavior and, ultimately, tyranny. The anti-distortion argument can too easily lead down this dangerous path, and *Citizens United* rightly discarded it.").

215. This concern is distinct, but closely related to the one considered in the last Section. The difference is that this Section focuses on relative resources among candidates, while the last focused on the relative resources among voters.

216. *See Bennett*, 131 S. Ct. at 2829 (striking down Arizona's matching fund law); Davis v. FEC, 554 U.S. 724, 743 (2008).

217. *Bennett*, 131 S. Ct. at 2826; *Davis*, 554 U.S. at 743.

218. *Davis*, 554 U.S. at 742; *see also Bennett*, 131 S. Ct. at 2826 ("[I]t is not legitimate for the government

their elected officials, "and it is a dangerous business for Congress to use the election laws to influence the voters' choices."[219] In short, there is no compelling government interest in leveling the playing field among candidates for office.

5. Reduce Cost of Campaigns

A final potential government interest in regulating campaign finance relates to the "skyrocketing" cost of political campaigns.[220] Because campaigns are so expensive, candidates are forced to spend "too much time raising money rather than devoting that time to campaigning among ordinary voters" or actually governing.[221] Accordingly, the government may have some interest in reducing the cost of political campaigns, simply as an efficiency measure. The Supreme Court, however, has expressly rejected this theory, holding that minimizing the cost of campaigns or time spent fundraising is not a compelling government interest under the *Buckley* framework.[222] Because it costs money to speak and run a campaign, and because the First Amendment encourages more speech rather than less, minimizing costs is just not an important government interest, at least not one important enough to withstand the force of the First Amendment.

C. Methods of Regulation

There are essentially four ways to regulate campaign finance: Expenditure limits, contribution limits, disclosure, and public financing. Each has been adopted by important federal campaign finance statutes, and each has been reviewed by the Supreme Court under the *Buckley* framework, specifically on the "narrowly tailored" aspect. This Section recounts the important case law on each of these four methods.

1. Contribution Limits

A contribution limit regulates the amount of money that may be donated to support a political campaign. Most importantly, contribution limits put a ceiling on how much a person or entity may give directly to a candidate and have largely been held to be constitutionally permissible, even under the exacting scrutiny called for by the *Buckley* framework. This is because contribution limits "entail[] only a marginal restriction upon the contributor's ability to engage in free communication" and do not strike at the heart of the First Amendment.[223] For this reason, contribution limits are subject to a somewhat

to attempt to equalize electoral opportunities in this manner.").

219. *Davis*, 554 U.S. at 742.

220. Buckley v. Valeo, 424 U.S. 1, 57 (1976).

221. Randall v. Sorrell, 548 U.S. 230, 243 (2006).

222. *Id.* at 246.

223. *See Buckley*, 424 U.S. at 20–21 ("[L]imitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication. . . . A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues. While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.").

"less searching" level of review than truly "strict" scrutiny;[224] as long as they are "closely drawn" to a "sufficiently important" government interest, contribution limits will generally satisfy the *Buckley* framework.[225]

Supreme Court doctrine has recognized two such government interests that are "sufficiently important" to support a limitation on campaign contributions. First, and most importantly, contribution limits respond directly to the important government interest in preventing quid pro quo corruption.[226] Direct contributions to a candidate, especially large ones, clearly raise the specter of quid pro quo corruption.[227] To prevent such corruption, the government has the constitutional power to impose reasonable limits on campaign contributions.[228] Second, contribution limits that apply to certain classes of people and entities, including corporations, labor unions, and foreigners (all of whom are legally prohibited from making campaign contributions to federal candidates)[229] are justified by the government interest in preserving the democratic process from outside interference.

Despite their general constitutionality, the *Buckley* framework does look askance at contribution limits when they are so unreasonably low that their effect is to allow "incumbents to insulate themselves from effective electoral challenges."[230] As the Supreme Court explained in *Randall v. Sorrell*, a very low contribution limit can "handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign," contravening the core First Amendment goal of sharing ideas and furthering debate.[231] Even so, the government is given broad discretion in setting contribution limits, and the courts will not engage in "fine tuning" legislative choices.[232] But if a contribution limit is so low that it seriously inhibits the ability of candidates to mount effective campaigns and effectively entrenches the incumbents in office, then it "goes too far" beyond the government's legitimate interests and violates the First Amendment.[233]

2. Expenditure Limits

An expenditure limit caps the direct spending on elections to a certain dollar value. This type of limit can be imposed on a candidate as well as those closely connected with a candidate. Such a limit may also sweep more broadly, generally limiting or banning "independent expenditures" made by third parties. In sharp contrast to a contribution limit, which only imposes a "marginal restriction" on the First Amendment,[234] a limit on expenditures imposes "direct and substantial restraints on the quantity of political

224. TOKAJI, *supra* note 160, at 281–83.

225. *See Buckley*, 424 U.S. at 25 ("Even a significant interference with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms.") (internal quotation marks and citations omitted).

226. *See supra* Section III.B.1 (discussing government interest in preventing corruption).

227. TUSHNET, *supra* note 168, at 251.

228. *Buckley*, 424 U.S. at 144.

229. Corporations and unions are totally prohibited from making contributions to candidates in federal election. 52 U.S.C. § 30118 (2015). The same rule applies for foreigners. 2 U.S.C. § 30121 (2015).

230. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 402 (2000).

231. *Buckley*, 424 U.S. at 56–57.

232. *Id.* at 30.

233. Randall v. Sorrell, 548 U.S. 230, 262 (2006).

234. *See supra* Section III.C.1 (discussing contribution limits); *Buckley*, 424 U.S. at 20.

speech."[235] For this reason, expenditure limits are held to the strictest scrutiny under the First Amendment, meaning that they must be narrowly tailored to achieve a compelling government interest in order to pass muster. Very few expenditure limits have passed this challenging test.[236]

Recall that the only government interests that have been recognized as compelling in this sense are the concern over quid pro quo corruption and the avoidance of interference by outsiders to the political process.[237] The anti-corruption interest is clearly a strong one, but simply inapposite to expenditure limitations: With respect to expenditures by a candidate herself or by her campaign, there is no risk of corruption. One cannot corrupt oneself. And with respect to independent expenditures by third parties, the "absence of prearrangement and coordination . . . alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate."[238] (By contrast, an expenditure by a nominally independent person or entity that is actually coordinated with a candidate or campaign raises the risk of corruption and is treated as a contribution under the law.)[239] The important point is that quid pro quo corruption cannot be the basis for an expenditure limitation. Independent people and entities are free to spend as much as they want to publicize their views on candidates and issues.[240]

This leaves just one potential government interest to support expenditure limitations, namely the goal of preventing outsiders to American polity—foreigners—from interfering with the domestic democratic process. Here, the Supreme Court has not directly spoken,[241] but it has summarily affirmed a lower court opinion that confirmed the government's authority to prohibit foreign nationals from making even independent expenditures that advocate for or against a specific candidate.[242] Even though this cuts against the First Amendment goal of encouraging speech on political issues, the government may do so in order to "prevent[] foreign influence over the U.S. political process."[243]

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235. *Buckley*, 424 U.S. at 39 ("It is clear that a primary effect of these expenditure limitations is to restrict the quantity of campaign speech by individuals, groups, and candidates. The restrictions, while neutral as to the ideas expressed, limit political expression at the core of our electoral process and of the First Amendment freedoms.") (citation and internal quotations omitted).

236. *But cf.* JOHN PAUL STEVENS, SIX AMENDMENTS 72–74, 79 (2014) (suggesting that prior expenditure limits were simply too low and proposing to amend the Constitution such that the government may impose "reasonable" expenditure limits).

237. *Supra* Section II.B.

238. *Buckley*, 424 U.S. at 47.

239. TOKAJI, *supra* note 160, at 282–83.

240. This is why the independent-expenditure-only entities known as "SuperPACs" are allowed to spend as they see fit to influence the electorate. *See* SpeechNow.org v. FEC, 599 F.3d 686, 696 (D.C. Cir. 2010) ("[T]he government can have no anti-corruption interest in limiting contributions to independent expenditure-only organizations."). *But cf.* Richard Briffault, *Super PACs*, 96 MINN. L. REV. 1644, 1681–82, 1685–86 (2012) ("[A]s Super PACs are typically run by former top aides to the candidates, formal coordination of message or strategies between candidates and their Super PACs is unnecessary. . . . [While Super PACs] are technically independent of the candidates, and are not allowed to coordinate their activities with the candidates[,] in practice a [Super PAC] is part of the campaign of the candidate it is aiding.").

241. *See* Bluman v. FEC, 800 F. Supp. 2d 281, 289 (D.C. Cir. 2011) (noting that "the Supreme Court has never squarely addressed the issue" of whether political donations from foreign nationals may be banned).

242. *Id.* at 288.

243. *Id.*

3. Disclosure

Rather than directly regulating the movement of money related to elections, as with expenditure and contribution limits, disclosure-based regulation requires that information about such expenditures and contributions be conveyed to the public. The identity of donors and how much they gave, as well as a record of campaign expenditures, are typical disclosure requirements.[244] Most disclosure-based campaign finance laws have been upheld as constitutional. Unlike limits on contributions or expenditures, requiring disclosure does not directly impede any speech, so the First Amendment infringement is lessened.[245] Also, there are important government interests in mandated campaign finance disclosure, including informing the electorate of where campaign money comes from and how it is spent and deterring quid pro quo corruption by publicizing the identity of large campaign contributors.[246] For these reasons, disclosure-based campaign finance regulation is generally consistent with the First Amendment.

There is an important caveat, however. It is well known that disclosure of contributions in support of unpopular causes can subject the donor to threats, harassment and reprisals—from either government or private parties—and that this can "chill" core First Amendment activity.[247] This is a serious concern, but one that depends on a case-by-case determination. Thus, disclosure laws are generally acceptable, unless a party can establish that "there were a reasonable probability that the group's members would face threats, harassment, or reprisals if their names were disclosed."[248] In such a case, requiring disclosure would run afoul of the First Amendment.[249]

4. Public Financing

A final method of campaign finance regulation is public financing, whereby the government itself provides funds to qualifying candidates.[250] The best-known example of public financing is the Presidential Campaign Fund,[251] which "has raised millions of dollars per presidential election cycle, and more than $1 billion since its inception."[252] Beyond the Presidential Campaign Fund, many states and localities have also implemented their own forms of public financing.[253]

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244. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 366–67 (2010) (describing disclosure requirements of the Bipartisan Campaign Reform Act).

245. *See id.* at 366 (explaining that while there is a burden there is "no ceiling on campaign-related activities" and no restriction on who may speak).

246. *Id.*

247. *See id.* at 370 (addressing Citizens United's argument "that disclosure requirements can chill donations to an organization by exposing donors to retaliation").

248. *Id.*

249. *See Citizens United*, 558 U.S. at 370 (explaining that a disclosure statute would "be unconstitutional as applied" in such a case).

250. *See* TOKAJI, *supra* note 160, at 316–17 (introducing public financing).

251. *See generally* Harris, *Shareholder Campaign Funds*, *supra* note 26, at 167 (providing a thorough description of the Presidential Campaign Fund, which is funded through a "check-the-box" method on the federal tax return).

252. *Id.* at 170. *But cf.* Michael Luo & Jeff Zeleny, *Reversing Stand, Obama Declines Public Financing*, N.Y. TIMES, June 20, 2008, at A1 (reporting announcement by then-Senator Barack Obama that he would opt out of the Presidential Campaign Fund, becoming the first major party candidate to do so).

253. *See, e.g.*, *Campaign Finance Reform Initiative*, CITY OF BOULDER, https://bouldercolorado.gov/

The primary goal of public financing is to reduce the need for candidates to solicit private money to run their campaigns; thereby reducing the risk of corruption that monetary contributions necessarily entail.[254] Most importantly for present purposes, however, is the point that public financing, standing on its own, does not infringe on the freedom of speech guaranteed by the First Amendment. It is really just a question of whether the government has the constitutional authority to spend money in this way, and the Supreme Court held in *Buckley* that the government does indeed possess that power.[255] The *Buckley* Court further clarified that the government may impose fair and reasonable conditions on those who accept public financing and also may use its judgment to provide funds only to the most-promising candidates.[256]

Subsequent cases, including *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*,[257] and *Davis v. FEC*,[258] have struck down certain conditions as imposing an unreasonable burden on the First Amendment rights of the candidates who accept public financing and their supporters. The constitutional problem in those cases was that they imposed a penalty on candidates that exuberantly exercised their First Amendment right to spend money to inform and persuade voters. In the statute at issue in *Arizona Free Enterprise*, for instance, if a campaign were to spend or raise more than her competitor, the latter would receive a benefit in the form of cash contributions from the public financing system.[259] But this link between public financing and benefiting a competitor is not necessary to the basic concept of public financing. Standing alone—fairly designed and administered—public financing remains on firm constitutional footing.

D. A Summary of the Buckley *Framework*

After forty years, the *Buckley* framework has become a firmly established component of our constitutional law.[260] This well-developed body of doctrine provides a set of rules

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elections/campaign-finance-reform-initiative (last visited Mar. 25, 2016) (describing a body of local campaign finance regulation).

254. *See* Buckley v. Valeo, 424 U.S. 1, 96 (1976) (stating that "public financing as a means of eliminating the improper influence of large private contributions furthers a significant governmental interest").

255. *See id.* at 90 (finding "no merit in [the] contention[]" that the Presidential Campaign Fund is somehow beyond the power of Congress to enact).

256. *Id.* at 90–108.

257. *See* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2817 (2011) (finding a matching fund provision unconstitutional).

258. *See* Davis v. FEC, 554 U.S. 724, 737, 744 (2008) (holding that certain aspects of the federal Bipartisan Campaign Reform Act of 2002 violate the First Amendment).

259. *Bennett*, 131 S. Ct. at 2808–09.

260. *See* Hasen, *supra* note 190, at 585 ("The fountainhead of modern U.S. campaign finance jurisprudence is the Supreme Court's opinion in *Buckley v. Valeo*."). *But cf.* NEUBORNE, *supra* note 77, at 115 (suggesting that First Amendment law is not "written in stone" but rather "in constant flux"). It must be noted that the *Buckley* framework, particularly as applied in *Citizens United*, has attracted the ire of many commentators. *See, e.g.*, NEUBORNE, *supra* note 77, at 117 (stating that "the Court got it dead wrong in *Citizens United*"); Stephen L. Carter, *Hillary Clinton's Plan to Pack the Court*, CHI. TRIB., May 29, 2015, at C17 (reporting an announcement from "Democratic presidential front-runner Hillary Clinton . . . that she would nominate to the [Supreme Court] only individuals committed to overturning the 2010 decision in *Citizens United* . . . ."). *But see, e.g.*, TRIBE & MATZ, *supra* note 183, at 100, 111, 145 (expressing support for the *Buckley* framework and *Citizens United*); TUSHNET, *supra* note 168, at 271–72 (same); *but cf.* TRIBE & MATZ, supra note 183, at 96 ("*Citizens United* is often deeply misunderstood."); TUSHNET, *supra* note 168, at 247 ("Misunderstandings of *Citizens United*

for analyzing political campaign finance regulation, one that is primarily designed to prevent corruption while still giving a challenger a fair shot to unseat an incumbent. At its most basic, the *Buckley* framework can be summarized as follows: Expenditure limits generally violate the First Amendment, except to the extent that they impact only foreigners. By contrast, most other types of campaign finance regulation are permissible, including reasonable contribution limits, disclosure mandates (unless there is a probability of harassment in a given instance) and public financing.[261] Now that the *Buckley* framework has been laid out, the next Part presents the central claim of this Article, one premised on a connection between the *Buckley* framework and the *Blasius* doctrine of corporate law.

IV. THE *BLASIUS-BUCKLEY* FRAMEWORK FOR CORPORATE CAMPAIGN FINANCE REGULATION

An animating concern of the *Buckley* framework is the fear that incumbent government officials might try to limit political campaign finance so as to hinder challengers and entrench themselves in office.[262] The need to defend popular sovereignty against this sort of behavior was dubbed the "republican rationale" above.[263] A parallel concern over incumbent entrenchment is well known and much discussed in the corporate context.[264] Concerns over an entrenched, self-perpetuating board of directors are at the core of *Unocal v. Mesa* and other landmark corporate law cases,[265] as well as the subject of much of the leading commentary on the field, including Berle & Means' and Jensen & Meckling's foundational works.[266] With respect to corporate elections, it takes little imagination to anticipate that an incumbent board could regulate the financing of corporate elections for the nefarious purpose of hindering insurgent campaigns and perpetuating themselves in office. Such behavior could obviously destroy the foundational principle of shareholder sovereignty on which corporations are supposed to be governed.

In the political sphere, we apply the *Buckley* framework to prevent the government from enacting campaign finance laws that interfere with the people's ability to assert their sovereign power through democratic elections.[267] In the corporate context, what legal rule

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abound.").

261. *See* Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118, 125 (2010) (providing a similar summary of the *Buckley* framework).

262. *See supra* Section III.A (describing the republican underpinnings of the *Buckley* framework).

263. *Supra* text accompanying notes 173–92.

264. *See, e.g.*, Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 900 (2005) (referring to empirical findings that "firm value is negatively correlated" with board entrenchment); Marcel Kahan & Edward B. Rock, *Corporate Constitutionalism: Antitakeover Charter Provisions As Precommitment*, 152 U. PA. L. REV. 473, 473 (2003) (claiming that shareholders "reasonably might opt for board entrenchment"); Lucian Arye Bebchuk et al., *The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence, and Policy*, 54 STAN. L. REV. 887, 892 (2002) (observing that the law of corporate takeovers are designed, in part, to prevent managers from "entrenching themselves").

265. *See* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985) (applying enhanced scrutiny to board actions taken to defend against a takeover because of "the omnipresent specter that a board may be acting primarily" to maintain its position of control).

266. BERLE & MEANS, *supra* note 45; Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

267. *See supra* Part III (describing the *Buckley* framework).

should we apply? There are no cases on point, in part because corporations have only just begun to regulate corporate campaign finance in the past year or two.[268] It is thus an open question and we must reason from first principles. This Part makes the claim that, when a corporate board acts to regulate campaign finance, a reviewing court should employ a corporate-law analog to the *Buckley* framework, and that this analog is the *Blasius* doctrine. I call this the "*Blasius-Buckley* framework" and elaborate on this below.

A. The Blasius *Doctrine*

The so-called "*Blasius* doctrine" of corporate law is named after a well-known Delaware Chancery Court decision decided in 1988.[269] The doctrine is easily stated: If an incumbent board of directors takes an action "for the primary purpose of impeding the exercise of stockholder voting power," it does not receive the protection of the business judgment rule, but rather "bears the heavy burden of demonstrating a compelling justification for such action."[270] Most importantly for present purposes, the *Blasius* doctrine is directly and expressly aimed at maintaining a republican form of corporate governance where shareholders hold the ultimate authority.[271] Indeed, *Blasius* itself is famous for waxing poetic on republican theory, to the point that "the opinion's stirring invocation of democratic principles often sends law students and other readers into a patriotic rapture of sorts."[272]

The most basic tenet of republican corporate governance is that the board is vested with wide authority to manage the business but, if "the stockholders are displeased with the action of their elected representatives, the powers of corporate democracy are at their disposal to turn the board out."[273] In the corporate world, as in the political one, however, the incumbents can abuse their control over the 'machinery of democracy' to entrench themselves in office and thereby undermine republican democracy. The *Blasius* doctrine, like the *Buckley* framework, is designed to address precisely this recurring situation.

The goal of *Blasius* is to defend shareholder sovereignty against the inherent self-interest of the incumbent board to retain their positions. Given the central importance of the shareholder franchise to the republican form of corporate governance, the election process must "be conducted with scrupulous fairness."[274] In order to have a legitimate corporate democracy, "those in charge of the election machinery of a corporation must be held to the highest standards in providing for and conducting corporate elections."[275]

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268. *See infra* Section V.B.1 (discussing the Wachtell Bylaw).

269. Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651 (Del. Ch. 1988).

270. *Id.* at 661; City of Westland Police & Fire Ret. Sys. v. Axcelis Techs., Inc., 1 A.3d 281, 288 (Del. 2010) (stating "a corporation's board must demonstrate a 'compelling justification' for board-adopted measures that interfere with, or frustrate, a shareholder vote") (quoting *Blasius*, 564 U.S. at 661).

271. *Infra* note 308; *see generally supra* text accompanying notes 5–9.

272. Strine, *supra* note 31, at 267.

273. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 959 (Del. 1985); MM Cos., Inc. v. Liquid Audio, Inc., 813 A.2d 1118, 1127 (Del. 2003) (observing, "if the stockholders are not satisfied with the management or actions of their elected representatives on the board of directors, the power of corporate democracy is available to the stockholders to replace the incumbent directors when they stand for re-election"); *see, e.g.*, Jacquie McNish, *Railroad Ups Ante for Deal*, WALL STREET J., Dec. 17, 2015, at B3 ("If shareholders are not happy with [the] stock price[,] 'I would throw out the board of directors at the next annual meeting.'") (quoting William Ackman).

274. Aprahamian v. HBO & Co., 531 A.2d 1204, 1206–07 (Del. Ch. 1987).

275. *Id.*; *MM Cos.*, 813 A.2d at 1126–27 ("The most fundamental principles of corporate governance are a

Under the *Blasius* line of cases, if a board of directors attempts to utilize the "corporate machinery . . . for the purpose of perpetuating itself in office," that is not an ordinary business decision but rather one that calls for heightened judicial scrutiny.[276] To take a simple example, if an incumbent board of directors were to "cancel all elections in order to retain power" forever, *Blasius* would apply and the incumbents would surely lose.[277]

In *Blasius* itself, the Atlas Corporation was managed by a board of seven people, but its certificate of incorporation authorized a board of up to 15.[278] One of Atlas's shareholders, Blasius Industries, sought the votes of its fellow shareholders through a written solicitation of their consent.[279] Blasius asked its fellows to vote both to increase the board to 15 people and to elect eight new directors nominated by Blasius, which would put Blasius in control of the enlarged board.[280] The Atlas board of directors, believing in good faith that the company would suffer under Blasius's control, quickly met and hatched a plan to thwart Blasius.[281] The Atlas board enacted a bylaw expanding the board to nine, and then appointed two (incumbent-friendly) directors to fill the new positions,[282] making it mathematically impossible for the Atlas shareholders to elect the Blasius slate.[283]

On these facts, the Delaware Court of Chancery found that, even though they acted in good faith, the Atlas directors breached the fiduciary duty of loyalty by frustrating the shareholders' power to elect a board of its choosing.[284] The court accordingly enjoined the incumbent's plan.[285] In his opinion explaining the ruling, Vice Chancellor William Allen expressly relied on the republican theory of the corporate form, writing, "The shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests."[286] As he further explained,

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function of the allocation of power within a corporation between its stockholders and its board of directors. The stockholders' power is the right to vote on specific matters, in particular, in an election of directors. The power of managing the corporate enterprise is vested in the shareholders' duly elected board representatives. . . . Maintaining a proper balance in the allocation of power between the stockholders' right to elect directors and the board of directors' right to manage the corporation is dependent upon the stockholders' unimpeded right to vote effectively in an election of directors. . . . Accordingly, careful judicial scrutiny will be given a situation in which the right to vote for the election of successor directors has been effectively frustrated and denied."); Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34, 42 (Del. 1994) ("Because of the overriding importance of voting rights, this Court and the Court of Chancery have consistently acted to protect stockholders from unwarranted interference with such rights."). The federal government has likewise expressed its view of the importance of the shareholder franchise through its enactment of the federal proxy rules. *See* J.I. Case Co. v. Borak, 377 U.S. 426, 431 (1964) (explaining that Congress enacted the proxy rules because it believed that "fair corporate suffrage is an important right").

276. Schnell v. Cris-Craft Inds., 285 A.2d 437, 439 (Del. 1971).

277. FRANKLIN A. GEVURTZ, CORPORATION LAW § 3.1 at 202 (2d ed. 2010).

278. Blasius Indus. v. Atlas Corp., 564 A.2d 651, 654 (Del. Ch. 1988).

279. *Id.* at 654–55; *see id.* at 664 ("Voting, or the granting of consent to stockholder action, is, of course, the legal right of record holders of stock.").

280. *Id.* at 654.

281. *See id.* at 652 (stating "defendants here acted on their view of the corporation's interest and not selfishly"); *Blasius*, 564 A.2d at 663 (noting "the action taken was taken in good faith").

282. *Id.* at 654–55.

283. *Id.* at 659.

284. *See id.* at 663 (concluding that the Atlas board's action "constituted an unintended violation of the duty of loyalty that the board owed to the shareholders," even though it "was taken in good faith").

285. *Id.*

286. *Blasius*, 564 A.2d at 659.

> [T]he stockholder vote . . . is critical to the theory that legitimates the exercise of power by some (directors and officers) over vast aggregations of property that they do not own. Thus, when viewed from a broad, institutional perspective, it can be seen that matters involving the integrity of the shareholder voting process involve consideration not present in any other context . . . . [This is why, when an incumbent board of directors acts] for the primary purpose of impeding the exercise of stockholder voting power . . . the board bears the heavy burden of demonstrating a compelling justification for such action.[287]

This standard of review that *Blasius* established has been described as "potent,"[288] "quite onerous,"[289] "strict,"[290] and "stringent."[291] Indeed, the standard is so high that its very application generally foreshadows that the defendants will lose.[292] But such a demanding level of review is needed because there is good reason to fear that incumbent directors (like incumbent politicians)[293] might abuse their control over the electoral process in order to entrench themselves in power.

This concern over the self-interest of incumbents to retain power also explains why the *Blasius* doctrine only applies to the acts of the board of directors; the doctrine places no limits on other parties, such as the government.[294] The *Blasius* doctrine thus has nothing to say about public laws and regulations that impact shareholder elections, like the federal proxy rules or stock market listing requirements.[295] It is solely concerned with "unilateral" action by an incumbent board of directors.[296] In other words, the *Blasius* standard of review only applies to one specific situation, where "the primary purpose of the board's action is to interfere with or impede exercise of the shareholder franchise and the shareholders are not given a full and fair opportunity to vote" for directors.[297] In practice, boards of directors commonly have many important reasons for their actions, making it difficult for plaintiffs to establish that the board's "primary purpose" was to interfere with or impede the free exercise of the shareholder franchise.[298] This predicate is thus "rarely" shown and incumbent boards are only infrequently called upon to justify their behavior under the *Blasius* test.[299]

287. *Id.* at 659–61; *see also* Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437, 439 (Del. 1971) (stating the law will not countenance subversion of corporate democracy by manipulation of corporate machinery).

288. Kallick v. Sandridge Energy, Inc., 68 A.3d 242, 258 (Del. Ch. 2013).

289. Williams v. Geier, 671 A.2d 1368, 1376 (Del. 1996).

290. Mercier v. Inter-Tel (Del.), Inc., 929 A.2d 786, 806 (Del. Ch. 2007).

291. Stroud v. Grace, 606 A.2d 75, 91 (Del. 1992).

292. Chesapeake Corp. v. Shore, 771 A.2d 293, 323 (Del. Ch. 2000) ("In reality, invocation of the *Blasius* standard of review usually signals that the court will invalidate the board action under examination. Failure to invoke *Blasius*, conversely, typically indicates that the board action survived . . . "); *accord* Yucaipa Am. All. Fund II, L.P. v. Riggio, 1 A.3d 310, 335–36 (Del. Ch. 2010).

293. *See supra* text accompanying notes 173–92 (describing the republican rationale for the *Buckley* framework).

294. *See* Blasius Indus. v. Atlas Corp., 564 A.2d 651, 659–60 (Del. Ch. 1988) (reviewing "a decision *by the board* to act for the primary purpose of preventing the effectiveness of a shareholder vote . . . .") (emphasis added).

295. *See, e.g.*, *infra* note 439 (discussing newly proposed a NASDAQ rule).

296. *Stroud*, 606 A.2d at 92.

297. MM Cos., Inc. v. Liquid Audio, Inc., 813 A.2d 1118, 1130 (Del. 2003).

298. *See, e.g.*, *Stroud*, 606 A.2d at 91–92 (reversing the lower court decision because "it was error to apply *Blasius* here").

299. *MM Cos., Inc.*, 813 A.2d at 1130.

This is not to diminish the importance of the *Blasius* doctrine, however. To the contrary, the doctrine and the republican conception on which it lies are of paramount importance and remain pillars of contemporary corporate law.[300] The case itself has been cited in hundreds of judicial opinions and thousands of times overall.[301] Furthermore, even when *Blasius* does not directly apply, the courts take care to "infuse [their] analyses with the spirit animating *Blasius*," and will "not hesitate to use [their] remedial powers where an inequitable distortion of corporate democracy has occurred."[302]

One issue that arises under *Blasius* is whether it applies with equal force to board actions taken on a "clear day," as opposed to in the "heat of battle" in response to some threat to the incumbents. The factual circumstances in which *Blasius*, *Schnell*, and other related cases arose are generally of the latter sort, the heat of battle, leading some commentators to suggest that actions taken on a clear day are more likely to survive *Blasius* scrutiny.[303] Although this distinction finds some support in the case law,[304] the better view seems to the contrary. In the sound opinion of one authority, *Blasius* should apply not only when "the opposition is currently taking steps to exercise their shareholder franchise, but [also when] management has taken steps that prevent such steps from even being commenced."[305] Thus the fact that a corporate board acts "on a 'clear day'" should not, in and of itself, shield a board from *Blasius* scrutiny.[306]

Finally, it is important to note that, under the *Blasius* doctrine, even if the director-defendants can show a compelling corporate interest for their action, they must also show a reasonable "fit" between the means employed by the board and the compelling corporate interest at stake.[307] This element, while not frequently mentioned in the law or commentary, is inherent in the concept of "justification," the term used in *Blasius*, as for one's acts to be justified, one must act proportionally. To take an example from criminal law, one may well be justified in running red lights on the way to the hospital to deliver a baby—but there is no such justification for running red lights on the way back. In the same way, just because a board of directors has a very good reason to interfere with the shareholder franchise, that doesn't mean that anything goes. Rather, the board's response must be appropriate and proportionate to the goal it is intended to achieve.

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300. Chesapeake Corp. v. Shore, 771 A.2d 293, 323 (Del. Ch. 2000); *see* Strine, *supra* note 31, at 244 (noting the central role of *Blasius* in Delaware corporate law); *id.* at 279 (noting the "enduring utility" of *Blasius*); *id.* at 290–91 (noting that *Blasius* maintained the credibility of Deleware law); *id.* at 290 n.138 (noting that some critics of *Blasius* turned into fans).

301. Westlaw KeyCite shows 1417 citing references as of March 14, 2016.

302. *Chesapeake Corp.*, 771 A.2d at 323.

303. *See, e.g.*, David C. McBride and Danielle Gibbs, *Interference with Voting Rights: The Metaphysics of* Blasius Indus. v. Atlas Corp., 26 DEL. J. CORP. L. 927, 930 (2001) (discussing the types of cases to which *Blasius* is applied); William J. Carney & George B. Shepherd, *The Mystery of Delaware Law's Continuing Success*, 2009 U. ILL. L. REV. 1, 43 (citing McBride and Gibbs attempting to rationalize the *Blasius* line of cases).

304. *Cf., e.g.*, Moran v. Household Int'l, Inc., 500 A.2d 1346, 1350 (Del. 1985) (noting that the present case was distinguishable from a set of cases decided in other jurisdictions, "since here we have a defensive mechanism adopted to ward off possible future advances and not a mechanism adopted in reaction to a specific threat").

305. JAMES D. COX & THOMAS L. HAZEN, BUSINESS ORGANIZATIONS LAW § 13.19 at 375 (3d ed. 2011).

306. Carney & Shepherd, *supra* note 303, at 43.

307. Mercier v. Inter-Tel (Del.), Inc., 929 A.2d 786, 811, 819 (Del. Ch. 2007); *cf.* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985) (requiring that the board's actions be reasonable in relation to the threat posed by a pending takeover bid).

B. Blasius *as an Analog to* Buckley*: The* Blasius-Buckley *Framework*

I claim that the *Blasius* doctrine can and should be understood as an analogy to the *Buckley* framework for issues of corporate campaign finance regulation. *Blasius*, like *Buckley*, is specifically designed to defend a republican form of governance from the danger that incumbents might use their power in order to frustrate actual or potential challengers and thus perpetuate themselves in office.[308] Thus both *Blasius* and *Buckley* apply a similar legal test to actions taken by incumbents that inhibit the ability of the electorate to vote them out of office, and for a similar reason: Incumbents, whether government officials or corporate directors, cannot be fully trusted to operate the machinery of democracy due to their inherent self-interest in perpetuating themselves in office.

This connection between *Blaisus* and *Buckley* is new to the literature, but it bears noting that the link between the two lines of doctrine had been recognized by Chief Justice Leo Strine of the Delaware Supreme Court during his tenure as a lower-court judge. In one case, Strine observed that *Blasius* "employed in the corporate context language that has totemic meaning for those steeped in our legal tradition. The words 'compelling justification' echo the almost impossible to satisfy standards used under the First . . . Amendment[] to address restrictions on political speech."[309] In another, he wrote that once the *Blasius* standard is invoked, a defendant board can "only justify their actions by showing a compelling justification, a very high standard drawing on the closest scrutiny used in cases . . . restrictions on political speech."[310] While these offhand references do not delve deeply into the connection between *Blasius* and *Buckley*, they do lend support to my claim that *Blasius* calls for a *Buckley*-like analysis when an incumbent board regulates the financing of dissident campaigns.

Now it is certainly true the analogy between corporate democracy and political democracy is not a perfect fit.[311] One difference between the two is that political voters have many different issues and interests in mind when they go to the polls, ranging from taxes to education to gun control. Shareholders, by contrast, are generally thought to be interested exclusively in their economic return.[312] Another distinction is that shareholders

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308. *See* Strine, *supra* note 31, at 267 ("*Blasius* was rooted in analogies to republican democracy and constitutional theory."); Paul H. Edelman et al., *Shareholder Voting in an Age of Intermediary Capitalism*, 87 S. CAL. L. REV. 1359, 1367 (2014) (describing *Blasius* as being premised on "a philosophical foundation of popular sovereignty parallel to what we see in our polity," where "shareholders are the ultimate repository of corporate authority, just as citizens are the font of power in the republic").

309. *Mercier*, 929 A.2d at 806 (citing First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 786 (1978)).

310. Kallick v. Sandridge Energy, Inc., 68 A.3d 242, 258 (Del. Ch. 2013) (citing United States v. Playboy Ent. Grp., 529 U.S. 803 (2000)); *see also* Strine, *supra* note 31, at 243, 290 (explaining *Blasius* protects shareholders against an incumbent board of directors "acting like a Latin American ruler in the latter part of the last century, declaring an end to democracy in order to protect the people from the dangers that would arise if the people erroneously ousted him at the upcoming election"). At least one constitutional scholar has also spotted this connection. *See* Ciara Torres-Spelliscy, *Corporate Democracy from Say on Pay to Say on Politics*, 30 CONST. COMMENT. 431, 434 (2015) ("Akin to the U.S. Supreme Court, the Delaware courts have been quite protective of the ability of shareholders to vote for new directors.").

311. *See, e.g.*, Rodrigues, *supra* note 9, at 1397–98 (warning that "corporations and political states are marked by differences so fundamental that it is dangerous to extrapolate lessons from one realm to the other").

312. *See Mercier*, 929 A.2d at 819 ("Stockholders invest to make moolah, cash, ching, green, scratch, cabbage, benjamins . . . money."); Stephen M. Bainbridge, *Privately Ordered Participatory Management: An*

can easily exit from the corporation, whereas political voters cannot so easily expatriate themselves to another state or nation.[313] A third is that voting in the political arena has expressive value separate and apart from its role in holding government officials accountable.[314]

Even accepting that the analogy is not perfect in every way, when it comes to the inherent self-interest of those in power to remain there, corporate and political democracy are indeed sufficiently analogous to make the connection between the *Blasius* doctrine and the *Buckley* framework. One need not accept that corporate and political democracy are alike in every way to conclude that they are alike in this one respect. Furthermore, one powerful method of insulating oneself from electoral challenge is to limit the amount of money a dissident campaign may collect or spend, and this is just as true in the corporate context as it is in the political one.

Thus, corporate campaign finance regulations imposed by an incumbent board of directors should be analyzed, in my view, by applying *Blasius* infused with the teachings of *Buckley*. This "*Blasius-Buckley* framework" calls for courts to strictly scrutinize board-imposed campaign finance regulations to determine whether they advance a compelling

Organizational Failures Analysis, 23 DEL. J. CORP. L. 979, 1067 (1998) ("Although investors have somewhat different preferences on issues such as dividends and the like, they are generally united by a desire to maximize share value."). This is a generalization and is clearly not entirely accurate, as evidenced by the precatory shareholder proposals on social, ethical, or environmental issues presented every year, the hundreds of "socially responsible" mutual funds that eschew tobacco, gambling, and certain other industries, and the consideration shown by pension funds to employee interests, just to name a few. *See, e.g.*, Elizabeth Pollman, *Citizens Not United: The Lack of Stockholder Voluntariness in Corporate Political Speech*, 119 YALE L.J. ONLINE 53, 55 (2009) (observing shareholders are "heterogeneous across multiple demographic categories and almost certainly across the political spectrum"); Kent Greenfield, *The Place of Workers in Corporate Law*, 39 B.C. L. REV. 283, 305 n.92 (1998) ("The putative homogeneity of shareholder preferences may evaporate in any number of concrete situations."). Furthermore, even solely within the economic domain, shareholders have different goals and interests, such as the time horizon for their investment. *See, e.g.*, Strine, *supra* note 65, at 10–12 (contrasting "institutional investors" with a "myopic concern for short-term performance" with "end-user investors" who "do not care about quarterly earnings or short-term gimmicks," but rather "want corporations to produce sustainable wealth," for instance to fund retirement); Leo E. Strine, Jr., *Can We Do Better by Ordinary Investors? A Pragmatic Reaction to the Dueling Ideological Mythologists of Corporate Law*, 114 COLUM. L. REV. 449, 456 (2014); Lipton, *supra* note 25, at 756 (criticizing as "erroneous" the idea that "the shareholder body is united by a common interest in maximizing share value"); Jill E. Fisch, *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy*, 31 J. CORP. L. 637, 661 (2006) (stating shareholders "vary considerably among such dimensions as the time frame over which they invest, the extent to which they trade versus passively holding the corporation's stock, their degree of diversification, the extent to which they hold non-equity interests in the issuer, any option or other hedging positions that they hold, and so forth"); Kent Greenfield, *The Place of Workers in Corporate Law*, 39 B.C. L. REV. 283, 305 n.92 (1998) ("Some investors plan to hold their shares for the long term and will be more interested in long-term returns; others will be looking for quick profits."); Stephen M. Bainbridge, *Participatory Management Within A Theory of the Firm*, 21 J. CORP. L. 657, 665 (1996) (explaining "shareholder investment time lines are likely to vary from short-term speculation to long-term buy-and-hold strategies, which in turn are likely to result in disagreements about corporate strategy"; also, "shareholders in different tax brackets are likely to disagree about such matters as dividend policy, as are shareholders who disagree about the merits of allowing management to invest the firm's free cash flow in new projects").

313. Rodrigues, *supra* note 9, at 1398 ("[S]hareholders have an important power that political voters lack: the power of easy exit through the sale of their shares—that is, the power to leave their polity. . . .").

314. First Nat'l. Bank of Boston v. Bellotti, 435 U.S. 765, 804 (1978) (White, J., dissenting) ("[S]ome have considered . . . the principal function of the First Amendment [to be] the use of communication as a means of self-expression, self-realization, and self-fulfillment.") (citing T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 4–7 (1966); W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)).

corporate interest in a narrowly tailored fashion.[315] Section IV.C will examine which, if any, corporate interests qualify as "compelling." Section IV.D will look at the various methods of corporate campaign finance regulation to analyze the issue of narrow tailoring, or fit.

C. Corporate Interests

This Section considers which corporate interests might qualify as "compelling" under the *Blasius-Buckley* framework and thus may properly be the basis for regulating corporate campaign finance. It takes the government interests considered in Section III.B, above, and analogizes each to the corporate arena.

1. Corruption

Corruption in politics, as discussed above in Section III.C.1, occurs when elected officials grant private benefits to certain favored parties rather than advance the interests of the nation (or state, city, etc.) as a whole, like they are supposed to. This concept can be analogized in the corporate context: Directors are elected to advance the corporate interest, and yet a director may abuse her position to advance the interests of one shareholder or some other constituency. Under this analogy, corruption in the corporate context occurs when a director diverts or subverts the corporation in order to pursue some goal other than the corporate interest.

And what is meant by "the corporate interest"? This question goes to the heart of corporate law and the ultimate purpose of the corporation. Some argue "the corporate interest" is a malleable concept that can be stretched to mean just about anything, from workers' rights to the environment.[316] But important case law on the question, from *Dodge v. Ford Motor Company*[317] in the early 20th century to *eBay v. Newmark*[318] in the early 21st, makes clear that the corporate interest is not quite that broad under the law. Cases such as these explain that "the corporate interest" is an interest in maximizing the pecuniary value of the corporation over the long term for the benefit of the shareholders.[319]

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315. Recall that *Blasius* only applies to actions taken by the incumbent board. *Supra* notes 294–96.

316. *See* Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 447 (2001) ("[T]he literature on corporate governance and corporate law has sometimes advocated 'stakeholder' models as a normatively attractive alternative to a strongly shareholder-oriented view of the corporation. The stakeholders involved may be employees, creditors, customers, merchants in a firm's local community, or even broader interest groups such as beneficiaries of a well-preserved environment.").

317. Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919) ("A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.").

318. eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34 (Del. Ch. 2010) ("The corporate form . . . is not an appropriate vehicle for purely philanthropic ends, at least not when there are other stockholders interested in realizing a return on their investment. . . . Having chosen a for-profit corporate form, [corporate] directors are bound by the fiduciary duties and standards that accompany that form. Those standards include acting to promote the value of the corporation for the benefit of its stockholders.").

319. *In re* Trados Inc. S'holder Litig., 73 A.3d 17, 37 (Del. Ch. 2013) (holding that corporate law imposes a legal duty on directors to "maximize the value of the corporation over the long-term for the benefit of the providers of equity capital, as warranted for an entity with perpetual life in which the residual claimants have locked in their

Surely it is possible for a director to be "corrupted" in the sense that she pursues some goal other than to advance the corporate interest in long-term wealth maximization. At the most base level, a director beholden to a specific shareholder (or some other party) may seek to benefit that shareholder at the expense of the corporation.[320] This concern underlies the longstanding prohibition on the "sale of office" by corporate directors.[321] Under this doctrine, directors may not sell their posts for money (although they may stand aside at the direction of a shareholder holding true voting control).[322] The law has long feared that directors who accept side payments from one shareholder may be corrupted and thereby act in favor of that shareholder, rather than the corporation and its shareholders as a body.

Beyond this simple type of corruption, a director who causes the company to act purely philanthropically or to provide a community service, instead of maximizing long-term profitability, would also be "corrupt."[323] A corporate director with close ties to one specific shareholder with a short investment horizon might try to divert the company away from its proper, long-term focus in order to achieve that shareholder's short-term investment goals.[324] Similarly, a director aligned with a non-shareholder constituency, such as employees, customers, or bondholders, may seek to advance that constituency's

investment") (citing, *inter alia*, Schwartz, *supra* note 153, at 777–83); *see* Honorable Leo E. Strine, Jr., *The Dangers of Denial: The Need for A Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 768 (2015) (observing that "the law of corporations in Delaware [holds that] directors must make stockholder welfare their sole end"); Schwartz, *supra* note 153, at 777 ("Among scholars, courts, and legislators, there exists a broad consensus that the ultimate objective of the business corporation is 'long-run profitability and shareholder gain,' as opposed to current profits, the betterment of humanity, or anything else."); PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01 cmt. f (1994) (stating "long-run profitability and shareholder gain are at the core of the economic objective"); Letter from Laurence D. Fink, Chairman and CEO of BlackRock, BUS. INSIDER (Apr. 14, 2015), http://www.businessinsider.com/larry-fink-letter-to-ceos-2015-4 ("[C]orporate leaders' duty of care and loyalty is not to every investor or trader who owns their companies' shares at any moment in time, but to the company and its long-term owners."). *But see generally, e.g.*, LYNN STOUT, THE SHAREHOLDER VALUE MYTH (2010) (challenging the idea that corporations are legally obligated to maximize shareholder value).

320. *See* Bebchuk, *supra* note 26, at 720 ("[S]hareholders with special interests [could seek] to get one or more representatives on the board" in order to "extract 'greenmail' benefits.").

321. *See* Frank H. Easterbrook & Daniel R. Fischel, *Corporate Control Transactions*, 91 YALE L.J. 698, 722 (1982) ("A sale of office is unlawful in every state . . . .").

322. Essex Universal Corp. v. Yates, 305 F.2d 572, 575 (2d Cir. 1962).

323. *See* Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919) (distinguishing the permissible "incidental humanitarian expenditure of corporate funds for the benefit of the employés, like the building of a hospital for their use," with an impermissible "general purpose and plan to benefit mankind"); *eBay Domestic Holdings, Inc.*, 16 A.3d at 34 (holding that the "corporate form . . . is not an appropriate vehicle for purely philanthropic ends"). Delaware and other states have recently adopted "benefit corporation" statutes that specifically authorize the creation of legal entities with multiple purposes beyond shareholder wealth-creation. *See* DEL. CODE tit. 8, § 362(a) (2013) (defining a "public benefit corporation" as one that "shall be managed in a manner that balances the stockholders' pecuniary interests, the best interests of those materially affected by the corporation's conduct, and the public benefit or public benefits identified in its certificate of incorporation").

324. *Cf.* Air Prods. & Chems., Inc. v. Airgas, Inc., 16 A.3d 48, 111 (Del. Ch. 2011) (declining to enjoin the target's defense on the basis of "evidence in the record that Airgas stockholders are so 'focused on the short-term' that they would 'take a smaller harvest in the swelter of August over a larger one in Indian Summer'") (quoting Mercier v. Inter-Tel (Del.), Inc., 929 A.2d 786, 815 (Del. Ch. 2007)); *id.* at 111–12 (finding "sufficient evidence that a majority of stockholders might be willing to tender their shares regardless of whether the price is adequate or not," and that this constitutes "a clear 'risk'" to the corporation).

interests at the expense of the essential corporate goal of durable, long-term profitability.[325] In the recent Delaware case of *In re Trados*,[326] for example, several directors of Trados Inc. were also partners in a venture capital firm that held a substantial quantity of preferred (but not common) stock in the company. This fact made them "dual fiduciaries" in that they owed a duty of undivided loyalty to both the VC fund and to Trados and its common shareholders.[327] Furthermore, because the preferred stock had a "liquidation preference" in the event of a merger, the VC funds had "a divergent interest . . . that conflicted with the interests of the common stock."[328] In other words, the VC-nominated directors on Trados's board had a conflict of interest because they were obliged to act in the interests of the VC fund standing behind them, and the fund's interests conflicted with those of the corporation.[329]

A final example would be where a director acts to advance a social or political goal at the expense of the corporation's long-term financial prospects.[330] Imagine, a director whose campaign was financed by an environmental activist, who is elected to the board of a coal company and then tries to cause the company to shut down and destroy (not sell) the company's facilities in order to combat climate change, even if those facilities are currently profitable.[331] She would be a "corrupt" director in the sense that she is trying to advance a

325. *Cf.* Tracie Woidtke, *Public Pension Fund Activism and Firm Value: An Empirical Analysis* 3 MANHATTAN INST. (Sept. 2015), http://www.manhattan-institute.org/pdf/lpr_20.pdf ("Ownership by public pension funds engaged in social-issue shareholder-proposal activism is negatively related to firm value."); John G. Matsusaka et al., *Opportunistic Proposals by Union Shareholders* 1 (USC Ctr. For L. & Soc. Sci., No. CLASS 15–25, Oct. 7, 2015), http://ssrn.com/abstract=2666064 ("The evidence suggests that some union proposals are intended to influence collective bargaining outcomes rather than maximize shareholder value . . . ."); *cf.* Ann Lipton, *Not Exactly About the Firm's Wealth Maximization*, L. PROFESSOR BLOGS NETWORK (Mar. 21, 2015), http://lawprofessors.typepad.com/business_law/2015/03/not-exactly-about-the-firm.html ("I find it very hard to believe that the UAW Retiree Medical Benefits Trust is genuinely concerned about drug pricing in its capacity as a *shareholder* seeking maximum returns. Instead, it seems far more likely that the Trust's concern is, you know, *drug prices*. That it has to pay. For its beneficiaries. And it's using its status as shareholder of several pharmaceutical companies to try to influence policy in that regard."). *But cf.* E. Norman Veasey & Christine T. Di Guglielmo, *How Many Masters Can A Director Serve? A Look at the Tensions Facing Constituency Directors*, 63 BUS. LAW. 761, 767 (2008) ("[C]ertain types of divergent interests that may at first appear to subject a constituency director to a conflict between the interests of his sponsor and his duty to the corporation and all the stockholders may not actually impose a conflict at all. A decision promoted by a labor representative on the board, for example, might increase labor costs—and increased costs might be seen by some as antithetical to stockholder interests in profits—but might nevertheless be in the company's long-term interests as promoting labor peace or increased productivity.").

326. *In re* Trados, Inc. S'holder Litig., 73 A.3d 17 (Del. Ch. 2013); *see also* Simone M. Sepe, *Intruders in the Boardroom: The Case of Constituency Directors*, 91 WASH. U. L. REV. 309, 345–48 (2013) (discussing the 2009 *Trados* unpublished opinion).

327. Trados, 73 A.3d at 46–47.

328. *Id.* at 47.

329. *See* Sepe, *supra* note 326, at 347 (reading *Trados* as taking the view that "being a board designee of a particular constituency may be sufficient for a director to be incapable of exercising disinterested judgment").

330. *See* Bebchuk, *supra* note 26, at 720 (explaining "shareholders with special interests [could seek] to get one or more representatives on the board" in order to "protect labor interests" or "advance a 'social' agenda").

331. Another example could be an anti-gun enthusiast elected to the board of a firearms company. *Cf.* Trinity Wall St. v. Wal-Mart Stores, Inc., 792 F.3d 323, 344 (3d Cir. 2015) (allowing corporation to exclude from its proxy materials a proposed shareholder resolution calling on the board to review the company's sale of high capacity firearms on the ground that the sale of such products "endangers public-safety and well-being").

non-corporate cause rather than the corporate interest.[332]

Just as in the political arena, the possibility that a director-candidate could be corrupted through the financing of her campaign such that she acts against the corporate interest is an important concern of all corporations. In other words, it is a compelling corporate interest for purposes of the *Blasius-Buckley* framework. The prospect that a director could be elected for the purpose of undermining the very corporation she is obliged to support and advance is a deeply serious concern that could justify intra-corporate regulation of the electoral process.

2. Outside Interference

The power to vote and elect corporate directors is vested exclusively in the shareholders.[333] This is analogous to the political sphere, where only citizens are granted the power to vote.[334] Even other stakeholders with abiding interests in the outcome of domestic elections—such as those on work visas who pay American taxes or foreign students attending American universities—are legally prohibited from voting in political elections.[335] In the same vein, non-shareholder corporate stakeholders and constituencies, including bondholders, employees, and customers, are likewise denied the right to vote in corporate elections. In both the political and the corporate arenas, the vote is limited in this way because decisions made by elected representatives are supposed to advance the interest of the specified electorate—citizens or shareholders—rather than any other group or constituency.[336]

And this goes beyond voting itself. As we saw in the political arena the government has a compelling interest under *Buckley* in preventing foreigners from participating in any activities that are "intimately related to the process of democratic self-government."[337] This is a "necessary consequence of the community's process of political self-definition."[338] As such, foreigners have been banned from contributing even one dollar (or euro or peso) to a candidate for an American political office.[339]

This interest applies with equal force in the corporate context. If non-shareholders were permitted to participate in activities intimately related to shareholder voting, there

332. The term "corrupt" admittedly sounds odd in this context.

333. DEL. CODE tit. 8, § 211(b) (2009); *see* Strine, *supra* note 312, at 453 ("In American corporate law, only stockholders get to elect directors . . . ."); Strine, *supra* note 319, at 766 ("In the corporate republic, no constituency other than stockholders is given any power.").

334. The right to political suffrage has greatly expanded over time to include women, African-Americans, non-property holders and young adults. TOKAJI, *supra* note 160, at 13–32; *see id.* at 13 (collecting sources).

335. *Id.* at 30; *see* Sugarman v. Dougall, 413 U.S. 634, 648–49 (1973) ("This Court has never held that aliens have a constitutional right to vote . . . . Indeed, implicit in many of this Court's voting rights decisions is the notion that citizenship is a permissible criterion for limiting such rights.").

336. *See* Strine, *supra* note 319, at 766 (suggesting that the right to vote being vested exclusively in the shareholders is a "rather important signal of what the end of corporate law is in Delaware").

337. Bluman v. FEC, 800 F. Supp. 2d 281, 287 (D.D.C. 2011) (quoting Bernal v. Fainter, 467 U.S. 216, 220 (1984)); *see supra* Section III.B.2 (discussing the need to protect domestic election processes from outside interference).

338. *Bluman*, 800 F. Supp. 2d at 287 (quoting Cabell v. Chavez-Salido, 454 U.S. 432, 439 (1982)). *Cf. generally* BENEDICT ANDERSON, IMAGINED COMMUNITIES (1983) (describing a nation as an imagined community defined by the constituents themselves).

339. *Bluman*, 800 F. Supp. 2d at 292.

would be good reason to fear that directors elected through such a process might act against the interest of the shareholders and in favor of the outsiders who helped get them elected. Take the case of two rival companies, such as Coca-Cola and Pepsi. It is easy to see that Coca-Cola could stand to benefit by intermeddling in Pepsi's elections, for instance by trying to get incompetent directors elected to Pepsi's board, and Pepsi clearly has a strong and legitimate interest in preventing this outcome. In short, the prevention of improper outside interference with corporate elections likely represents a compelling interest within the meaning of the *Blasius-Buckley* framework.

3. Equality/Anti-Distortion

In the political sphere, many commentators have suggested a government interest in equalizing electoral influence among voters. The intuition is that, just as each citizen gets one vote, regardless of wealth,[340] each citizen should likewise have roughly equal financial power to influence the votes of others.[341] This purported government interest in equality or anti-distortion has not, however, been found by the Supreme Court to be a compelling one for purposes of the First Amendment and the *Buckley* framework.[342] Even so, it is worth considering its salience in the corporate arena, as many commentators (as well as a minority of the Supreme Court) believe this to be an important concern.[343]

All that said, this equality rationale does not really apply to corporate elections, simply because corporate democracy is not based on providing each shareholder one vote.[344] Rather, the general rule of corporate suffrage is that each share gets one vote,[345] and it is perfectly acceptable for one person to gather up many shares and the voting power that goes with them.[346] It is even allowable for one class of shares to be endowed super-voting power where each share gets ten or one hundred votes.[347]

340. *See* Reynolds v. Sims, 377 U.S. 533, 560 (1964) (stating "one person's vote must be counted equally with those of all other voters").

341. *See, e.g.*, Foley, *supra* note 204, at 1204 (arguing that the "Constitution of the United States should contain a principle . . . that would guarantee to each eligible voter equal financial resources for purposes of supporting or opposing any candidate").

342. *Supra* Section III.B.3.

343. *Supra* text accompanying notes 204–07.

344. This has been the case since the nineteenth century in the United States, although historical practices have varied. It seems that in seventeenth century Britain as well as the antebellum period in the United States, for instance, the default rule of corporate law was that "shareholders were treated like citizens, entitled to only one vote each, no matter how much they invested." Collen A. Dunlavy, *From Citizens to Plutocrats: Nineteenth-Century Shareholder Voting Rights and Theories of the Corporation* 66, 73, *in* CONSTRUCTING CORPORATE AMERICA: HISTORY, POLITICS, CULTURE (Kenneth Lipartito & David B. Sicilia, eds. 2004). *But see id.* (noting that this default rule was "usually" overridden in practice in favor of one-vote-per-share).

345. DEL. CODE. tit. 8, § 212(a) (stating "each stockholder shall be entitled to 1 vote for each share . . . held by such stockholder," unless the certificate of incorporation provides otherwise); *see also* Dunlavy, *supra* note 344, at 82 (relaying that one-vote-per-share became "common" and "the norm" in the United States in the mid-to-late nineteenth century).

346. Notably, this is the foundation of the "market for corporate control." Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110, 112–13 (1965) (coining the phrase and describing the concept); *see, e.g.*, Andrew A. Schwartz, *Corporate Legacy*, 5 HARV. BUS. L. REV. 237, 241 (2015) (explaining how the market for corporate control can help align the interests of management and shareholders).

347. *See* DEL. CODE tit. 8, § 151(a) (empowering corporations to issue multiple "classes of stock," with "such voting powers . . . as shall be stated . . . in the certificate of incorporation"); *id.* § 212(a) (addressing the

This aggregation of voting power would be deeply troubling and clearly unconstitutional in the political context.[348] In our political democracy, "[l]egislators are elected by voters, not . . . economic interests."[349] But in our corporate democracy, directors are indeed elected by economic interests.[350] So it is not a problem that one shareholder holding many shares has much more say over an election than another shareholder holding only a few shares.[351]

All that being said, there may indeed be an equality or anti-distortion rationale that does apply to corporate elections; one that arises from another important distinction between political and corporate elections. In political elections, incumbent officials are strictly prohibited from using the public treasury to finance their re-election campaigns.[352] But in corporate elections, incumbent directors are generally allowed to spend corporate funds in support of their own re-election.[353] The upshot is that incumbent directors hold a fundamental financial advantage over challengers that is not found in the political arena.[354] This is a structural difference between the two systems that may make anti-distortion a more potent concern in corporate elections than it is in political ones.

In the end, however, the same reasoning that led the Supreme Court to reject equality or anti-distortion as a compelling interest under *Buckley* likewise leads to its rejection under the *Blasius-Buckley* framework. In the political arena, the First Amendment is "designed to secure the widest possible dissemination of information from diverse and antagonistic sources, and to assure unfettered interchange of ideas."[355] The same holds true under

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situation where "the certificate of incorporation provides for more . . . than 1 vote for any share"); *see, e.g.*, Zohar Goshen & Assaf Hamdani, *Corporate Control and Idiosyncratic Vision*, 125 YALE L.J. 560, 563 (2016) (reporting that "prominent technology firms that went public in recent years, including Google and Facebook, adopted the controversial dual-class share structure in which the founders retain shares with superior voting rights").

348. *See* Reynolds v. Sims, 377 U.S. 533, 562 (1964) ("It would appear extraordinary to suggest that a State could be constitutionally permitted to enact a law providing that certain of the State's voters could vote two, five, or 10 times for their legislative representatives, while voters living elsewhere could vote only once."); Dunn v. Blumstein, 405 U.S. 330, 360 (1972) (explaining that "a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction").

349. *See Reynolds*, 377 U.S. at 562 ("Legislators represent people, not trees or acres.").

350. *But cf. infra* text accompanying notes 378–82 (discussing the issue of empty voting).

351. In fact, the one-share-one-vote rule is widely seen as beneficial. *See, e.g.*, Henry Hansmann & Mariana Pargendler, *The Evolution of Shareholder Voting Rights: Separation of Ownership and Consumption*, 123 YALE L.J. 948, 956 n.20 (2014) (observing that "[m]ost of the existing economic literature underscores the superior incentives generated by the one-share-one-vote rule" and collecting authorities).

352. *See, e.g.*, CAL. GOV'T CODE § 8314 (making it "unlawful for any elected state or local officer . . . to use . . . public resources for a campaign activity"); Colorado Common Cause v. Coffman, 85 P.3d 551, 554 (Colo. App. 2003) (observing that state law prohibits "officials from spending public funds to influence the outcome of campaigns for political office" (citing COLO. REV. STAT. § 1–45–117)).

353. *See supra* Section II.B (discussing the financing of corporate campaigns).

354. This may be overstating the point. Incumbent politicians cannot directly use public funds to finance their re-election campaign, but they may (and do) use public funds to generate publicity for the public works they do, in part to influence voters to re-elect them to office. Examples of this behavior include press conferences, official websites, listening tours, etc. And it shows results, as incumbents tend to be re-elected time and again. *See* Jamin Raskin & John Bonifaz, *Equal Protection and the Wealth Primary*, 11 YALE L. & POL'Y REV. 273, 292 (1993) (reporting that "nearly nine out of ten [federal] incumbents seeking reelection win their races"); Lillian V. Smith, Note, *Recreating the "Ritual Carving": Why Congress Should Fund Independent Redistricting Commissions and End Partisan Gerrymandering*, 80 BROOK. L. REV. 1641, 1643 (2015) (reporting that, in the 2014 federal election, "more than 94% of congressional incumbents who sought reelection held their seats").

355. Buckley v. Valeo, 424 U.S. 1, 49 (1976).

Blasius. It is important for an incumbent board to be allowed to spend corporate funds to inform and attempt to persuade the shareholders of its merit, and the proper response by challengers is to fight fire with fire. In other words, the proper response to speech is more speech, not an attempt to level the playing field by suppressing or limiting one speaker or another.

To summarize, the equity or anti-distortion concept does not hold much relevance in corporate elections. Just as in the First Amendment context, where this idea has been held to be a less-than-compelling interest under *Buckley*, it is likely to suffer the same fate in the corporate context under the *Blasius-Buckley* framework.

4. More Competitive Elections

Most corporate elections for directors—even today in the supposed age of competitive elections[356]—are "ho-hum" and "dull affairs" whose "outcomes are predictable."[357] The incumbent board commonly runs without any alternative slate of candidates competing against them. Even when there is a contested election, incumbents often settle with the challengers by accepting a short slate of insurgent directors rather than face the prospect of an up-or-down vote on control of the company.[358] In response, many commentators have suggested that corporations would benefit from electoral contests that are more competitive.[359] Because the shareholder franchise is so vitally important to the essential legitimacy of corporate governance,[360] these commentators advocate that corporate governance would benefit from more "meaningful" elections that make directors "truly accountable to shareholders."[361]

Others disagree with the suggestion that we have too few truly contested corporate elections.[362] They correctly point out that "the mere demonstration of a small absolute number of contested elections demonstrates exactly nothing."[363] It is certainly possible that the low number of proxy fights is a desirable state of affairs, given that incumbents by definition have unique experience and knowledge about the corporation and that electoral contests entail significant costs for the company, both in money and in directors' and officers' time.[364]

The lesson from the political arena is closest to the latter view. As we saw, the

356. *Supra* Section II.A.

357. Harris, *Shareholder Campaign Funds*, *supra* note 26, at 168–69.

358. *Supra* notes 66–69 and accompanying text.

359. *See* Higgins, *supra* note 76 ("The Securities and Exchange Commission should adopt measures to empower shareholders in corporate elections and proxy proposals, according to Kara Stein, a Democratic commissioner.").

360. *See* Blasius Indus. v. Atlas Corp., 564 A.2d 651, 659 (Del. Ch. 1988) ("The shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests.").

361. Bebchuk, *supra* note 26, at 676.

362. *See generally id.* at 733; Lynn A. Stout, *The Mythical Benefits of Shareholder Control*, 93 VA. L. REV. 789 (2007).

363. Lipton, *supra* note 25, at 740.

364. *See id.* ("The more reasonable presumption is that the low number of electoral fights reflects the simple truths that the director nomination process works; that incumbent directors are far more often than not the best people for the job; that freedom from frequent electoral contests permits directors to exercise their best business judgment in the interests of the corporation as a whole; and that the costs of contested elections generally far outweigh any hypothetical benefits.").

Supreme Court has never accepted the idea that the simple desire to avoid landslide victories by one candidate and to make political races closer is a "compelling interest" within the meaning of the *Buckley* framework and the First Amendment.[365] It is up to the voters to decide whom to elect, and if they strongly prefer one candidate, there is no reason to prop up a challenger, even if the populace's preference is partly a result of the campaign spending of the winner.

The same outcome would seem to apply under the *Blasius-Buckley* framework. The corporation has an interest in having diligent and effective directors, and it clearly has an interest in recruiting such people to join the board. It may even have an interest in encouraging challenges from capable outsiders with a different, yet valid, view of appropriate corporate policy. But it is hard to see why the corporation has a compelling interest in fostering competitive elections simply for their own sake. That would seem nothing short of wasteful, especially given the high price—both in money and time—of running a modern corporate campaign.[366]

5. *Reduce Cost of Campaigns*

As with political elections, corporate elections can be quite expensive. A proxy contest can cost hundreds of thousands, or even millions, of dollars.[367] An argument can be made that this high level of spending is a problem in and of itself because incumbent campaigns are funded out of the corporate treasury; if the campaigns are expensive, this acts as a drain on corporate resources. Furthermore, because insurgent campaigns must pay their own costs, while any benefit they yield redounds to the corporation and its shareholders as a whole, the high cost of corporate campaigns can lead to a "free-rider" problem where even worthwhile insurgent campaigns will not be launched.[368] Finally, the magnitude of these problems is a direct function of the cost of corporate election campaigns: The more expensive they are, the worse the problems get.

Moreover, these out-of-pocket costs, as impressive as they are, may be dwarfed by the time-cost of distracting executives from focusing on managing the company. Thanks to prior exercises in shareholder activism, there is a clear trend toward annual elections of all directors (as opposed to staggered elections, as in the Senate).[369] If corporate elections continue to increase in number and competitiveness, as they appear to be doing,[370] the result will be a never-ending election cycle that could easily chew up large quantities of directors' and executives' time. And because "time is money," this sort of distraction could impose a significant economic toll on public companies.

In the public sphere, the goal of reducing the cost of campaigns has not been found to be a compelling government interest under *Buckley*, but it may have more purchase in the

365. *Supra* Section III.B.4.

366. *See supra* note 86 (reporting that it costs millions of dollars to run a proxy contest at a public company).

367. *See supra* notes 84–90 and accompanying text (discussing high costs of proxy contests).

368. *See* Bebchuk, *supra* note 26, at 689–90 ("The issue of costs is especially difficult because of the existence of a 'free-rider' problem."). Thus, one pillar of corporate election reform is a desire to reduce the costs of mounting an insurgent campaign. *See, e.g.*, Letter from Council of Institutional Investors to Securities and Exchange Commission, Mar. 5, 2015, at 6–7 (advocating for "universal proxies" on the theory that they would lower costs).

369. Schwartz, *supra* note 346, at 249.

370. *See supra* Section II.A (describing the current rising trend of competitive corporate elections).

corporate arena under the *Blasius-Buckley* framework. Most importantly, the distractions caused by constant campaigning are more troublesome for corporate officials than for government officials.[371] In a corporation, the primary directive for the board is to manage the business and affairs of the company; keeping in touch with the shareholders is secondary. For a government official, by contrast, interacting regularly with the voters is an important part of the job, and so a perpetual campaign is not necessarily inconsistent with this aspect of politics.

On the other hand, the fact remains that speech costs money. *Blasius*, like the First Amendment and *Buckley*, is concerned with the freedom of shareholders to exercise their franchise in light of all the information and debate they need. Any limit on the cost of campaigns will necessarily result in less information going out to shareholders as they decide how to cast their ballot. While some might suggest that a limit of, say, four letters to shareholders would provide them with "enough" information, it is surely the case that some shareholders would only be persuaded by a fifth letter.

In the end, it is a close call whether an interest in lowering campaign costs and minimizing the time spent campaigning would qualify as a compelling interest under the *Blasius-Buckley* framework that would provide a board with justification for imposing limits on corporate campaign finance.

D. Methods of Regulation

The prior Section concluded that there are two, and possibly three, compelling corporate interests in regulating campaign finance in corporate elections: corruption, outside interference, and (perhaps) reducing the cost of campaigns. This Section focuses on the other portion of the *Blasius-Buckley* framework—reasonable fit or narrowly tailoring. It explores potential intra-corporate methods (e.g., bylaws) for advancing those corporate interests that fall within the boundaries of acceptable corporate action under the *Blasius-Buckley* framework.

1. Contribution Limits

One type of corporate campaign finance regulation would be a contribution limit that restricts the amount of money that may be given to a director-candidate or her campaign. Most such regulations are generally permissible under the *Blasius-Buckley* framework, just as they are under *Buckley*, because contribution limits impose only a "marginal restriction"[372] on the shareholder franchise. A contribution limit does not prevent any shareholder from voting, nor would it impose any additional cost on voting. Nor does a contribution limit prevent any shareholder from speaking out on individual candidates or issues in the campaign. This is all closely related to the *Buckley* framework, which holds that contribution limits do not strike directly at the core of the First Amendment because

371. *Cf.* Leo E. Strine, Jr., *Towards a True Corporate Republic: A Traditionalist Response to Bebchuck's Solution for Improving Corporate America*, 119 HARV. L. REV. 1759, 1777 (2006) ("The director election process . . . must be designed with efficiency in mind, lest it destroy more value than it protects.").

372. *See* Buckley v. Valeo, 424 U.S. 1, 20–21 (1976) ("By contrast with a limitation upon expenditures for political expression," a contribution limit "entails only a marginal restriction upon the contributor's ability to engage in free communication.").

they do not directly limit speech.[373]

Moreover, contribution limits respond to the compelling corporate interests in preventing corruption and outsider meddling. As in the political context, large campaign contributions to director candidates clearly raise the specter of corruption (in the sense of subversion of the corporate interest in economic success over the long term).[374] There is good reason to fear a director candidate who receives a substantial sum from one shareholder may be inclined to act in a way that will benefit that shareholder, perhaps at the expense of the corporate interest. Similarly, a director candidate that receives large contributions from someone with a social or political goal may try to make the corporation advance that goal, which is another form of corruption. Finally, if a director candidate receives a contribution from an outsider—someone not a member of the shareholder electorate—there is good reason to fear that the director may be influenced by that outsider to pursue a course that benefits her.

Beyond corruption, there is also the problem of outside interference. On this point, it would almost certainly satisfy the *Blasius-Buckley* framework for a corporation to regulate intra-corporate campaign finance such that only shareholders—and no other constituencies—may make campaign contributions to director-candidates. Recall that *Blasius* is concerned with the voting rights of shareholders and has nothing to say about the interests of other non-voting constituencies. Thus the doctrine would almost certainly countenance a corporate policy that disempowers other groups, whether internal to the corporation, such as bondholders or employees, or external to the corporation, such as advocacy groups (e.g., the National Rifle Association or the Sierra Club).

But even a corporate policy that barred non-shareholders from making campaign contributions may not go far enough to prevent meddling by outsiders. In contrast to political elections, where it takes significant time and commitment to become a citizen, and where people can generally only be citizens of one country at a time, it is extremely quick and easy to become a shareholder (just call a broker and buy a share), and one may be a shareholder in an unlimited number of companies at the same time. So it may also satisfy the *Blasius-Buckley* framework—although this a closer question—for a corporation to further limit contributions such that only large or longstanding shareholders may contribute to director candidates. Proxy access bylaws provide a template for such a rule—3% for 3 years, for instance.[375]

This may be too tight a stricture, however, as small shareholders are shareholders too; *Blasius* protects the franchise rights of all shareholders, great and small. A corporation that tried to prevent small or recent shareholders from contributing to director campaigns could well violate the *Blasius-Buckley* framework, just as a statute that tried to prevent recently naturalized citizens from contributing to political campaigns would likely run afoul of *Buckley*.[376] Yet the situations are not identical because it is so easy to become a shareholder

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373. *Supra* Section III.C.1.

374. *See supra* Section IV.C.1 (discussing the concept of corruption of a corporation in terms of subverting its core function).

375. *Supra* text accompanying notes 71–75. *Cf.* Jesse M. Fried, *The Uneasy Case for Favoring Long-Term Shareholders*, 124 YALE L.J. 1554, 1554 (2015) (challenging the idea that long-term shareholders should be favored over short-term shareholders).

376. *Cf.* Dunn v. Blumstein, 405 U.S. 330, 360 (1972) (applying strict scrutiny and invalidating a state's limitation of the right to vote to those resident in the state for at least one year).

and so hard to become a citizen. In other words, all citizens can be presumed to have a strong commitment to the nation,[377] whereas the same cannot be said about all shareholders. And in light of the concerns over corruption and outside interference, a corporation that only allows longstanding shareholders (of any size) to contribute to director candidates may be acting appropriately and within the legal limits set by the *Blasius-Buckley* framework. Such a corporation would prevent the problem of outsiders transforming themselves into shareholders overnight by buying a few shares, while still allowing small holders to participate in the electoral process.

Finally, contribution limits present the issue of "empty voting" and related behavior.[378] As Henry Hu and Bernard Black have explained, through the purchase and sale of financial derivatives, a shareholder can alter her financial relationship to the company while still retaining the right to vote her shares.[379] For instance, through the use of an "equity swap," a shareholder can completely hedge her financial stake in the company, leaving her with no economic interest but retaining the right to vote.[380] At the extreme, a shareholder can even put herself in a "net negative" economic position vis-à-vis the company.[381] The latter type of shareholder would have an incentive to use her voting power to harm the company and drive its share price lower.[382] A board of directors would be on solid ground to address this perverse voting incentive. It would almost certainly be acceptable under the *Blasius-Buckley* framework for a corporation to prohibit or limit campaign expenditures by shareholders with zero, or negative, financial interest in the company.[383]

2. *Expenditure Limits*

An expenditure limit would place a ceiling on the amount that may be spent on corporate elections. An expenditure limit could be applied to the candidate herself, as well as those connected with her. It could also be applied to independent expenditures made by parties neither connected to nor coordinating with the candidate. As in the First Amendment context,[384] expenditure limits are much more problematic than contribution limits under the *Blasius-Buckley* framework for corporate campaign finance regulation.

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377. New citizens are obliged to renounce allegiance to other sovereigns and swear allegiance to the United States. Immigration and Nationality Act, Pub. L. No. 89–236, 70 Stat. 911 § 337(a) (1965).

378. *See* Henry T. C. Hu & Bernard Black, *The New Vote Buying: Empty Voting and Hidden (Morphable) Ownership*, 79 S. CAL. L. REV. 811, 812 (2006) (articulating the phenomenon where shareholders own more votes than economic ownership in a company).

379. *Id.*; *see also* Lipton, *supra* note 25, at 756–57 (expressing concern over "short-term, highly hedged investors such as hedge funds [who] increasingly acquire corporate electoral power far beyond their economic interests").

380. *See, e.g.*, CSX Corp. v. Children's Inv. Fund Mgmt. (UK) LLP, 654 F.3d 276, 279–80 (2d Cir. 2011) (describing "cash-settled total-return equity swaps").

381. *See* Hu & Black, *supra* note 378, at 812 ("In an extreme situation, a vote holder can have a negative economic interest and, thus, an incentive to vote in ways that reduce the company's share price.").

382. *See id.* at 816 (giving the example of the Perry Corp. hedge fund's large investment in Mylan Laboratories; because the hedge fund had fully hedged its Mylan shares, but not the shares it held in a merger partner, it had a direct financial interest in having Mylan overpay in the deal).

383. *Cf. id.* at 850–51 (referring to *Blasius* and observing that the decoupling of economic interest and voting rights "strikes directly at both the economic and legal logic behind shareholder voting rights").

384. *Supra* Section III.C.2.

Consider first a limit on the amount a candidate herself (or her campaign) may spend. First, the compelling corporate interest in preventing corruption is inapposite here, as a director-candidate cannot, by definition, corrupt herself. Furthermore, any such limit would probably violate the *Blasius-Buckley* framework because it would directly impede the ability of a director-candidate—who is very likely a shareholder herself—to communicate with shareholders and ask for their vote. This is an affront to the core concern of *Blasius* that shareholders be free to exercise their franchise without interference by the corporation.

Analysis of the other compelling corporate interest—prevention of outside interference—is more subtle, at least in the situation where the director-candidate appears to represent a non-shareholder constituent. Consider the case where a major bondholder or union leader runs for election to the board of directors. In such a case the corporation might have a valid rationale for preventing that outsider from using her seat on the board to primarily advance the interests of bondholders or employees and could therefore have a legitimate reason for capping the amount she can spend on her own campaign. This concern is real, but the medicine is probably worse than the disease. Shareholders, under the logic and holding of *Blasius*, must be given ample room to decide who they want to elect to the board, even if the incumbents believe in good faith that a certain director would be a disaster for the company and the shareholders.[385] Outsiders seeking election to the board—including bondholder and employee representatives—should almost certainly be allowed to spend her own money to take their message to the shareholders, who are sovereign over the corporate republic, after all.

Now consider spending limits placed not on candidates or campaigns, but rather on independent third parties spending their own money without coordinating with any director-candidate. In such a case, there is no valid concern over corruption because such independent expenditures are, by hypothesis, not made with any prearrangement or coordination with the candidate. (Of course, expenditures that are purportedly independent, but in fact are coordinated, would be treated as contributions, as in the political arena.[386]) Thus under *Blasius-Buckley*, just as in the political context,[387] independent expenditures relating to director elections probably cannot be limited by the incumbent board.

Finally, the board of directors may seek to limit spending in order to prevent outside interference, a compelling corporate interest.[388] It is conceivable that an outsider with a divergent agenda—for instance an anti-gun activist at Smith & Wesson—might take it upon itself to encourage shareholders to vote for or against a given candidate. This may cause problems at the company and impose costs on both the company and the shareholders, and the corporation likely has a compelling interest in avoiding such costs and distractions. On the other hand, the shareholders making the choice can benefit from the additional information and perspective, meaning that any restriction on independent expenditures would go the heart of *Blasius-Buckley*. Shareholder advisory services, such

385. *See* Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 658 (Del. Ch. 1988) (noting *Blasius* rule applies when the incumbent board impedes the shareholder franchise "because they held a good faith belief that such shareholder action would be self-injurious and shareholders needed to be protected from their own judgment").

386. *Cf.* Liz Hoffman et al., *SEC Probes Activist Hedge Funds*, WALL STREET J., June 5, 2015, at C3 ("The Securities and Exchange Commission is investigating whether some activist investors teamed up to target companies without disclosing their alliances, potentially in violation of federal securities rules . . . .").

387. *See supra* note 240 (describing the "SuperPAC").

388. *Supra* Section IV.C.2.

as ISS and Glass Lewis, regularly engage in this type of activity, and their expert and repeat participation adds an important perspective to the conversation among shareholders.[389] Similarly, unions, environmental activists, and others should almost certainly be permitted to make independent expenditures in favor or against a director. Their views add to the debate over corporate elections and thus directly benefit the shareholders whose franchise rights are protected by *Blasius*. Hence, despite the legitimate concerns over outside interference, if a corporation were to restrict independent expenditures by outsiders relating to a corporate election, it would present a close question under the *Blasius-Buckley* framework. The answer would require a careful analysis of how much election-related speech would be silenced by the board's action, as well as how valuable that speech would be to the voting shareholders. A nuisance campaign could probably be quieted, but an outsider with a legitimate grievance would likely have to be given the chance to air it.

In conclusion, independent expenditures relating to corporate elections likely cannot be limited in any way without running afoul of the *Blasius-Buckley* framework.[390] Just as in the political arena under *Buckley*, shareholders must to be free to speak to one another, and hear from those inside and outside the company, in order to knowledgably participate in board elections. Even in a case where a director-candidate has interests that conflict with those of the shareholders (a bondholder, for instance), it would likely violate the *Blasius-Buckley* framework for the incumbent board to stop her from communicating with the shareholders and trying to win their votes. The *Blasius-Buckley* framework emphasizes the free-flow of information for voting shareholders. Just as the government is generally not allowed to limit the number or type of messages the citizenry may to send and receive, so too the corporate board generally does not have the power to muzzle those who want to spend money to influence corporate elections.

3. Disclosure

A disclosure-based regulation of corporate campaign finance would require that shareholders receive notice of campaign contributions and campaign-related expenditures. In political campaign finance, this type of regulation is almost always permissible under the First Amendment. The same likely holds true in the corporate domain under the *Blasius-Buckley* framework.

Disclosure can effectively respond to corruption and outsider interference, two compelling corporate interests. As for corruption, disclosure of the identity of the funders of a director's campaign can reduce the risk of corruption by bringing such payments to the light of day. Disclosure can also minimize or avoid interference by outsiders in the same way. Furthermore, additional information that disclosure provides can enhance the ability of shareholders to make thoughtful decisions about which directors to elect, and any infringement on the shareholder franchise by disclosure rules is minimal.[391] Consider again the hypothetical case where one company might try to sabotage a corporate election at its rival: Pepsi's board would be well within its powers if it required Coke, in its

389. These companies even solicit public comment on their proposals, thus creating a useful arena for debate.

390. Exceptions might be made on an individualized basis. For example, a company who is suffering true libel, harassment, or similar harms due to someone's participation in corporate democracy would presumably have the power to act to restrain that individual—including through court order.

391. Disclosure-based regulations have long been a core component of the federal proxy rules.

independent spending relating to Pepsi board elections, to disclose who is funding the advertisements, mailings, etc. Pepsi shareholders would rightfully take Coke's advice with 'a grain of salt,' and they might even discount it entirely or hold it against the candidate. (Of course, knowing this in advance, Coke may decide against interfering in Pepsi's election process in the first place.)

In the political arena, campaign finance laws requiring disclosure generally survive review under the *Buckley* framework.[392] There is, however, an important exception allowed for specific cases where disclosure could lead to threats, harassment, or reprisals. In such cases, there is a legitimate concern that disclosure requirements could chill the free exchange of ideas relating to democratic elections. For that reason a rule requiring disclosure may be denied effect under *Buckley* in a given case.[393]

Should this exception be extended to the corporate context? There are good arguments on both sides. It is true that disclosure requirements might chill some speech regarding corporate elections. But that is less problematic in the corporate arena than the political one, for several reasons. First, the essential goal of *Blasius* is to protect the shareholder franchise, whereas the *Buckley* framework also recognizes that speech has a personal, expressive quality unrelated to its effectiveness.[394] For this reason, the chilling of speech in a corporate election is not as harmful as it would be in a political one. Second, it is so vitally important that the shareholders receive accurate information, including knowledge of who is backing whom in a proxy contest, that the need for a disclosure rule probably overrides the concern that some speakers may be chilled. As in the Coke and Pepsi hypothetical above, a disclosure requirement may effectively force Coke into remaining silent regarding Pepsi's election process. But that is not a bad outcome, since the goal of *Blasius* is to protect the Pepsi shareholders, not to enable Coke in its self-expression.

In sum, board-imposed disclosure-based regulation of corporate campaign finance would be generally permissible under the *Blasius-Buckley* framework, just as it is under *Buckley*.[395] That said, a situation could conceivable arise where a disclosure rule would go so far as to chill a lot of important voting-related speech, in which case it might violate the *Blasius-Buckley* framework, at least in that specific instance.

4. Corporate Financing

Corporate financing of dissident campaigns for seats on the board—analogous to 'public financing' of political campaigns—is the one area of corporate campaign finance that has received some attention in the academic literature.[396] In public financing, the government provides funding for candidates; by analogy, the corporation itself could provide funding for insurgent slates. Numerous scholars, including Lucian Bebchuk, have advocated a policy whereby unsuccessful challengers in board elections—those who lose the election—be at least partially reimbursed by the corporation, generally on the condition that they achieved a certain minimum level of support.[397] Most recently, Professor Lee

392. *Supra* Section III.C.3.

393. *See supra* text accompanying notes 247–49 (discussing this exception to the general rule).

394. *See supra* note 314 (providing an overview of the self-expression aspects of the First Amendment).

395. *Supra* Section III.C.3.

396. *See supra* Section III.C.4 (referring to this literature).

397. Bebchuk, *supra* note 26, at 699; *see also* Emerson & Latcham, *supra* note 8, at 435–36 (describing a

Harris published a similar proposal, modeled directly from the Presidential Campaign Fund discussed in Section III.C.4.[398]

Pursuant to the *Blasius-Buckley* framework, corporate financing of insurgent proxy campaigns seems harmless and even potentially meritorious, depending on how it were structured. It would almost certainly pass muster under that legal rule, as it would appear to only enhance shareholders' ability to exercise their vote in an informed manner.[399] This is akin to *Buckley*'s handling of the issue in the political sphere.[400]

V. THE *BLASIUS-BUCKLEY* FRAMEWORK APPLIED TO GOLDEN LEASH REGULATION

Part IV introduced and explained the *Blasius-Buckley* framework for judicial review of board-imposed corporate campaign finance regulations. To further illustrate the proposed doctrine and how it works, this Part applies the *Blasius-Buckley* framework to the important example of anti-golden leash bylaws.[401] Recall that the golden leash, described in detail in Section II.C above, is a new and powerful method of financing corporate elections. Since its introduction in 2013 by several activist hedge funds, it has been both praised and criticized by corporate law commentators and practitioners.[402] One of the strongest critics, the law firm Wachtell Lipton, published a model corporate bylaw that would largely outlaw the golden leash entirely (the "Wachtell Bylaw").[403] The boards of dozens of public companies adopted that bylaw, although almost all have since retracted it.[404] In addition to the Wachtell Bylaw, others could be imagined that limit or regulate the golden leash in any number of ways. How should corporate law respond to such board-imposed bylaws?

This Part contends that, because the golden leash can be understood as a method of financing corporate elections,[405] anti-golden leash bylaws can similarly be understood as corporate campaign finance regulations imposed by an incumbent board of directors. As such, their legal validity can and should be tested using the *Blasius-Buckley* framework developed in Part IV above.[406] This Part undertakes that analysis, thereby providing a

system of "proportional reimbursement"); Friedman, *supra* note 85, at 959–64 ("[I]n deciding a[n unsuccessful] minority stockholder's right to reimbursement[, h]is claim against the corporate treasury could be conditioned on his proposal's or candidate's obtaining a specified percentage of the shares voting thereon—perhaps ten or fifteen percent.").

398. Harris, *Shareholder Campaign Funds*, *supra* note 26, at 169.

399. *See* Friedman, *supra* note 85, at 958 ("[I]t seems apparent that a full and fair presentation of the issues in a contested corporate election cannot be made if the stockholders are given only one side of the picture. . . . Accordingly, the very reason that originally moved the courts to authorize management expenditures—the need for informing the stockholders—further requires that minority stockholders be accorded similar rights.").

400. *Supra* Section III.C.4.

401. *See supra* Section II.C (describing the golden leash).

402. *See generally* Nili, *supra* note 117, at 512 (defending the golden leash against "the hysteria over these payments").

403. Martin Lipton et al., *Bylaw Protection Against Dissident Director Conflict/Enrichment Schemes*, COLUM. L. SCH. BLUE SKY BLOG (May 9, 2013), http://clsbluesky.files.wordpress.com/2013/05/shareholder-activism-update-bylaw-protection-against-dissident-director-conflict-enrichment-schemes-1.pdf (proffering a model bylaw to prohibit the golden leash).

404. *See* Cain et al., *supra* note 20, at 652–54, 671–78 (recounting the history of the Wachtell Bylaw).

405. *See supra* Section II.C (discussing the function and purpose of the golden leash).

406. Other commentators have suggested that golden leash regulation should be tested under the *Blasius* doctrine. Prestidge, *supra* note 109, at 318 (citing *Blasius*); Brandon S. Gold, *Why the Wachtell Bylaw on Director*

demonstration of the *Blasius-Buckley* framework in action. Section V.A, building on the discussion above in Section II.C, will address whether a corporation has a compelling interest in regulating the golden leash, rather easily concluding that it does. Section V.B will then discuss the question of narrow tailoring. As will appear, I conclude that boards of directors have substantial authority under the *Blasius-Buckley* framework to regulate or limit the golden leash, but probably cannot prohibit the practice entirely. In other words, while the original Wachtell Bylaw might run afoul of the *Blasius-Buckley* framework, a modified version could easily pass muster.

A. Corporate Interests in Regulating the Golden Leash

The first component of the *Blasius-Buckley* framework would ask whether there exist compelling corporate interests in regulating the golden leash, and the answer is almost certainly yes. As discussed above in Section II.C, the golden leash poses a direct threat to the foundational corporate interest in having a board of directors whose loyalty unquestionably lies with the corporation and its shareholders. When one party makes large payments directly to a director-candidate, as in the golden leash, this clearly raises the specter that the candidate will follow the donor's commands (or hints or suggestions), even if doing so may not be in the best long-term interest of the corporation or its shareholders as a whole.[407] A corporation surely has a compelling interest in preventing this sort of corruption, diversion, and subversion.[408] On the other hand, the golden leash does have its benefits, most notably in that it helps recruit excellent directors.[409] Even so, a reasonable board of directors could conclude that the golden leash poses a serious threat to the corporation and its long-term success—or at least that the likely harms outweigh the likely benefits. In short, an incumbent board likely would have "compelling" corporate justifications to regulate the golden leash.

B. Methods of Regulating the Golden Leash

Under the *Blasius-Buckley* framework, a "compelling corporate interest" is only the first hurdle.[410] Beyond this threshold inquiry, any board-imposed regulation of campaign finance, such as the golden leash, must also be "narrowly tailored" to protect that corporate interest.[411] Given that the golden leash presents a clear threat of corruption/subversion/diversion, as discussed above in Section II.C, what types of board-imposed bylaws might be narrowly tailored to address this danger? This Section contends that the original Wachtell Bylaw may have been insufficiently narrowly tailored, but that

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Compensation by Shareholders is Overbroad and May Fail Blasius *Scrutiny*, COLUM. L. SCH. BLUE SKY BLOG, (May 31, 2013), http://clsbluesky.law.columbia.edu/2013/05/31/why-the-wachtell-bylaw-on-director-compensation-by-shareholders-is-overbroad-and-may-fail-blasius-scrutiny/ (applying *Blasius* to board response to the threat of the golden leash). Wachtell Lipton itself, however, appears to be of the opinion that its bylaw should be tested by the business judgment rule. *See* Lipton et al., *supra* note 403 ("Adoption of such a bylaw should be a simple matter of the board's business judgment.").

407. *Supra* Section II.C.

408. *Supra* notes 320–32.

409. *See, e.g.*, *supra* note 105 (discussing one of Jana's director-nominees, a former Canadian Minster of Agriculture).

410. *See supra* Section IV.B (describing the *Blasius-Buckley* framework).

411. *Supra* Section IV.A-B.

modestly modified versions of the Wachtell Bylaw would likely be proper.

1. The Wachtell Bylaw

In May 2013, Wachtell Lipton released a model bylaw that "would disqualify candidates that are party to [a golden leash agreement] from serving as directors."[412] The "Wachtell Bylaw," as this model has come to be known,[413] simply banned the golden leash entirely.[414] Acting on Wachtell Lipton's recommendation, the boards of directors of several dozen public companies adopted the Wachtell Bylaw through board action.[415]

Within months, however, the influential proxy advisory firm, ISS, came out against the Wachtell Bylaw, saying it would recommend voting against directors that adopted it.[416] According to ISS, the problem with the Wachtell Bylaw is that it may interfere with the proper functioning of republican corporate governance: "The adoption of [the Wachtell Bylaw] without shareholder approval may be considered a material failure of governance because the ability to elect directors is a fundamental shareholder right. Bylaws that preclude shareholders from voting on otherwise qualified candidates unnecessarily infringe on this core franchise right."[417] In response to ISS's threat—which it acted on in at least one case[418]—nearly all the companies that had adopted the Wachtell Bylaw abandoned it, on the theory that discretion is the better part of valor.[419] Yet the Wachtell Bylaw remains in place in a few companies and may be renewed in the future by others. And at some point, an activist shareholder may challenge it in court, thus making it worth analyzing under the *Blasius-Buckley* framework.

The analysis must begin from the recognition that the golden leash can provide at least one significant benefit to the corporation, namely as an aid in recruiting excellent people to serve on the board of directors who might not otherwise be interested or considered.[420] Furthermore, the fact that golden leash payments may be quite large, and may only be paid over to certain directors and not others, are not necessarily problematic. In many lines of

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412. Lipton et al., *supra* note 403.

413. Cain et al., *supra* note 20, at 652; Prestidge, *supra* note 109, at 333.

414. This is a bit of an overstatement, or at least may depend on a more precise definition of "golden leash" than provided in this Article, as the Wachtell Bylaw would apparently not bar relatively modest "customary compensation" payments to directors "for being willing to stand for election." David Benoit & Joann S. Lublin, *Debating Activists Paying Directors*, WALL STREET J., Nov. 26, 2013, at C1 (noting that such "customary" payments are a "common" practice); *see* Lipton et al., *supra* note 403 (proffering the Wachtell Bylaw). For present purposes, however, this Article makes the simplifying assumption that the Wachtell Bylaw would prohibit any and all golden leash payments.

415. Cain et al., *supra* note 20, at 652–53, 672 (reporting that thirty-two companies adopted the Wachtell Bylaw in the months following its release).

416. ISS, *Director Qualification/Compensation Bylaw FAQs* (Jan. 13, 2014), https://www.issgovernance.com/file/files/directorqualificationcompensationbylaws.pdf.

417. *Id.*

418. *See* Cain et al., *supra* note 20, 653, 673 (discussing Provident Financial Holdings).

419. *See id.* at 653, 677 (reporting that all but four of the 32 companies that had adopted the Wachtell Bylaw retracted it after ISS's announcement); *see* Lipton, *supra* note 25 ("In light of ISS' threat that it may issue withhold vote recommendations against boards that adopt director compensation bylaws, it can be expected that many companies will decide that discretion is the better part of valor and avoid a confrontation with ISS, despite the risks posed by 'golden leash' schemes.").

420. *See, e.g.*, *supra* note 105 (describing how Jana used a golden leash to recruit a former Canadian Minister of Agriculture to its dissident slate at Agrium).

business, we accept that one needs to pay large sums to recruit top talent,[421] and that some people are paid more than others, even with precisely the same title and position.[422] Hence by preventing any golden leash payments whatsoever, the Wachtell Bylaw is probably overly restrictive and thus not sufficiently narrowly tailored under *Blasius-Buckley*.[423]

In this way, the Wachtell Bylaw is like the contribution limit struck down by the Supreme Court in *Randall v. Sorrell*[424] pursuant to the *Buckley* framework. *Randall* concerned Vermont's campaign contribution limits, which placed very low caps ($200–$400) on the amount that Vermonters could legally donate to candidates for state office. The Supreme Court struck this down, with the lead opinion[425] holding these limits were so low as to allow incumbents to insulate themselves from effective electoral challenges.[426] The Wachtell Bylaw suffers from the same weakness as the Vermont campaign finance law. Both are well-intentioned and well-grounded, but they are simply too strict and thus make it too difficult for a dissident to mount a successful challenge against the incumbents. A golden leash payment of $1000 would not raise a reasonable fear of corruption; it looks more like an honorarium than a bribe. By banning even very small golden leash payments, the Wachtell Bylaw comes across as an incumbent entrenchment device, not a legitimate effort to combat corruption.[427]

At the same time, the dangers posed by the golden leash are real and substantial[428]—so strong medicine might be needed in a given instance. By analogy to the political arena, to the extent that the golden leash is like a bribe,[429] such behavior is flatly banned in all instances, regardless of the amount. A $1000 bribe can land you in jail just as easily as any other.

Ultimately, the propriety of the Wachtell Bylaw depends on the facts. If a certain company has well founded concerns that any sort of golden leash payment posed a threat to its ability to pursue long-term profits, then the imposition of the Wachtell Bylaw may well pass muster under *Blasius-Buckley*. Absent such a showing, however, a total ban would probably not satisfy the demanding *Blasius-Buckley* framework. Something short of a complete prohibition of the golden leash, however, may survive this demanding legal test, and it is to such modified versions of the Wachtell Bylaw that we now turn.[430]

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421. Basketball star LeBron James recently signed a lifetime endorsement deal with Nike rumored to be worth more than $500 million. Steven Russolillo, *LeBron Deal Won't Foul Nike*, WALL STREET J., Dec. 21, 2015, at C1 ("You have to spend money to make money . . . .").

422. Kevin Durant (Oklahoma City Thunder) is paid about $20 million per year to play small forward in the National Basketball Association; Greg Whittington (Miami Heat), Melvin Ejim (Orlando Magic) and Kyle Casey (Phoenix Suns), by contrast, all receive about $500,000 per year to play the same position in the same league. *NBA Player Salaries – National Basketball Association*, ESPN, http://espn.go.com/nba/salaries (last visited Mar. 25, 2016).

423. *Cf.* Gold, *supra* note 406 (arguing that the Wachtell Bylaw "may be legally invalid under *Blasius*").

424. Randall v. Sorrell, 548 U.S. 230, 240 (2006).

425. *See supra* note 190 (describing Justice Breyer's plurality opinion in *Randall* as the controlling opinion in the case).

426. *Randall*, 548 U.S. at 247.

427. *But see supra* note 414 (giving the caveat that the Wachtell Bylaw allows "customary" compensation, and thus may allow golden leash payments of modest size).

428. *See supra* Section II.C (discussing the dangers of the golden leash).

429. Coffee, *supra* note 56.

430. The remainder of the bylaws considered in this Section are hypothetical. The only real-world bylaw on point appears to be the Wachtell Bylaw.

2. *Modifications to the Wachtell Bylaw*

a. Limit on Size of Golden Leash

An incumbent board of directors can alter the Wachtell Bylaw to make it more likely to survive the *Blasius-Buckley* framework. One such modification would authorize golden leash payments, but place some limits on its *size*, on the theory that a very large golden leash payment is more likely to corrupt a director than one of more modest size.[431] There are at least two different ways this could be implemented. The first would be to enact a bylaw with an absolute dollar value, such as $1 million, as the highest golden leash payment a director is allowed to accept.

The second would be to use a ratio based on the ordinary compensation the company pays to its other directors. For example, a one-to-one ratio would provide that directors may only receive as much in a golden leash as they do from the company. A two-to-one ratio would allow a director to receive double the ordinary compensation as a golden leash payment. A ratio might be more advisable, as it would allow the golden leash to act as a recruiting and incentive tool, but prevent the side payment from swamping the ordinary compensation paid to directors. By keeping the total compensation in the same magnitude, this should not act as too much of an improper influence on directors.

Either way, and regardless of its precise contours, a board-enacted bylaw that imposed reasonable limits on the size of a golden leash would probably qualify as narrowly tailored under the *Blasius-Buckley* framework.

b. Limit on Type of Golden Leash

A second variation on the Wachtell Bylaw would regulate the *type* of golden leash payments, for instance by requiring that any performance-based compensation be calculated over a significant period of time. Recall that a primary criticism of the golden leash is that it would lead directors to "maximize current [share price] at the expense of long-term firm stability and performance."[432] For this reason a golden leash like the one at General Motors, which called for a payment based on share performance over one year, is of particular concern.[433]

To address this danger, a board could adopt a bylaw that required any golden leash payments to be based on share price performance over a reasonably long period of time (e.g., five years), or require that recipients of a golden leash hold company stock for at least that long.[434] Such a bylaw would stand a good chance of satisfying the *Blasius-Buckley* framework because it directly addresses the concern over short-termism without being

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431. *See* Nili, *supra* note 117, at 570 (recognizing that a very large golden leash could "reflect[] a form of 'loyalty-buying' by the activist").

432. Schloetzer, *supra* note 12, at 9; *see also supra* Section II.C (discussing the short-term incentives that golden leashes may offer).

433. *See* Schloetzer, *supra* note 12, at 9 ("General Motors presents an example that could be used by opponents of such compensation arrangements.").

434. *See* Nili, *supra* note 117, at 570 ("Activists could easily structure [a golden leash] in a manner that is more long-term oriented. For instance, such pay could be based on a five-year period . . . . Pay could be further delayed and given at some point after the director's departure . . . ."). Five years is just an example; a board should use its judgment as to the proper timeframe.

overbroad. In other words, such a bylaw would likely be found to be narrowly tailored.

c. Limits on Source of Golden Leash

Corporate boards could also enact a bylaw that imposes limits on the *source* of a golden leash payment. One such limit could be that only shareholders may make golden leash payments. This type of bylaw would respond directly to the concern of outside influence (e.g., influence by non-shareholder constituencies). In this way it would be analogous to the legal ban on corporate and union contributions to political campaigns.

Beyond simply limiting golden leash payers to shareholders, it may be good policy to allow only large and long-standing shareholders to make golden leash payments. Those types of shareholders are less likely to bring about the problematic aspects of the golden leash because their large stake and long tenure provides comfort that their interests are aligned with that of the corporation. How much should they have to hold, and for how long? Recall that proxy access has generally been limited to shareholders holding 3% of the stock for three years or more.[435] This model may be appropriate in the golden leash context as well, where a bylaw would limit golden leash payments to those made by large and longstanding shareholders. Of course, a board may conclude that a different combination of size and holding period would be appropriate to ensure that the sponsor of a golden leash is deeply committed to the long-term success of the corporation.

Alternatively, a bylaw could provide that after a golden leash is paid, its sponsor must retain its investment for some period of time. A bylaw of that type would directly respond to the concern that sponsors of golden leashes are only interested in success over the short run by lashing them to the company for some significant period of time. A bylaw that required sponsors to stay in the stock for a very long period of time, say twenty years, would likely not be sufficiently narrowly tailored but rather would be so onerous as to effectively quash the golden leash entirely. A shorter holding period of two or three years, however, could probably qualify as narrowly tailored. This would depend on the facts of a given case, including the strength of the corporate interest at stake, the risk of harm to the company, and other considerations.

d. Disclosure

A final variation on the Wachtell Bylaw would be a bylaw that requires the disclosure of the existence of golden leash payments as well as their details. As in the political context, disclosure of who is financing a corporate campaign is so important, and such a minimal hardship, that it could probably be required for all golden leashes.[436] This seems to be an

435. *See supra* text accompanying notes 70–75 (discussing proxy access practices at large public companies).

436. *See* Schloetzer, *supra* note 12, at 6 ("[T]here is no specific requirement under the current US securities rules for the disclosure of . . . compensation agreements between a [board] nominee and the nominating shareholder . . . .").

uncontroversial proposition and indeed it has been embraced both by friends[437] and foes[438] of the golden leash. Thus a bylaw that only permitted golden leash payments whose details were fully disclosed to the shareholders (and perhaps approved by them in a separate vote), would almost certainly qualify as narrowly tailored under the *Blasius-Buckley* framework.[439]

VI. CONCLUSION

This Article claimed that the financing of corporate campaigns raises many of the same issues as does the financing of political campaigns. Accordingly, when a board of directors regulates the financing of dissident campaigns for directorships, corporate law can and should look to the Supreme Court's *Buckley* framework for guidance. As a matter of corporate law doctrine, the *Blasius* doctrine should incorporate a *Buckley*-like analysis of board-imposed limits on corporate campaign finance. This *Blasius-Buckley* framework would hold that the incumbent board is not protected by the business judgment rule but rather must show a compelling corporate interest and that its action was narrowly tailored to achieve that purpose. Applying this proposed rule to the golden leash—itself a form of corporate campaign contribution—the Article explained that there are compelling corporate interests at stake in regulating this type of director compensation, but that any bylaws that restrict the golden leash must be narrowly tailored to pass muster.

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437. *See* Nili, *supra* note 117, at 566 (recognizing that "a full and complete disclosure of [golden leash] compensation agreements" is "extremely important"); ISS, *Director Qualification/Compensation Bylaw FAQs* (Jan. 13, 2014), http://www.issgovernance.com/file/files/directorqualificationcompensationbylaws.pdf ("ISS has not recommended voting against directors and boards at companies which have adopted bylaws precluding from board service those director nominees who fail to disclose third-party compensatory payments. Such provisions may provide greater transparency for shareholders, and allow for better-informed voting decisions.").

438. *See* Lipton, *supra* note 25 ("At a minimum, all companies should require full disclosure of any third-party arrangements that director candidates may have, which has long been a common practice . . . .").

439. As this Article was going to press, the NASDAQ stock market proposed a new rule mandating disclosure of golden leash payments at NASDAQ-listed companies. NASDAQ Form 19b-4, File No. SR-NASDAQ-2016-013 (Jan. 28, 2016) (reporting the "proposal to require listed companies to publicly disclose compensation or other payments by third parties to any nominee for director or sitting director in connection with their candidacy for or service on the companies' Board of Directors"). While such a rule would not directly implicate the *Blasius-Buckley* framework, since it is imposed by the exchange, rather than the board of directors, *supra* text accompanying notes 294–97, NASDAQ's proposal lends support to the ideas expressed in this Article that the golden leash can present a risk to important corporate interests, *supra* Sections II.C and V.A, and that disclosure is a practical method of golden-leash regulation.

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