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Corporate Democracy from Say on Pay to Say on Politics

Ciara Torres-Spelliscy

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INTRODUCTION

The President of the Business Roundtable once infamously said that "[c]orporations were never designed to be democracies . . ."[1] American courts respectfully disagree and have repeatedly held that the democratic rights of shareholders are sacrosanct.[2] The context for the Business Roundtable President's comment was the battle over say on pay—a battle the Business

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1. Kevin Drawbaugh, *CEOs' group hits US bill on shareholder pay votes*, REUTERS, Mar. 8, 2007, http://www.shareholderforum.com/op/Publications/20070308_Reuters.htm (quoting John Castellani, president of the Business Roundtable). This sentiment has been repeated by late corporate law professor Larry Ribstein. *See* Larry Ribstein, *Shareholder democracy vs. democracy*, FORBES, Oct. 25, 2010, http://www.forbes.com/sites/larryribstein/2010/10/25/shareholder-democracy-vs-democracy/ ("Corporations are not democracies.").

2. Citizens United v. FEC, 558 U.S. 310, 370 (2010) (citing First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 794 (1978)) ("Shareholder objections raised through the procedures of corporate democracy . . . ."); MM Companies, Inc. v. Liquid Audio, Inc., 813 A.2d 1118, 1127 (Del. 2003) ("This Court has repeatedly stated that, 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 also* Schnell v. Chris-Craft Industries, Inc., 285 A.2d 437, 439 (Del. 1971) ("[M]anagement has attempted to . . . perpetuat[e] itself in office; and, to that end, for the purpose of obstructing the legitimate efforts of dissident stockholders in the exercise of their rights to undertake a proxy contest against management. These are inequitable purposes, contrary to established principles of corporate democracy."); Unitrin, Inc. v. American General Corp., 651 A.2d 1361, 1378 (Del. 1995) ("This Court has been and remains assiduous in its concern about defensive actions designed to thwart the essence of corporate democracy by disenfranchising stockholders.").

Roundtable lost in the United States with the passage of the financial reform legislation known as Dodd-Frank.[3]

As I will explain in this piece, courts' robust conception of corporate democracy rights for shareholders should protect both shareholders' ability to have a say on pay and a say on politics. Say on pay is the practice in United States, among other nations, of mandating a non-binding shareholder vote on executive compensation at publicly traded firms.[4] A shareholders' say on politics does not yet exist in America. But theoretically, just as say on pay mandates shareholder democracy in the case of executive remuneration, say on politics would require shareholders to vote on corporate political spending.[5] Binding say on politics votes already exist in the U.K.[6]

Critiques of say on pay and say on politics have been couched as constitutional objections based on either the Tenth or First Amendments of the U.S. Constitution. But at their heart, these objections seem less rooted in the text of the Constitution and more inspired by a cribbed conception of shareholders' corporate voting rights. To untangle who has the stronger legal argument requires a review of how American courts have conceptualized "corporate democracy." I conclude that as framed by key courts such as the U.S. Supreme Court, the D.C. Circuit Court of Appeals and the Delaware state courts, "corporate democracy" is a capacious enough concept to justify both shareholders' say on pay and say on politics.

PART I. CORPORATE DEMOCRACY

In contrast to the argument raised by some businessmen and academics that corporations are not democratic institutions, American courts have held repeatedly that an important aspect of American corporations are their procedures of corporate democracy. The phrase "corporate democracy" appears in Justice

3. Dodd-Frank Section 951(a)(2); Exchange Act Section 14A(a)(2); 15 U.S.C. §78n-1(a)(2).

4. Jill E. Fisch, *Leave It to Delaware: Why Congress Should Stay Out of Corporate Governance*, 37 DEL. J. CORP. L. 731, 734 (2013) ("The corporate governance provisions in Dodd-Frank reflect a congressional decision to afford shareholders greater control over the election process in general and give them a greater voice, especially on executive compensation issues.").

5. Ciara Torres-Spelliscy, *Corporate Campaign Spending: Giving Shareholders a Voice*, BRENNAN CTR. FOR JUSTICE (2010), *available at* https://www.brennancenter.org/sites/default/files/legacy/publications/shareholdersvoice2_5_10.pdf.

6. Ciara Torres-Spelliscy & Kathy Fogel, *Shareholder-Authorized Corporate Political Spending in the United Kingdom*, 46 U. S.F. L. REV. 479 (2011).

Kennedy's opinion in *Citizens United*— a case that empowers corporations to spend money in American elections, but requires that that spending be transparent.[7] As Justice Kennedy wrote for the eight-person majority of the Supreme Court:

> Shareholder objections raised through the procedures of corporate democracy . . . can be more effective today because modern technology makes disclosures rapid and informative. . . . With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters.[8]

What Justice Kennedy meant by "procedures of corporate democracy" is not entirely self-evident as he neglected to provide a definition, but at the very least the quoted language above from *Citizens United* indicates that Justice Kennedy believes that shareholders' holding corporate managers accountable for their political spending is appropriate. Typically the way that shareholders hold managers accountable is through voting their proxy card at an annual or special meeting of shareholders.

As a matter of background, on a typical corporate proxy card there are four items that are subject to a shareholder vote on an annual basis: (1) the election of directors, (2) the appointment of auditors/accountants, (3) management proposals and (4) shareholder proposals.[9] As will be explained in more detail below, shareholders in publicly traded firms now have the right to vote on a fifth category of executive compensation.[10] And each of these five categories are properly a subject of "corporate democracy."

While Justice Kennedy used the term "corporate democracy" without providing a clear definition in *Citizens United*, other cases have articulated what the Supreme Court means by the phrase "corporate democracy." In 1964 in *Borak*, the Supreme Court noted that federal securities laws are meant to empower corporate democracy or what the Court referred to as

7. There are two aspects of the *Citizens United* decision. The decision is five to four on the issue of lifting the ban on corporate expenditures in federal elections and the decision is eight to one in favor of requiring transparency of money in politics.

8. Citizens United v. FEC, 558 U.S. 310, 370 (2010).

9. *Sample Proxy Card*, SEC, https://www.sec.gov/spotlight/proxymatters/proxy_sample.htm (last visited March 29, 2015).

10. Dodd-Frank Section 951(a)(2); Exchange Act Section 14A(a)(2); 15 U.S.C. §78n-1(a)(2).

"fair corporate suffrage."[11] Then in 1991, in *Virginia Bankshares*, the Supreme Court quoted the legislative history of the Securities Exchange Act of 1934 about the centrality of shareholders' voting rights: "[a]ccording to the House Report, Congress meant to promote the 'free exercise' of stockholders' voting rights, and protect '[f]air corporate suffrage,' from abuses exemplified by proxy solicitations that concealed what the Senate Report called the 'real nature' of the issues to be settled by the subsequent [shareholder] votes."[12]

Given Delaware's prominent role in American corporate law, another useful source for defining the meaning of "corporate democracy" is Delaware case law.[13] Delaware is the center of gravity for American corporate law because so many firms choose Delaware as their locus of incorporation. As the *New York Times* reported in 2012, "[n]early half of all public corporations in the United States are incorporated in Delaware. Last year, 133,297 businesses set up here. And, at last count, Delaware had more corporate entities, public and private, than people — 945,326 to 897,934."[14]

Admittedly, directors occupy a place of primacy in U.S. corporate governance.[15] Nonetheless, the way directors get their authority within the corporate structure is through shareholder elections. Akin to the U.S. Supreme Court, the Delaware courts have been quite protective of the ability of shareholders to vote for new directors.[16] As one of the lower courts in Delaware noted, "shareholder franchise is the ideological underpinning upon

11. J. I. Case Co. v. Borak, 377 U.S. 426, 431 (1964) ("The section stemmed from the congressional belief that '[f]air corporate suffrage is an important right that should attach to every equity security bought on a public exchange.'") (quoting H.R. Rep. No. 73-1383, at 13 (1934)).

12. Virginia Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1103 (1991).

13. MM Cos. v. Liquid Audio, Inc., 813 A.2d 1118, 1127 (Del. 2003) (explaining Delaware's courts "have remained assiduous in carefully reviewing any board actions designed to interfere with or impede the effective exercise of corporate democracy by shareholders, especially in an election of directors").

14. Leslie Wayne, *How Delaware Thrives as a Corporate Tax Haven*, N.Y. TIMES, June 30, 2012, *available at* http://www.nytimes.com/2012/07/01/business/how-delaware-thrives-as-a-corporate-tax-haven.html.

15. Mayer v. Adams, 141 A.2d 458, 461 (Del. 1958) ("under Delaware law the directors manage the corporation—not the stockholders.").

16. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 959 (Del. 1985) ("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."). The right to vote on board seats is also embodied in the Model Business Corporations Act (MBCA) §§ 7.28 and 8.08.

which the legitimacy of [corporate] directorial power rests."[17] Or as the Supreme Court of Delaware once explained:

> The Courts of this State will not allow the wrongful subversion of corporate democracy by manipulation of the corporate machinery or by machinations under the cloak of Delaware law. 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.[18]

A decade later, the Delaware Supreme Court made clear, "[b]ecause 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 [voting] rights."[19]

In a 2012 case decided two years after *Citizens United*, the Delaware Supreme Court reaffirmed these earlier Delaware precedents, stating in no uncertain terms: "[s]hareholder voting rights are *sacrosanct*. The fundamental governance right possessed by shareholders is the ability to vote for the directors the shareholder wants to oversee the firm. Without that right, a shareholder would more closely resemble a creditor than an owner."[20] Other American courts agree protecting the right of shareholders to vote for directors of their choice is a vital role played by the judiciary.[21]

17. Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 659 (Del. Ch. 1988); *id*. at 663 ("The theory of our corporation law confers power upon directors as the agents of the shareholders; it does not create Platonic masters.").

18. Giuricich v. Emtrol Corp., 449 A.2d 232, 239 (Del. 1982) (emphasis added); *see also* Unitrin, Inc. v. Amer. Gen. Corp., 651 A.2d 1361, 1378 (Del. 1995) ("This Court has been and remains assiduous in its concern about defensive actions designed to thwart the essence of corporate democracy by disenfranchising stockholders."); *Unocal Corp*., 493 A.2d at 959 (disenchanted investors have "the powers of corporate democracy . . . at their disposal to turn the board out").

19. Paramount Communications, Inc. v. QVC Network Inc., 637 A.2d 34, 42 (Del. 1994); *see also* Williams v. Geier, 671 A.2d 1368, 1381 (Del. 1996) (where "stockholders control their own destiny through informed voting . . . [t]his is the highest and best form of corporate democracy").

20. EMAK Worldwide, Inc. v. Kurz, 50 A.3d 429, 433 (Del. 2012) (emphasis added); *see also* Aprahamian v. HBO & Co., 531 A.2d 1204, 1206–07 (Del. Ch. 1987) ("In the interests of corporate democracy, those in charge of the election machinery of the corporation must be held to the highest standards in providing for and conducting corporate elections.").

21. AHI Metnall, L.P. by AHI Kansas, Inc. v. J.C. Nichols Co., 891 F.Supp. 1352, 1360 (W.D. Mo. 1995) ("The public interest in corporate democracy, as evidenced in the Missouri Constitution and numerous statutes, favors the issuance of an injunction."); ER Holdings, Inc. v. Norton Co., 735 F.Supp. 1094, 1100 (D. Mass. 1990) ("[O]ne of the most sacred rights of any shareholder is to participate in corporate democracy."); Int'l Banknote Co. v. Muller, 713 F.Supp. 612, 623 (S.D.N.Y 1989) ("Courts have consistently found that corporate management subjects shareholders to irreparable harm by denying them the

Meanwhile, the influential D.C. Circuit Court, which reviews many of the federal rules promulgated by the Securities and Exchange Commissions (SEC), has also had the opportunity to flesh out what it means by the concept of "corporate democracy" in the context of SEC Rule 14a, which governs corporate proxies at public firms.[22] The D.C. Circuit's views of corporate democracy includes the following iterations:

> It is obvious to the point of banality to restate the proposition that Congress intended by its enactment of section 14 of the Securities Exchange Act of 1934 to give true vitality to the concept of corporate democracy. The depth of this commitment is reflected in the strong language employed in the legislative history:
>
> Even those who in former days managed great corporations were by reason of their personal contacts with their shareholders constantly aware of their responsibilities. But as management became divorced from ownership and came under the control of banking groups, men forgot that they were dealing with the savings of men and the making of profits became an impersonal thing. When men do not know the victims of their aggression they are not always conscious of their wrongs . . . . Fair corporate suffrage is an important right that should attach to every equity security bought on a public exchange.[23]

The language above appeared in a case where shareholders at Dow[24] used a shareholder resolution to try to implore the firm to stop producing the chemical weapon napalm for the Vietnam War.[25] As the SEC Historical Society sums up the matter, "a shareholder of Dow Chemical sought inclusion in the company's

right to vote their shares or unnecessarily frustrating them in their attempt to obtain representation on the board of directors.").

22. Ciara Torres-Spelliscy, Kathy Fogel & Rwan El-Khatib*, Running the D.C. Circuit Gauntlet on Cost-Benefit Analysis after* Citizens United*: Empirical Evidence from Sarbanes-Oxley and the JOBS Act*, 9 DUKE J. CONST. L. & PUB. POL'Y 135, 155 (2014).

23. Med. Comm. for Human Rights v. SEC, 432 F.2d 659, 676 (D.C. Cir. 1970) (citing H.R. Rep. No. 73-1383, at 5, 13 (1934)).

24. The shareholders in question were the Medical Committee for Human Rights (MCHR), which provided emergency medical care for civil rights workers in Mississippi in the 1960s. MEDICAL COMMITTEE FOR HUMAN RIGHTS, MED. COMM. FOR HUMAN RIGHTS 1, 2, *available at* http://www.crmvet.org/docs/64_mchr.pdf (solicitation pamphlet).

25. Jill E. Fisch, *From Legitimacy to Logic: Reconstructing Proxy Regulation*, 46 VAND. L. REV. 1129, 1152 (1993) ("In the 1950s and 1960s, shareholders began to display increasing concern over the corporation's relationship to society at large. Issues such as the Vietnam War, the civil rights movement, and environmentalism became important not merely on the political agenda, but also on the corporate agenda. Shareholders began to use the corporate proxy to debate these issues.").

proxy of a request to corporate directors for the company to stop selling napalm to any buyer unless there was a reasonable assurance that the product would not be used against any human being. Dow refused to include the statement and the SEC declined to take action to force the inclusion."[26] This led to the shareholders suing the SEC.

In the Dow case, the D.C. Circuit expounded upon the rights of shareholders in publicly traded firms under SEC Rule 14a to vote on political and social issues through shareholder resolutions on corporate proxy cards. As the Court explicated:

> We think that there is a clear and compelling distinction between management's legitimate need for freedom to apply its expertise in matters of day-to-day business judgment, and management's patently illegitimate claim of power to treat modern corporations with their vast resources as personal satrapies implementing personal political or moral predilections.[27]

This case proved to be a watershed moment for increasing the scope of permissible shareholder proposals.[28] Shortly thereafter, the SEC changed Rule 14a-8 to allow for shareholder proposals on social and political matters.[29]

In 1992, the D.C. Circuit Court noted that shareholders also have a right to an informed vote. As the court declared,

> In order that the stockholder may have adequate knowledge as to the manner in which his interests are being served, it is essential that he be enlightened not only as to the financial condition of the corporation, but also as to the major questions of policy, which are decided at stockholders' meetings.[30]

26. *The Bright Image: The SEC, 1961-1973 A Greater Voice Proxy Regulation*, SEC HISTORICAL SOC'Y, *available at* http://www.sechistorical.org/museum/galleries/tbi/voice_b.php.

27. Med. Comm. for Human Rights v. SEC, 432 F.2d 659, 681 (D.C. Cir. 1970); *see also* Roosevelt v. E.I. Du Pont de Nemours & Co., 958 F.2d 416, 421 (D.C. Cir. 1992) ("Access to management proxy solicitations to sound out management views and to communicate with other shareholders on matters of major import is a right informational in character, one properly derived from section 14(a) and appropriately enforced by private right of action." (internal citation omitted)).

28. *See e.g.*, Lovenheim v. Iroquois Brands, Ltd., 618 F.Supp. 554, 556, 561 (D.D.C. 1985) (in light of "ethical and social significance" of a shareholder proposal on animal cruelty, court granted preliminary injunction barring a corporation from excluding from its proxy materials shareholder proposal regarding pate de foie gras production).

29. Adoption of Amendments Relating to Proposals by Security Holders, Exchange Act Release No. 12,999, 41 Fed. Reg. at 52,994, 52,998 (Nov. 22, 1976).

30. *Roosevelt*, 598 F.2d at 422 (quoting S. Rep. No. 73-792, at 12 (1934)). The Second Circuit has come to similar conclusions on shareholder voting rights with respect to

Thus, the conception of corporate democracy from Delaware, the D.C. Circuit Court and the Supreme Court informs the proper meaning that should be applied to Justice Kennedy's notion of "the procedures of corporate democracy" in *Citizens United*.[31] These courts indicate that shareholders have the right to vote on who will represent them on the board of directors of Delaware corporations; they have a right to vote on social and political policies at publicly traded firms; and in either case, they have a right to sufficient information to cast an informed vote on the corporate proxy card.[32]

PART II. SAY ON PAY

Given that American courts have embraced a broad notion of shareholder suffrage, how will this apply to say on pay or say on politics? Before we can answer that question, I must define what say on pay and say on politics are. I will begin with say on pay.

How CEOs are paid matters. As economist Dr. Susan Holmberg explained for the Roosevelt Institute, executive compensation packages may incentivize dangerously risky behavior that can impact the soundness of the entire market. As she argues, "[e]conomists are increasingly concerned that the structure of executive compensation encourages CEOs to engage in behavior that is economically inefficient in the long run, unreasonably risky, or even fraudulent, which can be harmful to companies, shareholders, and the economy at large."[33]

The issue of extraordinarily high executive compensation has been in the crosshairs of corporate governance fights for years.[34]

shareholder proposals. Amalgamated Clothing and Textile Workers Union v. Wal-Mart Stores, Inc., 54 F.3d 69, 71 (2d Cir. 1995) ("The percentage of shares voted against a proposal is insignificant because the right to cast an informed vote, in and of itself, is a substantial interest worthy of vindication.").

31. *Citizens United*, 558 U.S. at 370.

32. For arguments to the contrary of my conclusions on corporate democracy, *see* Thomas Joo, Comment, *Corporate Governance and the "D-Word"*, 63 WASH. & LEE L. REV. 1579 (2006).

33. Susan Holmberg, *Can Say-on-Pay Curb Executive Compensation? How Shareholder Rights Limit Excessive Pay*, ROOSEVELT INST. (Sept. 25, 2013), *available at* http://rooseveltinstitute.org/sites/all/files/Holmberg_Say_on_Pay_09_25_13.pdf.

34. Leo Hindery Jr., *Why We Need to Limit Executive Compensation*, BUS. WK, Nov. 4, 2008, *available at* http://www.businessweek.com/stories/2008-11-04/why-we-need-to-limit-executive-compensationbusinessweek-business-news-stock-market-and-financial-advice ("[W]ith such U.S. exalted compensation, management has so elevated itself above average employees as to have become, in my opinion, a constituency unto itself—and one that, to compound the inequity, largely sets its own compensation.").

As the Sage from Omaha, Warren Buffet, once put it in 2003, "[i]n judging whether corporate America is serious about reforming itself, CEO pay remains the acid test."[35] Testifying before Congress in 2009, the Chairman of the Board of H&R Block quipped, "[w]e have all seen examples of profligate compensation that can get seriously out of whack."[36] And, the CEO of Vanguard John C. Bogle summed up the issue in 2005 thusly, "[t]he bottom line is that our system of executive compensation is broken. It must be fixed."[37] Say on pay is one approach to fix it.

Say on pay is the ability of shareholders to vote on executive compensation packages on the corporate proxy card. Say on pay is a policy that has been adopted by multiple nations around the globe,[38] originating in the U.K., the Netherlands and Australia before it finally arrived in America.[39] The policy comes in two basic flavors: advisory or binding. The Netherlands and Switzerland have binding say on pay votes that managers must heed.[40] In other countries such as Australia, Norway, Spain,

35. Jonas Bergstrand, *Power pay: When the Game is Rigged in Favour of the Boss*, THE ECONOMIST (Jan. 18, 2007), *available at* http://www.economist.com/node/8514008 (quoting Mr. Buffett); *see also* Rik Kirkland, *The real CEO pay problem*, FORTUNE MAGAZINE (June 30, 2006), *available at* http://archive.fortune.com/magazines/fortune/fortune_archive/2006/07/10/8380799/index.htm ("'About half of American industry has grossly unfair compensation systems where the top executives are paid too much,' says Charlie Munger, Warren Buffett's partner at Berkshire Hathaway.").

36. *Further Examining What Went Wrong in the Securities Markets, How We Can Prevent the Practices that Led to Our Financial System Problems, and How to Protect Investors: Hearing Before the S. Comm. on Banking, Hous., & Urban Affairs*, 111th Cong 47 (2009) (testimony of Richard C. Breeden).

37. John C. Bogle, *The Executive Compensation System is Broken*, 30 J. CORP. L. 761, 765 (2005).

38. David F. Larker, *Ten Myths of "Say on Pay,"* HARV. L. SCH. F. ON CORP. GOV. & FIN. REG (Sept. 28, 2012, 8:59 A.M.), http://blogs.law.harvard.edu/corpgov/2012/09/28/ten-myths-of-say-on-pay/ ("[T]here is no single policy for implementing 'say on pay' that is uniformly adopted across countries. Models of 'say on pay' vary considerably in terms of whom they address (boards of directors or named executives), their objective (the compensation philosophy or compensation levels), their restrictiveness (binding or advisory), and their catalyst (legal mandate or market-driven pressure).").

39. Martin Conyon & Graham Sadler, *Shareholder Voting and Directors' Remuneration Report Legislation: Say on Pay in the UK*, 18 CORP. GOVERNANCE: AN INT'L REV. 296, 296 (2010) ("Legislation giving shareholder 'voice' has sprung up in many countries including the United Kingdom, Australia, the Netherlands, Norway, and Sweden."); Paul Hodgson, *A Brief History of Say on Pay*, IVEY BUS. J. (2009), *available at* http://blog.thecorporatelibrary.com/blog/2009/10/a-brief-history-of-say-on-pay.html ("[I]n August 2002 the U.K. government introduced the Directors' Remuneration Report, regulations which included the requirement to put a remuneration report to a shareholder vote at each annual general meeting.").

40. Emily Chasan, *Say-on-Pay Rules Expand Globally*, WALL ST. J. (Mar. 5, 2013, 2:23 PM), http://blogs.wsj.com/cfo/2013/03/05/say-on-pay-rules-expand-globally/.

France and United States, say on pay votes are merely advisory;[41] though the E.U. may soon have binding say on pay votes.[42]

Say on pay votes remind corporate managers of their fiduciary duty to shareholders and to help mitigate the classic agency problem of managers' prerequisite consumption identified so long ago by Professors Berle and Means.[43] With a vote on executive compensation, shareholders can express their displeasure (or pleasure) with how executives are being paid.

Say on pay was first suggested by shareholders in the United States who were concerned by the skyrocketing size of executive compensation packages which became larded with stock options, generous retirement packages and even golden parachutes for leaving the job.[44] Finally, many shareholders viewed board compensation committees as being captured by powerful CEOs who could subtly, or not so subtly, influence the setting of his or her own compensation rates.[45]

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41. Matt Orsagh, *Will "Say on Pay" Go Global, or Has It Already?*, CFA INST. (July 26, 2011), http://blogs.cfainstitute.org/marketintegrity/2011/07/26/will-%E2%80%9Csay-on-pay%E2%80%9D-go-global-or-has-it-already/ ("Netherlands currently requires a binding shareholder vote on executive pay, while a non-binding vote is the model in the U.K., Australia, Norway, Spain, France, and Sweden.").

42. Yves Herman, *EU's Barnier urges binding shareholder vote on pay*, REUTERS May 16, 2012, http://uk.reuters.com/article/2012/05/16/uk-eu-pay-barnier-idUKBRE84F0D020120516.

43. ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).

44. Gary Shorter, *The "Pay Ratio Provision" in the Dodd-Frank Act: Legislation to Repeal It in the 113th Congress*, CONG. RESEARCH SERV. 1 (2013), http://fas.org/sgp/crs/misc/R43262.pdf ("The CEO's pay is typically a combination of base pay, an annual bonus tied to performance, grants of stock, stock options, contributions to a retirement program, and various benefits such as the use of limousines and club memberships, and it is formally set by the company's board of directors.").

45. Ian Gregory-Smith et al., *CEO Pay and Voting Dissent Before and After the Crisis*, 124 ECON. J. F22, F22 (2014) ("Say on pay involves the direct empowerment of shareholders in the determination of executive compensation arrangements in their company. This move rests, explicitly or implicitly, on some version of the 'rents capture' hypothesis of corporate control. That is, the proposition . . . suggests that executives 'capture' their boards sufficiently to push their own rewards beyond purely market-determined levels. It is consequently assumed that self-interested shareholders will, if offered a low-cost opportunity to voice their concerns, vote to punish excess and that executives, fearful of such retribution, will curtail their own opportunism."); *see also* Don Baker, *CEO pay is 'acid test' for reform*, DAYTON BUS. J. (Apr. 12, 2004), http://www.bizjournals.com/dayton/stories/2004/04/12/editorial1.html?page=all ("Boardrooms, for the most part, still are filled with good ol' boys who pat each other on the back and wink as they pad each other's paychecks. It's a you-scratch-my-back-I'll-make-you-rich understanding that has existed for too long."); Carl T. Bogus, *Excessive Executive Compensation and the Failure of Corporate Democracy*, 41 BUFF. L. REV. 1, 34 (1993) (finding in 500 large firms in 1989 that "the CEO initially recommended 90-100% of all directorial nominees").

Union pension funds were some of the institutional investors that raised the issue of executive compensation earliest.[46] A say on pay vote was first suggested in shareholder proposal by the American Federation of State, County and Municipal Employees (AFSCME), investors who were self-consciously copying the U.K.'s say on pay approach."[47]

Shareholders were frequently concerned with the growing disconnect between pay and performance[48] after CEOs (and other top managers) continued to be paid generously while leading particular firms into bankruptcy or other financial ruin.[49] As one reporter put it during the 2008 financial crisis, "[t]he guys who ran the recently collapsed Lehman Bros., Merrill Lynch, Bear Stearns, Fannie Mae and Freddie Mac all prove one thing. You don't always get what you pay for."[50] Since many suspected that executive compensation incentivized the wrong type of short-term risk taking that led to the 2008 financial collapse,[51] attempts to rein in excessive executive compensation through the adoption

46. Yonca Ertimur et al., *Shareholder Activism and CEO* Pay, 24 REV. FIN. STUD. 535, 576 (2011) ("Using a comprehensive sample of 1,198 shareholder proposals and 134 vote-no campaigns related to CEO pay over the 1997-2007 period, we document a significant increase in the frequency of compensation-related activism after 2002, largely due to greater activism by union pension funds. We find no evidence of union-related motives in union pension funds' activism."); *What International Markets Say on Pay: An Investor Perspective*, INST. S'HOLDER SERVS. (Apr. 2007).

47. Barbara Kiviat, *Giving Investors a Say on CEO Pay*, TIME, (Apr. 9, 2008), *available at* http://content.time.com/time/business/article/0,8599,1729480,00.html.

48. Gretchen Morgenson, *Say-on-Pay Gets Support at Verizon*, N.Y. TIMES May 19, 2007, *available at* http://www.nytimes.com/2007/05/19/technology/19verizon.html (quoting Brian Foley, "People were frustrated with the way management had been paid relative to performance . . . .").

49. Alyce Lomax, *Is Shareholder "Say on Pay" Working?*, MOTLEY FOOL (Apr. 3, 2014), http://www.fool.com/investing/general/2014/04/03/is-shareholder-say-on-pay-working.aspx ("For years, CEO pay rose largely unchecked in America. Although leaders who build great companies deserve pay commensurate to their accomplishments, too many underperforming or lackluster CEOs make astronomical amounts of money at shareholders' expense. It's odd that one class of workers tends to make millions -- often without a performance review.").

50. Eve Tahmincioglu, *Can wild CEO pay be tamed? Probably not*, MSNBC.COM (Sept. 1, 2008), http://www.nbcnews.com/id/26963309/ns/business-stocks_and_economy/t/can-wild-ceo-pay-be-tamed-probably-not/#.VKYP5orF_pA ("Big paychecks for jobs not well done: Lehman Bros.' Richard Fuld, $40 million. Merrill Lynch's Stanley O'Neal, $46 million. Bear Stearns' James Cayne, $40 million. Freddie Mac's Richard Syron, just shy of $20 million. Fannie Mae's Daniel Mudd, $12.2 million.").

51. Brett Arends, *Curbing Executive Pay, But Not the Perks*, WALL ST. J., Oct. 26, 2009, http://www.wsj.com/articles/SB125624772316002303 ("Kingly pay packages for executives hardly benefited stockholders, and encouraged managers to take short-term risks . . . . Americans may not realize it, but ours is the only country in the world where executives routinely expect $20 million a year in salary. And our markets have under-performed most of the rest of the world for years.").

of say on pay policies has increased across the globe in the wake of the 2008 global financial crisis.[52]

The inflection point for say on pay in the United States came in the guise of the $700 billion taxpayer funded bailout of the financial system through the Troubled Asset Relief Program (commonly known as TARP) legislation in 2008. Many TARP bailout recipients paid large year-end bonuses. This was a bridge too far for many members of Congress. As part of TARP, a condition for receipt of federal bailout dollars was shareholder votes on executive compensation packages as the result of 2009 supplemental legislation.[53] Furthermore, TARP recipients were also subject to executive compensation packages that were set by the so-called "Pay Czar" Kenneth Feinberg, who was highly critical of CEO perks including large bonuses[54] and complementary country club memberships.[55]

Then when the omnibus bill which would eventually become Dodd-Frank was being crafted between 2008 and 2010, corporate governance experts suggested that say on pay should be expanded

52. Gregory-Smith et al., *supra* note 45, at F22–F23 ("Since 2007–8, numerous countries have either adopted say on pay schemes or strengthened existing ones. These moves have been widely linked to the view that executive pay arrangements encouraged excessive risk taking, particularly in financial services, and/or have protected senior managers from the consequences of such behavior [sic] (Hill, 2012).").

53. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 111(e), 123 Stat. 115, 519; William Alan Nelson II, Esq., *Ending the Silence: Shareholder Derivative Suits and Amending the Dodd-Frank Act So "Say on Pay" Votes May Be Heard in the Boardroom*, 20 U. MIAMI BUS. L. REV. 149, 154 (2012) ("The proposals for a 'say on pay' vote on executive compensation were initially set forth by the Obama Administration in June 2009 via the Department of Treasury's 'White Paper' on financial reform.") (citing U.S. TREASURY DEP'T., FINANCIAL REGULATORY REFORM, A NEW FOUNDATION: REBUILDING FINANCIAL SUPERVISION AND REGULATION (2009), *available at* http://www.treasury.gov/initiatives/Documents/FinalReport_web.pdf).

54. John Ydstie, *Pay Czar Slams Bank Executives' Bonuses*, NPR (July 23, 2010), *available at* http://www.npr.org/templates/story/story.php?storyId=128725677 ("Some of the payments . . . many of them were over $10 million per individual, which were in our view ill-advised,' Feinberg said.")

55. David Ellis & Ed Henry, *Pay czar issues salary caps for execs*, CNN, Dec. 11, 2009, http://money.cnn.com/2009/12/11/news/companies/feinberg_compensation/ ("We want to minimize these runaway perks and other compensation practices,' Feinberg said . . . ."); Devin Leonard, *Bargain Rates for a C.E.O.?*, N.Y. TIMES (Apr. 3, 2010), *available at* http://www.nytimes.com/2010/04/04/business/04comp.html ("[I]f you were the typical American C.E.O., you may have found some of the pay czar's prescriptions startling. For instance, he thinks you should pay golf club dues out of your own pocket. He also would like you to take less of your pay in cash and more of it in stock.").

far beyond TARP recipients to all publicly traded companies.[56] Congress agreed and integrated the reform into Dodd-Frank.[57]

Mohandas Gandhi is (mis)credited with declaring, "[f]irst they ignore you. Then they laugh at you. Then they attack you. Then you win."[58] This quote, whether Gandhi's or not, seems to capture a trajectory say on pay took in the past decade in the United States.

Before it was the law of the land in America, the approach of empowering shareholders with a say on executive pay was the subject of considerable consternation. Say on pay was a departure from the American corporate law that preceded it, because before this, shareholders typically had no input on board decisions to spend corporate resources.[59]

At first the idea of a shareholder vote on executive compensation in America was met with dismissive derision. Then-CEO of Apple, Steve Jobs joked, "I hope 'Say on Pay' will help me with my $1 a year salary."[60] The year he made this joke, Mr. Jobs exercised over $14 million in Apple stock options and had a private jet that was subsidized by Apple.[61]

Critics tried to throw the kitchen sink at say on pay to stop it from becoming federal law in United States. The criticisms and objections to say on pay were all over the map and not logically consistent when compared side by side. Objections to say on pay

56. *Written Testimony Submitted by Professor Lucian A. Bebchuk before the Committee on Financial Services, United States House of Representatives Hearing on Compensation Structure and Systemic Risk* 6 (June 11, 2009), http://www.law.harvard.edu/faculty/bebchuk/Policy/FSC-written-testimony-June-11-09.pdf ("[S]hareholders' rights in U.S. public firms are significantly weaker relative to the U.K. and other common law countries. In addition to introducing advisory say-on-pay votes, it is important to strengthen shareholder rights in a number of other ways.").

57. Dodd-Frank Section 951(a)(2); Exchange Act Section 14A(a)(2); 15 U.S.C. §78n-1(a)(2).

58. Eoin O'Carroll, *Political misquotes: The 10 most famous things never actually said*, CHRISTIAN SCI. MONITOR, June 3, 2011, http://www.csmonitor.com/USA/Politics/2011/0603/Political-misquotes-The-10-most-famous-things-never-actually-said/First-they-ignore-you.-Then-they-laugh-at-you.-Then-they-attack-you.-Then-you-win.-Mohandas-Gandhi.

59. CA, Inc. v. AFSCME Employees Pension Plan, 953 A.2d 277 (Del. 2008) (holding that stockholder initiated bylaws cannot mandate how the board should decide a specific substantive question; rather they can merely define the process and procedure by which the board makes its decisions.).

60. Ellen Lee, *Apple shareholders OK 'Say on Pay'*, S.F. CHRON., Mar. 5, 2008, http://www.sfgate.com/business/article/Apple-shareholders-OK-Say-on-Pay-3225225.php.

61. *Steve Jobs Salary in 2007: $1,* ASSOCIATED PRESS, Jan. 23, 2008, http://www.nbcnews.com/id/22807978/ns/business-us_business/t/steve-jobs-salary/#.VKykTYrF_pA.

ranged from it being a stupid idea,[62] to an argument that shareholders would not care about executive compensation so they would not bother to vote,[63] to shareholders are obsessed with executive compensation therefore it would be inappropriate to grant them any say on executive compensation packages,[64] to shareholders would not have enough information to vote sensibly,[65] or that say on pay would lead to an inflexible one-size-fits-all approach to compensation.[66]

While early say on pay bills stalled in Congress,[67] say on pay shareholder proposals caught on quickly between 2006 and 2008.[68] When say on pay shareholder proposals started showing up on the

62. David McCann, *Say What? The Battle over Executive Comp*, CFO.COM (June 4, 2008), http://ww2.cfo.com/human-capital-careers/2008/06/say-what-the-battle-over-executive-comp/ ("'Say on Pay isn't the only thing that is really stupid that generates business for me,' said Alan Johnson, managing director of Johnson Associates in New York, a consulting firm.").

63. Leonard, *supra* note 55 (quoting Charles M. Elson "Unfortunately, I think say-on-pay is pointless."); McCann, *supra* note 62 (quoting Alan Johnson: "To ask shareholders for their views is going to be a burdensome side show."); Colin Barr, *Why 'Say on Pay' won't work*, FORTUNE, Nov. 16, 2009, *available at* http://www.shareholderforum.com/sop/Library/20091116_Fortune.htm ("But there's a catch. The biggest investors—institutions such as mutual funds and pension funds that hold more than half of all shares—have shown little interest in playing pay watchdog. And it's not clear that will change even if the government mandates say on pay as part of the financial reform taking shape in Washington.").

64. Leonard, *supra* note 55 (quoting Thomas Quaadman, the executive director of the U.S. Chamber of Commerce's Center for Capital Markets Competitiveness, "This [Say on Pay] is something that isn't about better corporate governance . . . .This is about activists being put at the head of the line.").

65. Kiviat, *supra* note 47 ("IBM says there's no way that shareholders can know what's an appropriate pay practice since they're not privy to competitive information like which executives are receiving other job offers. Coca-Cola stresses that shareholders already have a way to deal with pay practices they find unpalatable: don't vote for members of the board when they come up for re-election.").

66. V.G. Narayanan, *Executive Pay: It's About "How," Not "How Much,"* HARV. BUS. REV. (June 22, 2009), https://hbr.org/2009/06/its-about-how-to-pay-not-how-m/ ("Governmental and shareholder second-guessing on pay would create an environment of fear in which no board would dare try an approach that's different from the herd's or that is tailored to the company's particular strategy. And one size definitely does not fit all when it comes to compensation – when business strategies differ between companies, their compensation practices ought to differ as well.").

67. Protection Against Executive Compensation Abuse Act of 2005, H.R. 4291, 109th Cong. (2005).

68. NAT'L ASS'N OF CORPORATE DIR'S, KEY AGREED PRINCIPLES TO STRENGTHEN CORPORATE GOVERNANCE FOR U.S. PUBLICLY TRADED COMPANIES: WHITE PAPERS: SERIES I 16 (2009), https://secure.nacdonline.org/source/members/whitepapers-new/pdf/NACD_White_Papers.pdf ("In 2006, there were four such shareholder proposals; only two years later, in 2008, shareholders submitted 72 proposals for say-on-pay."); Tomoeh Murakami Tse, *Score One for Dissent*, WASH. POST, Feb. 15, 2007, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/02/14/AR2007021401628.html (noting 50 companies were holding "say on pay" votes on shareholder proposals).

proxy cards of publicly traded firms more frequently, the reaction by critics became more pointedly negative.[69] Compensation consultants who advise boards about setting executive pay complained in the press. Some of the objections to say on pay displayed a deep discomfort with shareholder democracy. For example, Frederic W. Cook, an executive compensation consultant, argued that say on pay was "unnecessary and potentially harmful . . . . He [wa]s also concerned that say on pay could provide an opening to shareholders who want to muscle in on the corporate agenda and lead to shareholder 'plebiscites' on other issues."[70] Here Mr. Cook raised a classic slippery slope argument that if say on pay were allowed, there would be no logical stopping point to what else might end up on a corporate proxy card for a vote.

When say on pay was being considered in Congress as potential new federal law, certain CEOs themselves started pushing back, arguing that requiring say on pay at all public firms would be unnecessary and overly broad. CEOs interviewed by *USA Today* before Dodd-Frank became law had a litany of warnings against say on pay.[71] William Lauder, CEO of The Estée Lauder Cos. argued "that passing say on pay would require all companies to pay for the sins of a few: 'I can only say that the cost to an organization for complying with the extraordinary rules and

69. Hodgson, *supra* note 39 ("Back in 2007 . . . a major shareholder campaign to introduce an advisory vote on executive compensation was launched. The campaign, orchestrated by a significant group of institutional stockholders, led to the launch of shareholder resolutions at over 50 major U.S. corporations."); Randall S. Thomas et al., *Dodd-Frank's Say on Pay: Will It Lead to a Greater Role for Shareholders in Corporate Governance?,* 97 CORNELL L. REV. 1213, 1217–18 (2012) ("[I]t was not until 2006 that the first shareholder say-on-pay proposals in U.S. public companies were submitted under Rule 14a-8. Their popularity grew quickly and by 2009 they constituted the largest category of shareholder-sponsored proposals, regularly garnering majority shareholder support." (internal citations omitted)).

70. Joseph McCafferty, *The 'Say-on-Pay' Debate Heats Up*, BUS.WK., Mar. 18, 2008, http://www.businessweek.com/stories/2008-03-18/the-say-on-pay-debate-heats-upbusinessweek-business-news-stock-market-and-financial-advice; *see also* Del Jones, *CEOs Openly Oppose Push for Say-on-Pay by Shareholders*, U.S.A. TODAY, July 17, 2009, *available at* http://usatoday30.usatoday.com/money/companies/management/2009-07-15-ceo-say-on-pay-shareholders_N.htm ("CEOs say the legislation would open the door to micromanagement by largely uninformed shareholders, who understand neither the competitive market forces that drive executive pay nor the complex incentives designed by experts to get the best results . . . . 'You cannot run companies effectively through the democratic process of voting on all things,' says Judy Odom, former CEO of Software Spectrum.").

71. Kenneth R. Davis, *Taking Stock-Salary and Options Too: The Looting of Corporate America*, 69 MD. L. REV. 419, 473 (2010) ("Others observe that shareholders lack the knowledge of compensation packages to make informed decisions when voting on say-on-pay resolutions."); Del Jones, *supra* note 70.

regulations that are largely driven from the unfortunate existence of bad actors is enormous . . . .'"[72] Thus, he worried that regulation could be improperly tailored and expensive.

The CEO lobbying group, the Business Roundtable, complained to Congress in 2007 when one of the earlier say on pay bills was being debated, "[c]orporations were never designed to be democracies. . . . While shareholders own a corporation, they don't run it . . . ."[73] Two years later, the organization had not changed its tune. In Congressional testimony in 2009, the President of Business Roundtable did not accept that any corporate governance changes were needed in reaction to the 2008 economic crash. He stated, "[a]t the outset, we must respectfully take issue with the premise that corporate governance was a significant cause of the current financial crisis. . . . Some of the current corporate governance proposals, including a universal 'say-on-pay' right . . . may actually exacerbate the emphasis on short-term gains."[74]

When Dodd-Frank was in the process of being passed through Congress, Congressman Shelby complained about the say on pay provisions in the bill's Conference Report. He said, "Main Street corporations will be subject to a panoply of new corporate governance and executive compensation requirements. These new requirements will be costly and potentially harmful to shareholders because they empower special interests and encourage short-term thinking by managers."[75]

The only constitutional argument raised against say on pay was that it violated federalism[76] as state corporate law traditionally governs the internal affairs of corporations.[77] This

72. McCafferty, *supra* note 70.

73. Drawbaugh, *supra* note 1.

74. *Examining the Improvement of Corporate Governance for the Protection of Shareholders and the Enhancement of Public Confidence: Hearing Before the Subcomm. on Securities, Insurance, and Investment of the S. Comm. on Banking, Housing, and Urban Affairs*, 111th Cong. 127 (2009), (testimony of John J. Castellani, President, Business Roundtable).

75. Conference Report (Senate), 156 Cong. Rec. S5877 (daily ed. July 15, 2010) (statement of Rep. Shelby).

76. Stephen M. Bainbridge, *Is 'Say on Pay' Justified?*, REG. (Spring 2009), http://object.cato.org/sites/cato.org/files/serials/files/regulation/2009/2/v32n1-6.pdf; Joseph E. Bachelder III, *Dodd-Frank Provisions Affecting Executive Pay*, HARV. L. F. ON CORP. GOVERNANCE & FIN. REGS (Oct. 5, 2010) ("Dodd-Frank may be described as a significant further step in the 'federalization' of executive pay. 'Federalization' for this purpose is intended to mean the use of federal law as a source of rulemaking and of governance on executive pay issues in contrast to the use of state law in deciding such issues.").

77. CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 89 (1987) ("No principle of corporation law and practice is more firmly established than a State's authority to

critique is rooted in the Tenth Amendment of the Constitution, which states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively . . . ."[78] In other words, where a power has not specifically been given to the Congress, the Tenth Amendment reserves residual power to the 50 states.

Thus the argument goes, power to regulate the internal affairs of corporations should be left with each state. As former Chief Justice of the Delaware Supreme Court, E. Norman Veasey, framed the issue:

> A number of post-Sarbanes-Oxley developments in the federal arena also raise significant federalism questions . . . . A bill requiring a stockholder advisory vote on executive compensation (the 'Say on Pay' bill) that recently passed . . . raises the question of whether and to what extent regulation of executive compensation should be federalized . . . .[79]

As Professor Steven Bainbridge put his Tenth Amendment argument pre-Dodd-Frank's enactment: "Legislation that 'fixes' a nonexistent problem by upsetting basic principles of federalism ought to be a nonstarter. Unfortunately, the executive compensation debate has become so thoroughly bollixed up with issues of class warfare and financial populism that rational arguments seem to fall on deaf ears."[80]

Members of Congress also chimed in with their federalism objections to legislative proposals to empower shareholders with say on pay votes. For example in 2007, Congressman Ron Paul stated, "[g]iving the SEC the power to require shareholder votes on any aspect of corporate governance—even on something as seemingly inconsequential as a nonbinding resolution—illegitimately expands federal authority into questions of private

regulate domestic corporations, including the authority to define the voting rights of shareholders. See Restatement (Second) of Conflict of Laws § 304 (1971) (concluding that the law of the incorporating State generally should 'determine the right of a shareholder to participate in the administration of the affairs of the corporation')").

78. U.S. CONST. amend. X. (1791).

79. E. Norman Veasey, *What Would Madison Think? The Irony of the Twists and Turns of Federalism*, 34 DEL. J. CORP. L. 35, 49–50 (2009).

80. Bainbridge, *supra* note 76; *see also* Stephen M. Bainbridge, *Dodd-Frank: Quack Federal Corporate Governance Round II*, 95 MINN L. REV. 1779, 1789 (2011) ("SOX and Dodd-Frank bring to the fore the question of whether we should prefer Washington to Dover as the principal regulator of corporate governance. If so, we should criticize those acts for not having gone far enough in displacing state law. If not, of course, we should criticize them for representing the latest moves in a creeping federalization of corporate governance law.").

governance."[81] Two years later in 2009, Congressman Paul was still concerned that "[t]he Wall Street bailouts have already given the federal government too much power in corporate boardrooms, and H.R. 3269 [2009's say on pay legislation] is yet another step in the wrong direction."[82]

At the same time, Congressman Garrett worried about federal intrusions on state law. As he said, "[h]ere [Congress] want[s] to step in and preempt those States, States that may have had a long history of dealing with such situations as executive pay compensation, or States that may want to address it in the future, but the underlying bill says that [Congress] will preempt that."[83] Preemption, which is governed by the Supremacy Clause of the U.S. Constitution, means that when a federal law and a state law conflict, the federal law controls.[84]

Despite all of these objections and predictions of doom, say on pay became the law of the land in the United States in 2010. Technically there are three distinct aspects of this part of the voluminous Dodd-Frank law: (1) say on pay, (2) say on frequency and (3) say on parachutes. The say on frequency votes allow shareholders to vote on how frequently they want to hold say on pay votes (annually, biannually or triennially).[85] At least so far, most shareholders have elected to hold say on pay votes on an annual basis.[86] Say on parachutes allows shareholder votes on certain golden parachutes for executives.[87]

Dodd-Frank and the final rule from the SEC implementing say on pay were a compromise. As explained by the Ninth Circuit, Dodd-Frank "provides that, at least every three years, public

81. H.R. Rep. 110-88, at 21 (2007) (statement of Rep. Paul).

82. 155 Cong. Rec. H9224 (daily ed. July 31, 2009) (statement of Rep. Paul).

83. 155 Cong. Rec. H9231 (daily ed. July 31, 2009) (statement of Rep. Garrett).

84. U.S. Const. Art. VI cl. 2.

85. Fabrizio Ferri & David Oesch, *Management Influence on Investors: Evidence from Shareholder Votes on the Frequency of Say on Pay* 23 (2013), http://www.niri.org/Other-Content/sampledocs/Ferri-Oesch-Say-on-Pay-Paper.aspx ("Using a sample of S&P 1500 firms, we find that management recommendation for a given frequency is associated with 25.9% more voting support for that frequency, a figure close to estimates of the influence of proxy advisors in prior studies.") (unpublished study).

86. Thomas et al., *supra* note 69, at 1250 ("In addition, shareholders showed a clear preference for companies holding an annual say-on-pay vote, with shareholders at 1792 companies supporting (by majority or plurality vote) annual votes, compared to a preference of triennial voting at only 412 companies.").

87. SEC, Press Release, SEC Adopts Rules for Say-on-Pay and Golden Parachute Compensation as Required Under Dodd-Frank Act, (Jan. 25, 2011), *available at* https://www.sec.gov/news/press/2011/2011-25.htm; Michael J. Segal et al, *Compensation Committee Guide*, WACHTELL, LIPTON, ROSEN & KATZ 1, 45 (2011), *available at* http://www.wlrk.com/webdocs/wlrknew/wlrkmemos/wlrk/wlrk.18330.11.pdf.

companies must conduct a shareholder vote 'to approve the compensation of executives.' 15 U.S.C. § 78n–1(a)(1). However, these 'say-on-pay' votes 'shall not be binding on the issuer or the board of directors of an issuer . . . .'"[88]

Under Dodd-Frank, shareholders are able to vote on the top five executives' compensation packages as a group, which makes it impossible for shareholders to clearly object to a particular pay package for a particular executive.[89] Furthermore the vote is precatory—that is non-binding. But say on pay does give shareholders the ability to signal to management in a broad way that they approve or disapprove of management's general approach to executive compensation.

Thus far, the federalism argument against say on pay has not been litigated post-Dodd-Frank's enactment. But Congress is on firm Commerce Clause ground[90] when it regulates publicly traded companies whose stocks are bought and sold in interstate commerce.[91] And even the former Chief Justice of the Delaware Supreme Court acknowledges that while Dodd-Frank "mandates

88. Dennis v. Hart, 724 F.3d 1249, 1251 (9th Cir. 2013).

89. Russ Banham, *Fray on Pay: The Battle Over Executive Compensation and What It Means for You*, CFO MAG. (June 1, 2009), http://ww2.cfo.com/human-capital-careers/2009/06/fray-on-pay/ ("'It's a blunt instrument,' asserts Russell Miller, managing director of Executive Compensation Advisors, a division of executive search firm Korn/Ferry International. 'Shareholders will be asked to vote either yes or no. It doesn't give them the ability to vote on the merits or detractions of various elements within compensation programs . . . .'").

90. Fisch, *supra* note 4, at 737–38 ("Any concern about congressional authority to regulate corporations has long been put to rest. Under the increasingly liberal interpretation of the Commerce Clause, Congress' power is understood to be very broad, and clearly corporations (even very small ones) affect interstate commerce sufficiently to allow broad federal oversight."); Sung Hui Kim, *The Last Temptation of Congress: Legislator Insider Trading and the Fiduciary Norm Against Corruption*, 98 CORNELL L. REV. 845, 914 (2013) ("the whole of federal securities laws[] regulate what is clearly economic activity involving 'instrumentalities of interstate commerce' and thus substantially relates to interstate commerce. Hence, the relevant statute indisputably falls within the federal commerce power.").

91. SEC v. W.J. Howey Co., 328 U.S. 293, 301 (1946) ("The statutory policy of affording broad protection to investors is not to be thwarted by unrealistic and irrelevant formulae."); Wright v. SEC, 112 F.2d 89, 94 (2d Cir. 1940) ("The *Torr* case, with the authorities therein cited, also disposes of the contention that in enacting the Securities Exchange Act of 1934, 15 U.S.C.A. 78a et seq., Congress attempted to enter a field reserved to the states, namely, the regulation of intrastate commerce."); Oklahoma-Texas Trust v. SEC, 100 F.2d 888, 890 (10th Cir. 1939) ("While securities are mere evidences of obligations to pay money or of rights to participate in earnings and distribution of corporate, trust, and other property and are mere choses in action, nevertheless in modern commercial intercourse they are sold, purchased, delivered, and dealt with the same as tangible commodities and other ordinary articles of commerce. . . . [W]e have no doubt that they should be regarded as subjects of interstate commerce and transportation. . . . We conclude that the [1933] Act is within the constitutional powers of Congress").

a number of governance structures and practices that traditionally have been regulated only by state law," it "does not, however, constitute a wholesale federal preemption of corporate law and corporate governance."[92] Or as Yale Professor Jonathan Macey told the *Washington Post*, "[s]ure, Dodd-Frank is a mess . . . sure, the statute takes power away from citizens and states and transfers it to the federal government. However, it's not unconstitutional. . . ."[93] And even Professor Bainbridge admitted after Dodd-Frank passed despite his earlier arguments: "No one seriously doubts that Congress has the power under the commerce clause to preempt the field of corporate governance law."[94]

So is say on pay working? Dodd-Frank say on pay votes started four years ago in 2011 and at the vast majority of firms, executive compensation packages have been approved.[95] Indeed, in the first year, shareholders voted down executive compensation packages only 1.6% of the time.[96] This is not particularly surprising as individual shareholders will hold relatively smaller percentages of any given firm,[97] and thus achieving a pro-management majority vote is typical.[98]

92. E. NORMAN VEASEY & CHRISTINE T. DI GUGLIELMO, INDISPENSABLE COUNSEL: THE CHIEF LEGAL OFFICER IN THE NEW REALITY 17 (2012).

93. Suzy Khimm, *Could Dodd-Frank Be Unconstitutional?*, WASH. POST, Feb. 15, 2013, http://www.washingtonpost.com/blogs/wonkblog/wp/2013/02/15/could-dodd-frank-be-unconstitutional/ (quoting Jonathan Macey).

94. Bainbridge, *supra* note 76, at 1794.

95. Abha Bhattarai, *Under Say on Pay, Most Shareholders Approve Executive Pay Packages*, WASH. POST, May 13, 2013, *available at* http://www.washingtonpost.com/business/capitalbusiness/under-say-on-pay-most-shareholders-approve-executive-pay-packages/2013/05/12/ad8374ee-b7f7-11e2-b94c-b684dda07add_story.html.

96. Thomas et al., *supra* note 69, at 1248–49 ("In the 2011 Proxy season, the inaugural year for the Dodd-Frank say-on-pay mandate, shareholders voted on say-on-pay proposals submitted by management at about 2,200 U.S. public companies . . . . Shareholders showed strong support for existing pay practices, with say-on-pay votes garnering on average 91.2% support. Say-on-pay proposals were voted down only 1.6% of the time (at 37 of the Russell 3000 companies subject to say-on-pay votes), apparently mostly based on pay-for-performance concerns.").

97. Damon A. Silvers & Michael I. Garland, *The Origins and Goals of the Fight for Proxy Access* 15-16 (2004), http://www.sec.gov/spotlight/dir-nominations/silversgarland022004.pdf (finding that a union or public pension fund did not own more than 1% of the company's stock among eight large firms).

98. Fabrizio Ferri & David Oesch, *Management Influence on Investors: Evidence from Shareholder Votes on the Frequency of Say on Pay* 6 (working paper 2013), http://www.niri.org/Other-Content/sampledocs/Ferri-Oesch-Say-on-Pay-Paper.aspx ("Combined with the evidence from studies on proxy advisors, our estimate suggests that, on average, proxy advisors and management influence about one fourth of the total votes each, with the remaining votes (about half of the total votes) essentially representing 'votes in play[.]'").

But notably, several high profile firms have experienced no votes on say on pay.[99] The reasons for each negative vote is rooted in the performance of each firm as well as their shareholders' disenchantment.[100] Citigroup made headlines when it experienced a negative say on pay vote in 2012.[101] That year both major proxy advisory services, the Institutional Shareholder Services (ISS) and Glass Lewis & Co., recommended a no vote on Citigroup's compensation packages.[102] In particular, certain investors viewed Citigroup's CEO Vikram Pandit's compensation as generous pay for mediocre performance.[103]

Some firms have changed their pay practices in order to avoid a no vote.[104] This happened at Disney in 2011. Shareholders and

99. Emily Chasan, *RadioShack, Nabors Stick with CEO Pay Despite Shareholder Objections*, WALL ST. J., Apr. 25, 2014, *available at* http://www.wsj.com/articles/radioshack-nabors-stick-with-ceo-pay-despite-shareholder-objections-1409013179 (noting negative say on pay votes at Oracle and RadioShack).

100. Thomas et al., *supra* note 69, at 1251 ("[A]bout half of the companies with failed say-on-pay votes had reported negative double-digit three-year total share returns. Other pay issues—such as tax gross-ups, discretionary bonuses, inappropriate peer benchmarking, and unpopular pay committee members—were also mentioned. In fact, for nearly every company where say on pay failed to get majority support, there was a company-specific story of shareholder discontent, particularly involving the disconnect between pay and performance at the company . . . ." (citing TED ALLEN ET AL., INSTITUTIONAL SHAREHOLDER SERVS., PRELIMINARY 2011 U.S. POSTSEASON REPORT (2011)).

101. Steven Davidoff Solomon, *Citigroup Has Few Options After Pay Vote*, N.Y. TIMES, Apr. 18, 2012, *available at* http://dealbook.nytimes.com/2012/04/18/citigroup-has-few-options-after-pay-vote/?_r=0 ("Citigroup received a particularly public rebuke on Tuesday when its shareholders voted to reject the bank's executive compensation package at its annual shareholder meeting.").

102. Donal Griffin & Bradley Keoun, *Citigroup Investors Reject Management Compensation Plan*, BLOOMBERG, Apr. 17, 2012, http://www.bloomberg.com/news/2012-04-17/citigroup-shareholders-reject-management-s-compensation-plan-1-.html ("ISS and its competitor, Glass Lewis & Co., faulted [CEO] Pandit's payouts and recommended that investors reject the bank's executive compensation plan for 2011.").

103. Jessica Silver-Greenberg & Nelson D. Schwartz, *Citigroup's Chief Rebuffed on Pay by Shareholders*, N.Y. TIMES DEAL BOOK (Apr. 17, 2012), http://dealbook.nytimes.com/2012/04/17/citigroup-shareholders-reject-executive-pay-plan/?_r=0 ("'C.E.O.'s deserve good pay but there's good pay and there's obscene pay,' said Brian Wenzinger, a principal at Aronson Johnson Ortiz, a Philadelphia money management company that voted against the pay package."); John Waggoner & Matt Krantz, *Shareholders Don't Often Vote Against Huge CEO Pay*, USA TODAY (Apr. 20, 2012), http://usatoday30.usatoday.com/money/companies/management/story/2012-04-18/shareholders-say-on-ceo-pay/54397394/1 ("Investors are saying, 'We didn't get paid. Why should you?' [CEO of the Value Alliance Eleanor] Bloxham says.").

104. Xavier Gabaix et al., *CEO Pay and Firm Size: An Update After the Crisis*, 124 ECON. J. F40, F41 (2014) ("[A]fter the Enron-type scandals and the burst of the dotcom bubble, there has been . . . an increase in compensation-related shareholder activism through shareholder proposals and vote-no campaigns against compensation committee members (Ertimur et al., 2011). As a result of the above activism, the mandatory adoption of 'say on pay' in 2011 leads firms to change their pay practices both before and after the vote, in an attempt to obtain a favourable voting outcome (Larcker et al., 2012; Ertimur et

the proxy advisory service ISS objected to Disney's practice of tax gross ups for top managers, which are sometimes characterized as a perk on a perk.[105] This objection was communicated to Disney before the final executive compensation package was sent out to shareholders for the say on pay vote. Disney got the message loud and clear and decided to remove the tax gross ups. When the executive compensation package was sent to shareholders (sans tax gross ups), they approved it.[106]

The Citigroup no vote (among other no votes)[107] and the removal of tax gross ups at Disney are both signs that say on pay has some real teeth and is a way for shareholders to communicate with internal managers about high executive remuneration.[108]

While mandatory say on pay votes are relatively new in the United States, studies have shown that say on pay can impact executive compensation when there are coordinated no-vote campaigns among investors.[109] One empirical study of say on pay votes found that the proxy advisory firm ISS's voting recommendations were quite influential in voting outcomes.[110]

al., 2013)."); Ira T. Kay, *The Unintended Consequences of Say on Pay Votes*, HARV. L. SCH. F. ON CORP. GOV. & FIN. REG (July 8, 2013, 9:35 A.M.), http://blogs.law.harvard.edu/corpgov/2013/07/08/the-unintended-consequences-of-say-on-pay-votes/ ("The confluence of Say on Pay (SOP) votes and heightened scrutiny plus the influence of proxy advisory firms (particularly ISS) are having a major unintended consequence—the movement to 'one-size-fits-all' or homogenization of executive compensation programs.").

105. Dawn C. Chmielewski, *Disney Withdraws Golden Parachute Provision Amid Criticism*, L.A. TIMES, Mar. 19, 2011, *available at* http://articles.latimes.com/2011/mar/19/business/la-fi-ct-disney-20110319.

106. *Id*.

107. Jim Hanks, Mike Sheehan & Daniel Mendelsohn, *Disclosing Company Responses to Negative Say-on-Pay Votes*, VENABLE LLP (Mar. 5, 2013), http://www.venable.com/files/Publication/cda356b0-e569-4ba7-a34c-99163579138f/Presentation/PublicationAttachment/5845d3f5-97fb-4846-a5fb-a0e4e4cfc364/Disclosing_Company_Responses_to_Negative_Say-on-Pay_Votes.pdf (listing firms that received negative say on pay votes and the firm's subsequent actions).

108. Diane Brady, *Say on Pay: Boards Listen When Shareholders Speak*, BUS. WK., June 7, 2012, http://www.businessweek.com/articles/2012-06-07/say-on-pay-boards-listen-when-shareholders-speak ("Almost all of the companies that faced embarrassing 'no' votes last year have done away with practices that irked their investors.").

109. Ertimur et al., *supra* note 46, at 576 ("[W]ith respect to the consequences of compensation-related activism, we document a $7.3 million reduction in CEO total pay (corresponding to a 38% decrease) for firms with excess CEO pay targeted by vote-no campaigns. As for shareholder proposals, we find evidence of a moderating effect on CEO pay—a $2.3 million reduction—only in firms with excess CEO pay targeted by proposals sponsored by institutional proponents and calling for a better link between pay and performance.").

110. James F. Cotter et. al., *The First Year of Say-on-Pay Under Dodd-Frank: An Empirical Analysis and Look Forward*, 81 GEO. WASH. L. REV. 967, 1011 (2013) ("Changes in corporate governance behavior—such as more complete disclosure of pay-for-performance policies and the reversal of specific, controversial pay practices—inaugurated by say-on-pay in 2011 appear to be continuing apace and may be even

Another more qualitative study found no votes stemmed from poor pay for performance at a given firm.[111] Finally, a 39 country comparison by the Federal Reserve found that say on pay reduced CEO pay.[112] The hour may be too early for either side to declare victory in the United States as a matter of efficacy.[113] But one thing is clear, say on pay fits within the broad protection of shareholder voting rights that Delaware and other American courts including the U.S. Supreme Court have embraced, should Dodd-Frank's say on pay's legality be challenged.

PART III. SAY ON POLITICS

Now that the United States has say on pay, could the United States adopt say on politics in the near future? Post-*Citizens United*, several academics have urged the adoption of legislation that would provide a say on politics to protect shareholders from managers' spending corporate resources on politics.[114] As the

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gathering strength in 2012. Again led by ISS targeting of outlier companies, shareholders have shown that their scrutiny of pay practices in 2011 was not a passing phenomenon."); *see also* Thomas et al., *supra* note 69, at 1249 ("Negative say-on-pay recommendations by ISS prompted many companies to modify their disclosure filings or to change their pay practices (sometimes retroactively) to win support." (citing TED ALLEN ET AL., INSTITUTIONAL S'HOLDER SERVS., PRELIMINARY 2011 U.S. POSTSEASON REPORT (2011)); Larker, *supra* note 38 ("[T]he practice of 'say on pay' increases the influence of third-party proxy advisory firms that provide recommendations to institutional investors on how they should vote items on the annual proxy over corporate policy. Research evidence demonstrates that these recommendations are highly influential.").

111. Thomas et al., *supra* note 69, at 1252–53 (2012) ("A study of failed say-on-pay votes prepared for the Council of Institutional Investors confirmed the importance of the pay-performance relationship.") (citing Robin Ferracone & Dayna Harris, *Say on Pay: Identifying Investor Concerns*, COUNCIL OF INSTITUTIONAL INVESTORS 1 (Sept. 2011), https://www.opers.org/pensionresearchcenter/attachments/2011/WhitePaper-SayOnPay.pdf.

112. Ricardo Correa & Ugur Lel, *Say on Pay Laws, Executive Compensation, CEO Pay Slice, and Firm Value around the World*, Bd. of Gov's of the Fed. Reserve System International Finance Discussion Papers No. 1084 at 29 (July 2013), http://www.federalreserve.gov/pubs/ifdp/2013/1084/ifdp1084.pdf ("First, the level of CEO pay is lower in the period following the adoption of SoP [Say on Pay] laws, which stems from declines in equity-based pay. The growth in estimated CEO pay is lower for firms subject to SoP laws compared to the control group of firms in the pre-law period and to firms located in countries that never pass such laws. Further, the link between CEO pay and firm performance becomes stronger after the passage of SoP laws.").

113. Fisch, *supra* note 4, at 757 ("Whether say on pay will have the effect of improving compensation policies and practices remains unclear.").

114. Elizabeth Pollman, *Citizens Not United: The Lack of Stockholder Voluntariness in Corporate Political Speech*, 119 YALE L.J. ONLINE 53 (2009), http://yalelawjournal.org/forum/citizens-not-united-the-lack-of-stockholder-voluntariness-in-corporate-political-speech ("*Citizens United* could leave even stockholders who carefully screen and monitor their investments at risk of having money they invested used for political advocacy they oppose.").

current Chief Justice of the Delaware Supreme Court recently wrote in a law review article: "By holding that for-profit corporations have the First Amendment right to spend their funds on political activity, *Citizens United* arguably exposes American investors to the same constitutional harm found extant in *Abood* [of compelled subsidizing of political speech]. . . ."[115]

Professor John C. Coates IV has indicated that publicly-traded corporations' political spending raises risks that investors should be mindful of. As he argues: "political activity creates distinct and difficult-to-model risks. Dozens of studies . . . support the view that political activity can harm shareholder interests. These harms can flow through many channels—from reputational harm to dilution of strategic focus, from politically risky acquisition bets or capital investments to state laws deterring takeovers."[116] Thus, corporate political spending raises similar risks of managerial shrinking and self-dealing as high executive compensation and should be of similar concern to investors.

Professor Pamela Karlan explained, a year after *Citizens United*, "[t]hat corporate managers might spend corporate funds not to maximize the shareholders' welfare but to maximize their own is a very real danger."[117] Thus she indicated that corporate politicking raises a classic agency problem for investors. Or as the late Professor Ronald Dworkin contended, "[m]any of the shareholders who will actually pay for the [corporate political] ads, who in many cases are members of pension and union funds, will hate the opinions they pay to advertise." Consequently, Professor Dworkin urged, "Congress should also require that any corporation that wished to engage in electioneering obtain at least the annual consent of its stockholders to that activity and to a proposed budget for it, and that the required disclosure in an ad report the percentage of stockholders who have refused that

115. Leo E. Strine & Nicholas Walter, *Conservative Collision Course?: The Tension between Conservative Corporate Law Theory and* Citizens United, 100 CORNELL L. REV. 335, 336 (2015).

116. John C. Coates, IV, *SEC's Non-Decision Decision on Corporate Political Activity a Policy and Political Mistake*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Dec. 13, 2013 at 8:51 AM), https://blogs.law.harvard.edu/corpgov/2013/12/13/secs-non-decision-decision-on-corporate-political-activity-a-policy-and-political-mistake/; *see also* Paul DeNicola et al., *Handbook on Corporate Political Activity: Emerging Corporate Governance Issues*, THE CONFERENCE BOARD, 17 (2010) (noting that "[c]orporate political spending can introduce issues of reputational risk").

117. Pamela Karlan, *Me Inc.*, BOSTON REV. (July 1, 2011), http://www.bostonreview.net/pamela-karlan-corporate-personhood.

blanket consent."[118] Professors Bebchuk and Jackson urged the adoption of say on politics in the United States.[119] Meanwhile Professor Benjamin Sachs has urged that shareholders be given an opportunity to opt out of corporate political spending.[120] I too have urged adoption of say on politics.[121]

In 2014, an industry group called the CFA Institute did a survey of 1,500 financial analysts to ask them about say on politics as well as greater transparency of corporate political spending. The survey found that "[i]nterestingly, 62% of respondents either agree or strongly agree that shareholders should have a say in who gets [political] contributions."[122] Meanwhile, CEO John Bogle has urged supermajority say on politics votes by shareholders.[123]

Congressional legislation to provide shareholder approval of corporate political spending, or what I have been calling "say on politics," has been introduced in Congress several sessions in a row,[124] but so far, these bills have not progressed in the legislative process.[125] Bills to provide shareholder approval of corporate

118. Ronald Dworkin, *The Decision that Threatens Democracy*, N.Y. REV. OF BOOKS (May 13, 2010), http://www.nybooks.com/articles/archives/2010/may/13/decision-threatens-democracy/.

119. Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83, 89–90 (2010).

120. Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights After Citizens United*, 112 COLUM. L. REV. 800, 829 (2012).

121. Ciara Torres-Spelliscy, *Corporate Political Spending & Shareholders' Rights: Why the US Should Adopt the British Approach*, in RISK MANAGEMENT AND CORPORATE GOVERNANCE 391 (Abol Jalilvand & A.G. Malliaris eds., 2011).

122. *Political Contribution Disclosure Survey Results*, CFA INST. 1, 3 (2014), http://www.cfainstitute.org/Survey/political_contribution_survey_final.pdf.

123. John C. Bogle, *The Supreme Court Had Its Say. Now Let Shareholders Decide*, N.Y. TIMES, May 14, 2011, *available at* http://www.nytimes.com/2011/05/15/opinion/15bogle.html ("Institutional investors should insist that the proxy statement of each company in which they invest contain the following: 'Resolved: That the corporation shall make no political contributions without the approval of the holders of at least 75 percent of its shares outstanding.'").

124. Jennifer S. Taub, *Money Managers In The Middle: Seeing and Sanctioning Political Spending After* Citizens United, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 443, 447 (2012) ("There are efforts to require advance consent of corporate political spending. On the Congressional front, a pending bill called the Shareholder Protection Act (SPA), which was introduced in 2010 and again in 2011, would require corporations to both disclose certain direct and indirect political expenditures and obtain advance consent by a majority of the outstanding shares before dedicating funds toward those political activities.").

125. Bill Summary & Status—111th Congress (2009–2010)—H.R.4790, THOMAS, http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR04790:@@@R (showing the Shareholder Protection Act of 2010, H.R. 4790, was reported out of the Committee on Financial Services in House Report 111-620, but no floor vote was taken); Michael Megaris, *The SEC and Mandatory Disclosure of Corporate Spending by Publicly Traded Companies*, 22 KAN. J.L. & PUB. POL'Y 432, 440 (2013) ("The stated purpose of the Shareholder Protection Act (SPA) was to 'amend the Securities Exchange Act of 1934 to require

political budgets have also been introduced in several states, but so far none has become law.[126] One bill in Connecticut to empower shareholders passed the legislature, but was vetoed by the governor.[127] Maryland, among other states, is in the process of considering say on politics legislation as this piece is being written.[128]

Say on politics, like say on pay, originated in the U.K.[129] Say on politics under the U.K. Companies Act requires shareholders to vote on political budgets that are proposed by managers over a one to four year period.[130] If the budget is not approved by shareholders, then the company is not authorized to spend money on politics, and moreover, the directors are personally liable to the company for any unauthorized political spending.[131] The U.K.

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shareholder authorization before a public company may make certain political expenditures.' The bill, as evidenced by the timing of its introduction, was drafted in direct response to the Supreme Court decision in *Citizens United*. The bill, unfortunately, never made it out of committee reviews.").

126. *See* S.B. 570, 2010 Leg., 427th Sess. (Md. 2010); S.B. 101, 2011 Leg., 234th Sess. (N.Y. 2011); A.B. 919, 2009 Leg. (Cal. 2009); Pa. H.B. 1002, 2011 Leg. (Pa. 2011); H.P. 1120, 2011 Leg., 125th Sess. (Me. 2011); Peter Hardin, *WI Senate OKs Shareholder Consent Bill*, GAVEL GRAB (Apr. 14, 2010), http://www.gavelgrab.org/?p=9793.

127. Mark Pazniokas, *Common Cause Slams Malloy Veto of Campaign Finance Bill*, CT MIRROR, http://ctmirror.org/2012/06/15/common-cause-slams-malloy-veto-campaign-finance-bill/ (June 15, 2012) (discussing the governor's veto of H.B. 5556 in 2012).

128. S.B. 153, 2015 Leg., 432nd Sess, (Md. 2015); Jamie B. Raskin, *A Shareholder Solution to 'Citizens United'*, WASH. POST, Oct. 3, 2014, *available at* http://www.washingtonpost.com/opinions/a-shareholder-solution-to-citizens-united/2014/10/03/5e07c3ee-48be-11e4-b72e-d60a9229cc10_story.html; *see also* Liz Essley Whyte, *States Consider Requiring Shareholder Approval for Political Gifts*, CTR. FOR PUB. INTEGRITY, (Feb. 17, 2015), http://www.publicintegrity.org/2015/02/17/16757/states-consider-requiring-shareholder-approval-political-gifts ("State legislators in Maine, Maryland, New York and New Jersey have introduced bills that demand that a majority of shareholders approve corporate gifts to political committees or candidates.").

129. Michael S. Kang, *Shareholder Voting As Veto*, 88 IND. L.J. 1299, 1335 (2013) ("The Shareholder Protection Act would require shareholder approval of a company's campaign contributions and expenditures in a binding vote that basically follows the model of say on pay.").

130. Torres-Spelliscy *supra* note 121, at 391.

131. Political Parties, Elections and Referendums Act, 2000, c. 41, §§ 139–140, sched. 19 (U.K.); Explanatory Notes to the Political Parties, Elections and Referendums Act, 2000, c. 41, ¶ 11, http://www.legislation.gov.uk/ukpga/2000/41/notes/division/2/9 ("Part IX [of the PPERA] introduces a requirement that shareholder consent must be obtained before a company makes a donation to a political party or incurs political expenditure. It also requires the disclosure of political expenditure in directors' annual reports to shareholders."); Companies Act § 369; *see also Corporate Briefing, The Companies Act 2006: Political Donation*, TRAVERS SMITH (Nov. 2007), http://www.traverssmith.com/media/600666/companies_act_2006_-_political_donations_-_nov_2007.pdf ("[D]irectors in default of the requirement for authorisation are jointly and severally liable to pay to the company the amount of the unauthorised donation or expenditure, with interest, and also to compensate the company for any loss or damage sustained by it as a result of the unauthorised donation or expenditure having been made."). The interest rate charged on unauthorized political expenditures is 8% per annum. Companies (Interest Rate for

Companies Act also provides disclosure of corporate political spending to shareholders.[132] The Shareholder Protection Act that has been introduced in Congress mirrors the U.K. Companies Act and would apply to publicly traded firms.[133]

The International Corporate Governance Network considers the U.K.'s say on politics to be a best practice.[134] They argue:

> Shareholders should be able to vote on a company's political donations policy, preferably through a company-proposed resolution or, secondly, through a shareholder resolution. Shareholders should be able to vote on the maximum amount of company donations for political purposes. Shareholders also should be in a position to vote on material changes to the company's donations policy.[135]

So far, most shareholder resolutions on corporate political spending in America have been focused on mere disclosure. As the Forum for Sustainable and Responsible Investment (US SIF) reported, "[i]n the 2014 season, the bulk of the 130-plus resolutions on political spending and lobbying asked companies to report on their lobbying expenditures, including through indirect channels such as trade associations and non-profit organizations that do not have to report their donors."[136] Furthermore, some institutional investors like mutual funds are notorious for sitting out votes.[137] Though recently, mutual funds

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Unauthorised Political Donation or Expenditure) Regulations, 2007, S.I. No. 2007/2242, art. 2 (U.K.).

132. Political Parties, Elections and Referendums Act, 2000, c. 41, § 140 (U.K.) (requiring disclosure of political donations in the annual director's report); *see* Companies Act 1985 (Operating and Financial Review and Directors' Report etc.) Regulations, 2005, S.I. 2005/1011, art. 2 (substituting § 234ZZA (3)–(4) of the Companies Act of 1985 to require disclosure of political contributions in the directors report to shareholders).

133. Shareholder Protection Act of 2010, H.R. 4790, 111th Cong. (2010); Shareholder Protection Act of 2011, H.R. 2517, 112th Cong. (2011); Shareholder Protection Act of 2011, S. 1360, 112th Cong. (2011).

134. *ICGN Statement and Guidance on Political Lobbying and Donations*, INT'L CORPORATE GOVERNANCE NETWORK (2012) https://www.icgn.org/images/ICGN/files/icgn_main/Publications/best_practice/PLD/icgn_pld_mar2012_long.pdf.

135. *Id*.

136. *Shareholder Resolutions*, US SIF (2015), http://www.ussif.org/resolutions; *see also* Heidi Welsh, *Mid-Year Review: Corporate Political Activity Proposals in the 2014 Proxy Season*, SUSTAINABLE INVESTMENTS INSTITUTE 1, 10 (2014), https://si2news.files.wordpress.com/2014/08/si2-2014-proxy-season-mid-year-review-corporate-political-activity-excerpt.pdf ("A broad coalition of investors continued to file resolutions asking companies to tell stockholders and the public more about what they spend on political campaigns and lobbying, both directly and most particularly through intermediary groups . . . . In all, shareholders have filed 530 resolutions on these subjects in the last five years, with 136 in 2014.").

137. John Helyar, *Investor 'Say on Pay' Is a Bust*, BLOOMBERG BUSINESSWEEK, June 16, 2011, http://www.businessweek.com/magazine/content/11_26/b4234023747122.htm

have become more engaged precisely on the issue of transparency of corporate political spending.[138]

Some post-*Citizens United* shareholder resolutions have asked corporations to refrain from corporate political spending[139] or to give shareholders a say on politics.[140] One such shareholder resolution was filed by the Comptroller of New York State at AIG asking for a say on politics.[141]

Just as say on pay was hit with a barrage of criticism from 2005 to 2010 before it became federal law, so too has say on politics been a subject of critical debate. Similar to the federalism objection raised against the Dodd-Frank say on pay, there are also federalism objections raised against say on politics proposals.[142] In

("Lynn Turner, a former managing director for research at Glass Lewis and former chief accountant at the SEC, says mutual funds, which own 70 percent of U.S. equities and are many companies' biggest shareholders, cast few negative pay votes out of business considerations.").

138. Bruce F. Freed, *Corporate Political Spending and the Mutual Fund Vote*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Dec. 9, 2013), http://blogs.law.harvard.edu/corpgov/2013/12/09/corporate-political-spending-and-the-mutual-fund-vote/ ("Forty large US mutual fund families voted in favor of corporate political spending disclosure an unprecedented 39% of the time, on average.").

139. Lisa Baertlein & Ronald Grover, *Starbucks Shareholders to Vote on Political Spending Ban*, REUTERS, Mar. 15, 2013, http://www.reuters.com/article/2013/03/15/starbucks-shareholder-idUSL1N0C7BTL20130315; Eric Lach, *Chevron Shareholders Vote Against Ban on Political Spending*, TALKING POINTS MEMO (May 29, 2013), http://talkingpointsmemo.com/livewire/chevron-shareholders-vote-against-ban-on-political-spending.

140. Nell Minow, *Shareholders United: SEC Rules That Political-Spending Proposal Must Go to a Vote*, MONEYWATCH, Apr. 6, 2011, http://www.cbsnews.com/news/shareholders-united-sec-rules-that-political-spending-proposal-must-go-to-a-vote/; Letter from Ted Yu, Senior Special Counsel, Div. of Corp. Finance, SEC, to Andrew A. Gerber, Attorney for Bank of America Corp., K&L Gates LLP (Feb. 29, 2012) (on file with the SEC), http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2012/trilliumassetstephen022912-14a8.pdf (allowing shareholders at Bank of American to file a shareholder proposal regarding the company's political spending); Letter from Gregory S. Belliston, Special Counsel, Div. of Corp. Fin, SEC, to Stacy S. Ingram, Assistant Sec'y & Senior Counsel, Corp. and Sec. Practice Grp., The Home Depot, Inc. (Mar. 25, 2011) (on file with the SEC), http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2011/northstarasset032511-14a8.pdf (allowing shareholders at Home Depot to file a shareholder proposal regarding the company's political spending); Letter from Ted Yu, Senior Special Counsel, Div. of Corp. Finance, SEC, to Ronald O. Mueller, Gibson, Dunn & Crutcher LLP (Feb. 23, 2012), http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2012/northstarasset022312-14a8.pdf (allowing shareholders to file a shareholder proposal at Intel about political spending).

141. Robert Steyer, *DiNapoli Seeks Campaign Contribution Vote at AIG*, PENSIONS & INVESTMENTS, Feb. 9, 2010, http://www.pionline.com/article/20100209/ONLINE/100209879/dinapoli-seeks-campaign-contribution-vote-at-aig.

142. Larry E. Ribstein, *The First Amendment and Corporate Governance*, 27 GA. ST. U. L. REV. 1019, 1053–54 (2011) ("Additional questions concern the interaction between state and federal governance law . . . . [A] federal statute that requires a shareholder vote but is otherwise silent may implicate state procedures for determining such issues as who may vote, how the votes are counted, and when and how meetings are called.").

a *Forbes* article, the late Professor Ribstein listed the following among his objections to the Shareholder Protection Act: "[its] [s]ignificant federal regulation of formerly state-controlled corporate governance issues."[143] Congressman Spencer Bachus warned that the Shareholder Protection Act "is a serious departure from the long-established premise of primacy of state corporate law."[144]

Say on politics has inspired a similar objection to say on pay that it would be inappropriate for the federal government to regulate the internal affairs of corporations. This was a weak argument against say on pay and it isn't any more robust when raised against say on politics. Under the Supremacy Clause, Congress can displace conflicting state laws through preemption so long as it is regulating using an enumerated power.[145]

Here the enumerated power is still the Commerce Clause Power.[146] As the Congressional Research Service noted in its report entitled, *Legislative Options After* Citizens United v. FEC:

> [T]his tradition of leaving corporate expenditure decisions to corporate executives does not mean that Congress is without constitutional authority to enact legislation requiring shareholder approval of corporate political expenditures. The Constitution's Commerce Clause may arguably provide Congress with authority to enact legislation of the type in question. . . . [S]everal cases were brought challenging the constitutionality of the Securities Act of 1933 and the Securities Exchange Act of 1934. The cases upheld the constitutionality of these major federal securities laws on the basis of Congress's power under the Commerce Clause.[147]

143. See Ribstein, *supra* note 1.

144. *Rep. Barney Frank Holds a Markup on Pending Legislation, Day 2 House Committee on Financial Services*, SEC WIRE (July 28, 2010) (testimony of Rep. Bachus).

145. Arizona v. U.S., 132 S. Ct. 2492, 2500 (2012) ("The Supremacy Clause provides a clear rule that federal law 'shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.' Art. VI, cl. 2. Under this principle, Congress has the power to preempt state law.").

146. Testimony of Professor Heather K. Gerken, J. Skelly Wright Professor of Law, Yale Law Sch., submitted to the U.S. Sen. Comm. on Rules & Administration (Feb. 2, 2010) 1, 2, *available at* http://www.law.yale.edu/documents/pdf/News_&_Events/gerken testimony020210.pdf ("Congress must build a record establishing the effects of corporate political spending on interstate commerce in order to justify entering an area traditionally, but not exclusively, regulated by the states.").

147. L. Paige Whitaker et al., *Legislative Options After* Citizens United v. FEC*: Constitutional and Legal Issues*, CONG. RESEARCH SERV. 7 (Mar. 8, 2010), https://www.fas.org/sgp/crs/misc/R41096.pdf.

Thus the nonpartisan research arm for Congress indicates that say on politics is realistically within the Congress's Commerce Clause Power.[148]

Some critics have raised the possibility that say on politics could offend the First Amendment.[149] For instance, the American Legislative Exchange Council (better known as ALEC), has specifically lobbied against say on politics bills in New York State deploying this argument.[150] *Citizens United* dispatches this First Amendment argument, endorsing corporate accountability to shareholders and shareholder democracy in the context of corporate political spending. Moreover, as the *Citizens United* majority held:

> Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits, and citizens can see whether elected officials are "'in the pocket' of so-called moneyed interests." The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way.[151]

Lower courts have not fully addressed the issue yet, since shareholder approval of corporate political spending has not been adopted in any part of the United States and consequently there has yet to be a live case or controversy to litigate. Nonetheless, shareholder protection rationales have been raised in other cases involving disclosure of corporate political spending and board

148. *Id*. (citing Wright v. Securities and Exchange Commission, 112 F.2d 89 (2d Cir. 1940); Oklahoma-Texas Trust v. Securities and Exchange Commission, 100 F.2d 888 (10th Cir. 1939); and Securities and Exchange Commission v. Jones, 12 F. Supp. 210 (S.D.N.Y. 1935), *aff'd,* 79 F.2d 617 (2d Cir. 1935), *cert. granted in part*, 297 U.S. 705 (1936), *cert. denied in part*, 297 U.S. 705 (1936), *rev'd in part on other grounds*, 298 U.S. 1 (1936)).

149. Ribstein, *supra* note 142, at 1042 ("[T]he [Shareholder Protection] Act's requirement that corporations get advance shareholder approval for corporate political activity sharply constrains all such speech by essentially requiring firms to lock in their political activity for a year from the close of a fiscal year."); Paul Sherman, *The Latest Unconstitutional Speech Restriction: The Shareholder Protection Act*, INST. FOR JUSTICE (Aug. 3, 2010), http://makenolaw.com/blog/56-the-latest-unconstitutional-speech-restriction-the-shareholder-protection-act/ ("And just like direct attempts to limit corporate speech, this indirect attempt violates the First Amendment.").

150. Mariah Blake, *ALEC Attacks Shareholders,* SALON, Apr. 23, 2012, http://www.salon.com/2012/04/23/alec_attacks_shareholders/ ("ALEC's Public Safety and Elections Task Force . . . sent out an 'issue alert' to its New York members urging them to vote the [say on politics] measure down. Among other things, the document, which was dated Feb. 15, 2011, argued the bill imposed 'oppressive and impractical requirements on corporations,' which restricted corporate free speech and thus could 'deter and delay these entities from participating in political debate.'").

151. Citizens United v. FEC, 558 U.S. 310, 370 (2010) (internal quotations omitted).

approval of corporate political spending.[152] But the language of *Citizens United*, as well as language from the Delaware Supreme Court and the D.C. Circuit, should help inform courts considering these reforms to uphold them in the name of robust shareholder suffrage rights.

CONCLUSION

Say on pay became federal law despite a barrage of criticism from corporate lobbies, among others, that made arguments that say on pay violated federalism under the Tenth Amendment. This objection is being lobbed against the post-*Citizens United* legislation that would provide shareholders a say on politics. Congress would be on firm constitutional ground in regulating say on politics at public firms by exercising its Commerce Clause power.

The other constitutional objection to say on politics is that it offends the First Amendment. This argument is put to rest by a careful reading of the *Citizens United* decision, which envisions a robust role for shareholders in checking the potential excesses of corporate managers in political expenditures.

The heart of the objections to say on pay and say on politics is not that either approach is actually unconstitutional. Rather the gravamen of the argument against say on pay and say on politics is that these approaches empower shareholders, which for some corporate insiders upsets their normative view of the proper balance of power between day to day managers and beneficial owners. These objections exhibit a deep distrust of shareholder democracy. Fortunately for shareholders, the most important sources of law, the U.S. Supreme Court, the D.C. Circuit Court, and the Delaware Supreme Court, disagree and endorse strong shareholder voting rights, including informed shareholder votes on political matters within the corporate structure.

152. Iowa Right to Life Comm., Inc. v. Tooker, 717 F.3d 576, 600 (8th Cir. 2013) ("any interest in protecting [shareholders] is irrelevant as applied to IRTL, because it has no shareholders."); *id.* at 605 ("Because [Iowa Right to Life Committee, Inc.] fails to show that the board-authorization requirement treats corporations differently from other entities, Iowa Code subsections 68A.404(2)(a) and (b) are constitutional under the Equal Protection Clause . . . ."); *see also* Minn. Citizens Concerned for Life, Inc. v. Swanson, 692 F.3d 864, 879 (8th Cir. 2012) ("The PAC option allows corporate political participation without the temptation to use corporate funds for political influence, quite possibly at odds with the sentiments of some shareholders . . . ." (quoting FEC v. Beaumont, 539 U.S. 146, 163 (2003))).