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Constraining and Channeling Corporate Political Power in Trump's America

Kent Greenfield*

After the Supreme Court decided *Citizens United v. Federal Election Commission* in 2010, it quickly joined the rogue's gallery of most-despised Supreme Court decisions in modern history. Most of the opponents of the decision have focused their energy on one matter of constitutional theory and one matter of strategy. The first has been to challenge the constitutional rights of corporations generally; the second has been to marshal support for a constitutional amendment to overturn the ruling.

I, too, believe *Citizens United* was wrongly decided, at least in rationale if not on its facts. I have nevertheless questioned many of the arguments of those who oppose corporate constitutional rights and I have also expressed reservations about an amendment remedy.¹ My support for corporate constitutional rights is hardly absolute, and my skepticism about an amendment is as much strategic as substantive. I also believe that it is reasonable to worry about the influence of corporate power in our elections and in our democracy generally. But I have been a contrarian among the ideological and academic left in how to respond to these difficulties.

* Kent Greenfield is Professor of Law and Dean's Distinguished Scholar at Boston College Law School. The author thanks Timothy Kuhner and Eugene Mazo for the invitation to contribute to this volume, and Sheila Krumholz for assistance with, and access to, data of corporate independent expenditures. The author also thanks Anna E. Sanders for excellent research assistance.

¹ See, e.g., KENT GREENFIELD, CORPORATIONS ARE PEOPLE TOO (AND THEY SHOULD ACT LIKE IT) (2018); Kent Greenfield, *In Defense of Corporate Persons*, 30 CONST. COMMENT. 309 (2015) (hereafter *Corporate Persons*); Kent Greenfield, *Let Us Now Praise Corporate Persons*, THE WASHINGTON MONTHLY (Jan./Feb. 2015); Kent Greenfield, *Why Progressives Should Oppose A Constitutional Amendment to End Corporate "Personhood,"* HUFF. POST (Jan. 26, 2012); Kent Greenfield, *How to Make the Citizens United Decision Even Worse*, WASH. POST (Jan. 19, 2012).

My contrariness toward the most full-throated critiques of *Citizens United* has been two-fold. First, I have argued that the question of corporate constitutional rights is more complicated than most critics acknowledge.² Protecting the ability of corporate entities to bring constitutional claims—that is, protecting corporate constitutional “personhood”—is a valuable element in constraining the arbitrary exercise of governmental power. *Citizens United* was incorrectly decided not because it recognized the constitutional right of corporations to speak; rather it was incorrect in applying a simplistically libertarian view of free speech to campaign finance reforms and by rejecting compelling governmental interests in constraining the power of money in politics. Second, the best way to ameliorate the problems of corporate power in American electoral and political processes is through adjustments in corporate law rather than constitutional law.³ The problem of corporate involvement in politics is not that corporations speak. The problem is that they speak not for all their stakeholders but for a sliver of the financial and managerial elite. And that problem is best addressed through corporate law rather than constitutional law.

The purpose of this chapter is to flesh out three concrete examples of how corporate law and other areas of business regulation might be adjusted to mitigate some of the harmful effects of corporate political involvement. One can disagree with, or be agnostic toward, my (limited) defense of corporate constitutional rights and still find these concrete examples intriguing. If we worry about corporate power in democracy, we need not limit ourselves to constitutional remedies alone.⁴ Non-constitutional remedies are worthy of our attention and our efforts as well.

The first of the three concrete suggestions focuses on the obligations and structure of corporate governance. If corporations are to act as citizens in a democracy, we can require corporations to import democratic norms within their governance structures. If corporations were more democratically structured so that the interests and concerns of all their important stakeholders were taken into account with regard to corporate decisions, it would be less

² Greenfield, *Corporate Persons*, *supra* note 1, at 315–27.

³ *Id.* at 327–30.

⁴ Though in some instances the advocates of a constitutional amendment have marshaled arguments that include an attentiveness to the interests of shareholders. This has made it appear that some opponents of *Citizens United* have signed onto the corporate governance notion of shareholder primacy, a highly contested view of corporate governance usually associated with the ideological right. As I discuss below, shareholder primacy is part of the problem and should not be part of the solution. See Greenfield, *Corporate Persons*, *supra* note 1, at 330–32 (describing how opponents of corporate personhood are bolstering shareholder primacy).

problematic for them to participate in the public sphere. In other words, if corporations spoke less for the financial and managerial elite and more for others who contribute to their success, their involvement would more likely reflect a pluralistic perspective and pose less risk of skewing the public debate.

The second policy idea relates to taxation. We know that the government can condition tax benefits on the agreement of recipients to do or not do certain things. Non-profit charitable organizations, for example, are prohibited from engaging in core political speech as a condition of beneficial tax status.⁵ This legal tool is subject to important constraints, most notably a doctrine that limits the ability of government to condition benefits on the recipient's waiver of constitutional rights. This rule is known as the "doctrine of unconstitutional conditions," and its contours have bedeviled the courts and scholars for decades.⁶ But I believe a provision can be crafted that would limit corporate political activity and withstand constitutional scrutiny.

The third idea is to use state law to include limitations on corporate political activity within the foundational chartering documents of corporations in their state of incorporation. This idea, like the second, uses the fact that government can impose conditions on government benefits. This idea is frankly more problematic as a matter of constitutional law than the second idea, for reasons I will explain. But it is worth exploring further, and I believe that there are ways to impose limits on corporate political activity with this mechanism that will pass constitutional muster.

But before sketching these ideas, this chapter will first grapple with the implications of Donald Trump's recent election for the debate on corporate political power.

⁵ *Regan v. Tax'n with Representation of Wash.*, 461 U.S. 540 (1983).

⁶ The Court has not been clear as to when government benefits can be conditioned on the waiver of a constitutional right. *Cf. Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205 (2013) (striking down condition on funding); *Rumsfeld v. Forum for Acad. & Inst. Rts., Inc.*, 547 U.S. 47 (2006) (upholding conditions on funding). Academic commentary on the question is abundant. For a sampling see, for example, Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1 (2001); David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675 (1992); Richard A. Epstein, *The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988); Robert L. Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321 (1935); Frederick Schauer, *Too Hard: Unconstitutional Conditions and the Chimera of Constitutional Consistency*, 72 DENV. U. L. REV. 989 (1995); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989); Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism*, 70 B.U. L. REV. 593 (1990).

I. CORPORATE POWER AND DONALD TRUMP

In November 2016, the seismic political event of the twenty-first century occurred. To say the election of Donald Trump as President of the United States came as a surprise is a profound understatement. That someone of his insincerity and intellectual laziness, with his violent, race-baiting rhetoric, misogyny, and xenophobia could be elected to the most powerful political office in the world was a shock. Indeed, for those who had hoped the United States would rise to its better nature rather than succumb to its baser instincts, it felt like a crushing blow. Legal scholars, political scientists, journalists, sociologists, and historians will study the election of 2016 for decades. It may be quite some time before we can make sense of what happened.

At first glance, one might suggest that the election of 2016 poses a counter example to those scholars who have been warning of the power of money in elections. The Super PAC money in 2016 was not on Trump's side.⁷ Democratic nominee Hillary Clinton spent more money overall,⁸ and more than twice as much independent money was spent in opposition to Trump than in opposition to Clinton.⁹ Indeed, Trump used free media exposure masterfully, spent relatively little money early on, and did not start running television ads for the general election until August of 2016, a strikingly late date.¹⁰ In the general election, many of the traditional sources of large contributions abandoned Trump,¹¹ including the Koch Brothers.¹² While Trump's contributions and spending surged late,¹³ there is little doubt that Hillary Clinton's campaign and her supporters spent much more money than Trump and his supporters. So in the end, the candidate who spent the most money was the progressive

⁷ Anu Narayanswamy, Darla Cameron & Matea Gold, *Election 2016: Money Raised as of Dec. 31*, WASH. POST (Feb. 1, 2017), www.washingtonpost.com/graphics/politics/2016-election/campaign-finance.

⁸ Fredreka Schouten, *How Trump Won by Spending Half as Much Money as Clinton*, USA TODAY (Nov. 10, 2016), www.usatoday.com/story/news/politics/elections/2016/2016/11/09/another-way-trumps-bid-changed-politics/93565370/.

⁹ *2016 Outside Spending, by Candidate*, CENTER FOR RESPONSIVE POLITICS (Nov. 28, 2016), www.opensecrets.org/outsidespending/summ.php?cycle=2016&disp=C&type=R.

¹⁰ Arnie Seipel, *Trump Campaign to Run First General Election TV Ads*, NPR (Aug. 16, 2016), www.npr.org/2016/08/16/490294221/trump-campaign-to-run-first-general-election-tv-ads.

¹¹ Jonathan Martin, Alexander Burns & Maggie Haberman, *Cut Ties to Donald Trump, Big Donors Urge* R.N.C., N.Y. TIMES (Oct. 14, 2016), www.nytimes.com/2016/10/14/us/politics/republican-donors-trump.html?_r=0.

¹² Andy Kroll, *Trump Might Be a Dream Come True for Megarich Campaign Donors*, MOTHER JONES (Jan./Feb. 2017), www.motherjones.com/politics/2016/11/donald-trump-dark-money-election.

¹³ Russ Choma, *Millions of Dollars Pouring in for Trump at Last Minute*, MOTHER JONES (Nov. 7, 2016), www.motherjones.com/politics/2016/11/last-seven-days-money.

and the Democrat, and she lost the election (or at least, most importantly, the vote of the Electoral College).

If one focuses more particularly on the role of *corporate* money in the 2016 presidential cycle, there too one could tell the story that the critics of *Citizens United* have been misdirecting their efforts. In the 2012 election, we saw the bulk of independent expenditures originate not from corporate treasuries but from high net-worth individuals. In the 2016 cycle, corporate money again stayed largely on the sidelines.¹⁴ Indeed, according to data provided by the Center for Responsive Politics, only one publicly traded company contributed \$1 million or more to a Super PAC supporting a presidential candidate in 2016. And that was from a clean energy company to Jeb Bush, who dropped out in February of that year.¹⁵ Both of the major party's nominees were polarizing and few corporations wanted to risk alienating millions of voters by aligning with one candidate or the other. Trump's candidacy was particularly disruptive and incendiary. A number of corporations withdrew their sponsorship connections with the Republican National Convention after it became clear that Trump had accumulated the delegates necessary for the nomination.¹⁶

A reasonable case could be made, then, that the election of 2016 indicates that the worst predictions of the implications of *Citizens United* have not come true. Corporate money has not flooded into presidential politics. Independent expenditures have not been so massive as to dictate outcomes at the national level. And worries that *Citizens United* would create an ideological skewing of the electoral "marketplace of ideas" toward the political right have not been borne out. It is quite likely, in fact, that Clinton's defeat would have

¹⁴ According to the *New York Times*, as of February 2016, in the heat of the primary season, 87 donors had given at least \$1 million to a candidate or a candidate's Super-PACs. Of those 87, only nine donors were for-profit corporations. Of those, only one was publicly traded. Of the eight private companies, most appear to be dominated by a single owner. See Wilson Andrews et al., *Million-Dollar Donors in the 2016 Presidential Race*, N.Y. TIMES (Feb. 9, 2016), www.nytimes.com/interactive/2016/us/elections/top-presidential-donors-campaign-money.html; Theo Francis, *Despite Citizens United, Corporate Super PAC Contributions Trail Individuals, Study Finds*, WALL ST. J. (Nov. 2, 2016), www.wsj.com/articles/despite-citizens-united-corporate-super-pac-contributions-trail-individuals-study-finds-1478059201; THE LANDSCAPE OF CAMPAIGN CONTRIBUTIONS (Committee for Econ. Dev. of the Conf. Board, Nov. 2016), www.ced.org/pdf/Election_Spending_Report_-_Nov_2016.PDF.

¹⁵ Right to Rise USA, Contributors, 2016 Cycle, CENTER FOR RESPONSIVE POLITICS, www.opensecrets.org/pacs/pacgave2.php?cycle=2016&cmte=C00571372. See also *2016 Top Donors to Outside Spending Groups*, CENTER FOR RESPONSIVE POLITICS, www.opensecrets.org/outsidespending/summ.php?cycle=2016&disp=D&type=O&superonly=N.

¹⁶ Zachary Mider & Elizabeth Dexheimer, *More Companies Opt to Sit Out Trump's Coronation in Cleveland*, BLOOMBERG POL. (June 16, 2016), www.bloomberg.com/politics/articles/2016-06-16/more-companies-opt-to-sit-out-trump-s-coronation-in-cleveland.

been larger if her campaign had not been bolstered by her advantage in independent spending.

Indeed, one might say that *Citizen United's* protection of corporate speech rights will be quite important in Trump's America. Corporations certainly have their ideological commitments and biases that do not always correlate with the public interest. But their commitments rarely include the racism, Islamophobia, homophobia, xenophobia, and misogyny that was evident at Trump's rallies (and continue, in my view, to be evident in his Presidency). Corporations are often inclusive in ways that many Americans living in homogeneous, culturally anxious, economically distressed, insular tribes are not. Corporate marketing evidences this pluralistic impulse. A current Cover Girl wears a hijab. A recent commercial for Amazon features a priest and an imam sharing tea. A Coca-Cola ad running in the months after Trump's election featured a diverse array of Americans singing "America the Beautiful" in a multitude of languages.

It is no coincidence that these commercials contain an inclusive vision of America that looks quite different from what we saw from the Trump campaign.¹⁷

It is unlikely, for example, that large corporations will become supporters of legislative embodiments of the nationalist urges that found voice in the Trump campaign. Nor will large corporations likely support large-scale deportations or efforts to weaken international trade agreements. And many large corporations have spoken out forcefully against proposed retreats on affirmative action or on protections for LGBTQ Americans.¹⁸

¹⁷ A 2016 television advertisement for Amazon shows an elderly Catholic priest and an elderly Muslim imam sharing tea and later ordering knee pads for the other; the commercial ends with both kneeling in prayer. See Elizabeth Weise, *Amazon Ad May Be First to Feature a Muslim Cleric*, USA TODAY (Nov. 16, 2016), www.usatoday.com/story/tech/news/2016/11/16/amazon-ad-may-first-feature-muslim-cleric/93944166/. Coca-Cola ran ads during 2016 that showed a diverse array of Americans singing "America the Beautiful" in a variety of languages. See MPR Group, *Coca Cola—America the Beautiful—Super Bowl Ad*, YOUTUBE, www.youtube.com/watch?v=xYVU7tRXu0M. The new "Cover Girl" is Muslim, and wears a hijab. Sarah Larimer, *She's One of the New Faces of CoverGirl, And She's Wearing a Hijab*, WASH. POST (Nov. 8, 2016), www.washingtonpost.com/news/acts-of-faith/wp/2016/11/08/shes-one-of-the-new-faces-of-covergirl-and-shes-wearing-a-hijab/.

¹⁸ Abby Jackson, *Fortune 100 Companies Tell the Supreme Court Why America Still Needs Affirmative Action*, BUS. INSIDER (Nov. 6, 2015), www.businessinsider.com/fortune-100-companies-issue-amacus-brief-in-support-of-affirmative-action-at-university-of-texas-2015-11; See *Updated List: Who Has Spoken for, against NC's New LGBT Law*, CHARLOTTE OBSERVER, www.charlotteobserver.com/news/business/article69251877.html; Andrés Martínez, *Give Corporations More Political Power—Seriously*, TIME MAG. (July 10, 2015).

In other words, large corporations may provide a brake on some of Trump's worst political tendencies. Of course, a small number of businesses that align themselves with Trump's kleptocracy may enrich themselves in the short term. The financial industry may support deregulation even if not in the public interest, and Exxon is hardly the company to trust to educate the new President about climate change. But most businesses, like most Americans, have too much at stake over the long term in a global economy to rest their fortunes on a xenophobic, narrow-minded, isolationist president.

But the story I have just told is too sanguine about the role and power of corporations. In fact, the election of Donald Trump is in some ways the result of the misuse of corporate power.

Even if it is unclear whether independent spending (or corporate independent spending) has affected *outcomes* in a material way, contributions and independent spending have certainly affected *politicians*. There is little doubt that contributions (and presumably independent spending) affects access to politicians. If you give money to candidates or spend money on their behalf, you will have their ear. Instead of looking only at how campaign money affects electoral outcomes, it is more important to look at how it affects lobbying efforts. And studies show that campaign contributions lead to lobbying success.¹⁹

And though corporations may be shy about weighing in too heavily in presidential politics, they do not shy away from spending money in congressional races. They do so not only through direct corporate contributions but also through trade groups and corporate PACs and by way of donations from individual executives.²⁰ And corporations then layer on billions of dollars of lobbying expenses. Most years, over \$3 billion is spent lobbying Congress—most from corporations and trade groups of businesses.²¹

This advantageous access and the legislative success it engenders add to the public perception that the system is “rigged.” The public's disassociation from

¹⁹ See Raquel Alexander, Stephen W. Mazza & Susan Scholz, *Measuring Rates of Return on Lobbying Expenditures: Empirical Case Study of Tax Breaks for Multinational Corporations*, 25 J.L. & POL. 401 (2009); Brad Plumer, *The Outsized Returns from Lobbying*, WASH. POST (Oct. 10, 2011), www.washingtonpost.com/blogs/ezra-klein/post/the-outsized-returns-from-lobbying/2011/10/10/gIQAADSNEaL_blog.html?utm_term=.3fddf4974cf3.

²⁰ See *Top PACs*, CENTER FOR RESPONSIVE POLITICS, www.opensecrets.org/overview/toppacs.php?cycle=2016; *Top Organization Contributions: All Federal Contributions*, CENTER FOR RESPONSIVE POLITICS, www.opensecrets.org/overview/toporgs.php; *Hot Races*, CENTER FOR RESPONSIVE POLITICS, www.opensecrets.org/overview/hottraces.php.

²¹ See *Top Spenders*, CENTER FOR RESPONSIVE POLITICS, www.opensecrets.org/lobby/top.php?indexType=s&showYear=2016; *Lobbying Database*, CENTER FOR RESPONSIVE POLITICS, www.opensecrets.org/lobby/index.php.

and disgust with mainstream politics gave momentum not only to Trump but also to the “outsider” candidacy of Bernie Sanders in the Democratic Party. In this view, *Citizens United* did not lead to Trump’s victory in any direct sense but added to the overall distrust of the political system and its loyalty to financial and corporate elites, which created the context in which Trump’s victory was possible. Notwithstanding the (ironic) short-term benefits of the decision within the 2016 election and during the Trump presidency, it could indeed be that Trump would not be President but for *Citizens United* and the corporate elitism and prerogatives it embodied. At the very least, *Citizens United* reflected and furthered the larger obtuseness of the American political system to the interests of working-class Americans, and those chickens finally came home to roost. (The irony of Americans disillusioned by elitism putting their faith in a putative-billionaire-casino-and-golf-resort-magnate is a topic for another day.)

Another thing to note is that the frustration and anger of Americans who resorted to voting for Trump (and for Sanders) was not simply a political anger. The system was not only “rigged” politically. There was significant economic frustration as well, and Trump’s diatribes against trade agreements and Sanders’s remonstrations against economic inequality found eager listeners.

These frustrations are not unrelated. There is a link between corporate political advantage and economic stagnation. The privileged access granted to those who contribute financially to politicians not only skews the legislative process but the economic marketplace as well. In fact, often the very purpose of lobbying efforts is to affect the economic marketplace. Lobbying efforts add to or even take the place of efforts to win competitive advantage by improving goods, services, or pricing. Business advantage gained politically—by disadvantaging competitors or gaining ways to externalize costs onto employees, customers, communities, or the environment—has the same impact on the balance sheet as business advantage gained in the marketplace. Yet from the standpoint of society’s balance sheet, the two are not identical at all. Unfair political advantages frequently create unfair economic advantages, which individual businesses see as net gain but which society suffers as deadweight losses. This means that successful campaign finance reforms should not only be thought of as fixes for democracy. They will be economically beneficial as well, because it will focus corporations on gaining competitive advantage through economic markets, not through the political market.²²

Having said that, there is now virtually no chance that the Supreme Court will change in the near term in a way that will lead to a weakening of

²² See generally GREENFIELD, CORPORATIONS ARE PEOPLE TOO, *supra* note 1.

Citizens United and the rest of the Court's campaign finance jurisprudence. Though Trump's campaign gave voice to the frustrations of the economically dispossessed, his nominees to the Supreme Court (like his first, Neil Gorsuch) will likely be from the jurisprudentially conservative mainstream. Unless the Court moves significantly to the left, which is quite unlikely now, there is little likelihood that the Court will abandon its flawed campaign finance jurisprudence. Limitations on contributions and independent expenditures in elections will continue to receive strict scrutiny. Existing jurisprudence, mistaken as it is, will need to be taken as given for quite some time. Changes will have to come from elsewhere.

To those ideas we now turn.

II. IDEA NUMBER ONE: CHANGE CORPORATE GOVERNANCE

The problem of corporate power in elections is an iteration of the larger problem of corporate power more generally. Compared to those of other nations, the social contract of American corporations is thin. The executives who run American corporations do not generally think of themselves as having obligations to the public. The concerns of employees, communities, consumers, the environment, and the public interest in general matter only to the extent they have implications for the company's bottom line and share price. Otherwise, they are elbowed aside. Corporations tend to be managed aggressively to maximize shareholder return. As a result, the risks they run—whether of oil spills in the Gulf or of financial crises erupting from Wall Street—are often unrecognized until too late. And corporate involvement in politics—and corporate speech more generally—is often used in service of corporations' narrow, shareholder-focused, managerially driven obligations.

A cycle has been created. The Court's increasing deference to corporate speech rights offers corporations another tool through which to exercise their considerable economic power. Their economic power is then used to bolster further their political power, which is brought to bear to increase their economic power.

Efforts to overturn *Citizens United* by way of doctrinal change or constitutional amendment work on the political side of this cycle. Those efforts face conceptual and tactical obstacles and major change is likely foreclosed in the immediate future. That is not to say that scholars and activists should cease their work on the political power of corporations. Scholars are doing important work,²³ and activist pressures

²³ See, e.g., John C. Coates, IV, *Corporate Politics, Governance, and Value Before and After Citizens United*, 9 J. EMP. LEGAL STUD. 657 (2012); Ciara Torres-Spelliscy, *Corporate*

on corporations to disclose their political involvement are having an impact.²⁴

But the cycle might also be weakened by focusing on the corporate side of the loop. The fact that corporations exert their considerable economic and political power in the service of a narrow group of managerial and financial elites is not a function of constitutional law or corporate “personhood.” It is a function of—indeed a fundamental flaw of—corporate law.²⁵ As a problem of corporate law it can be fixed by corporate law.

For about 100 years, the central failure of corporate governance in the United States has been the requirement—enforced through both law and norms—that corporations must be managed to further the interests of shareholders. Scholars disagree on whether, in practice, these corporate governance rules provide more protection for shareholders or managers. But one thing is absolute: corporate law in the United States—and by that I mean the corporate law of Delaware²⁶—cares not at all about employees, communities, customers, or other stakeholders, except insofar as shareholders also gain. If there is a conflict, shareholders must win. As Leo Strine, the Chief Justice of the Delaware Supreme Court, recently wrote, executives who take care of an “interest other than stockholder wealth” breach their fiduciary duties.²⁷

A number of corporate scholars have challenged these assumptions for some time, arguing that corporations should be seen as having robust social and public obligations that cannot be encapsulated in share prices.²⁸ These

Democracy from Say on Pay to Say on Politics, 30 CONST. COMMENT. 431 (2015); Maggie McKinley, *Lobbying and the Petition Clause*, 68 STAN. L. REV. 1131 (2016).

²⁴ See THE 2016 CPA-ZICKLIN INDEX OF CORPORATE POLITICAL DISCLOSURE AND ACCOUNTABILITY (2016), http://files.politicalaccountability.net/index/2016_Index.pdf.

²⁵ See KENT GREENFIELD, *THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS AND PROGRESSIVE POSSIBILITIES* (2006).

²⁶ Kent Greenfield, *End Delaware's Corporate Dominance*, 39 DEMOCRACY: A JOURNAL OF IDEAS, Winter 2016, <https://democracyjournal.org/magazine/39/end-delawares-corporate-dominance/>

²⁷ See Leo E. Strine, *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761 (2015).

²⁸ For a selection, see LYNN A. STOUT, *THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC* (2012); LAWRENCE E. MITCHELL, *PROGRESSIVE CORPORATE LAW* (1995); Brett McDonnell, *Strategies for an Employee Role in Corporate Governance*, 46 WAKE FOREST L. REV. 429 (2011); Timothy P. Glynn, *Communities and Their Corporations: Towards a Stakeholder Conception of the Production of Corporate Law*, 58 CASE W. RES. L. REV. 1067 (2009); Judd F. Sneirson, *Green Is Good: Sustainability, Profitability, and a New Paradigm for Corporate Governance*, 94 IOWA L. REV. 987 (2009); Cynthia A. Williams & John M. Conley, *An Emerging Third Way?: The Erosion of the Anglo-American Shareholder Value Construct*, 38 CORNELL INT'L L.J. 493 (2005); Marleen A. O'Connor, *The Human Capital Era: Reconceptualizing Corporate*

“progressive” corporate scholars argue that the fiduciary duties of managers should be extended to employees and other corporate stakeholders, or to the company as a whole defined as those who meaningfully invest in the collective success of the firm.²⁹

One way to make these obligations operational is to make the decision-making structure of the company itself more pluralistic. In a number of European countries, for example, companies have “codetermined” board structures that require representation of both shareholders and employees.³⁰ Even with these management structures, corporations continue their focus on building wealth—that is the core purpose of the corporate form—but not only for a narrow sliver of equity investors. And it works. Germany, where codetermination is strongest, is the economic powerhouse of Europe. The CEO of the German company Siemens argues that codetermination is a “comparative advantage” for Germany. And a senior managing director of the U.S. investment firm Blackstone Group said that codetermination was one of the factors that allowed Germany to avoid the worst of the financial crisis.³¹

If corporations were held to a more robust social contract and governed themselves more pluralistically, their involvement in the political arena would be less worrisome. A possible cure for the fact that American corporations have become a vehicle for the voices and interests of a small managerial and financial elite is more democracy *within* businesses—more participation in corporate governance by workers, communities, shareholders, and consumers. If corporations were more democratic, their participation in the nation’s political debate would be of less concern and they could even become a force for positive political change.

Ironically, many opponents of *Citizens United* make arguments that seem to cut against these governance reforms. Skeptics of corporate “personhood” often characterize corporations as having a narrow social role; because of that narrow role, the argument goes, they owe it to shareholders to stay out of politics. These arguments implicitly—and sometimes explicitly—bolster shareholder primacy.

Law to Facilitate Labor-Management Cooperation, 78 CORNELL L. REV. 899 (1993); David Millon, *Redefining Corporate Law*, 24 IND. L. REV. 223 (1991).

²⁹ See generally GREENFIELD, *supra* note 25.

³⁰ ALINE CONCHON, BOARD-LEVEL EMPLOYEE REPRESENTATION RIGHTS IN EUROPE: FACTS AND TRENDS (2011), www.etui.org/Publications2/Reports/Board-level-employee-representation-rights-in-Europe. See also MAP: Board-Level Representation in the European Economic Area, WORKER-PARTICIPATION.EU, www.worker-participation.eu/National-Industrial-Relations/Across-Europe/Board-level-Representation2/MAP-Board-level-representation-in-the-European-Economic-Area2.

³¹ CONCHON, *supra* note 30, at 8.

Take for instance Justice John Paul Stevens's dissent in *Citizens United* itself. He argued, among other things, that corporate speech should be limited in order to protect shareholders' investments. Shareholders are seen as owners, as "those who pay for an electioneering communication," and are assumed to have "invested in the business corporation for purely economic reasons."³² Stevens argued that corporate political speech did not merit protection because:

[T]he structure of a business corporation ... draws a line between the corporation's economic interests and the political preferences of the individuals associated with the corporation; the corporation must engage the electoral process with the aim to enhance the profitability of the company, no matter how persuasive the arguments for a broader ... set of priorities.³³

Even more revealing, Stevens cites as support a set of corporate governance principles adopted by the prestigious American Law Institute. These principles were the product of compromise, both asking corporations to look after shareholder interests and allowing them to act with an eye toward "ethical" and "humanitarian" purposes. But Stevens quoted only the language embodying shareholder primacy: "A corporation ... should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain."³⁴

Some opponents of *Citizens United* are following Stevens into the shareholder-rights trap. Common Cause has a "featured campaign" for "strengthening shareholder rights."³⁵ The Brennan Center for Justice is supporting a "shareholder protection act" and calls shareholders "the actual owners" of corporations.³⁶ Professor Jamie Raskin of American University (now a United States Congressman) is one of the smartest and most energetic academic opponents of *Citizens United*, yet he says that corporations should not be spending in elections because, "after all, it's [shareholders'] money."³⁷

³² *Citizens United v. FEC*, 558 U.S. 310, 475–76 (2010) (Stevens, J., dissenting).

³³ *Id.* at 469–70 (Stevens, J., dissenting) (internal citations omitted).

³⁴ *Id.* at 470 (Stevens, J., dissenting) (quoting A.L.I., PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS, § 2.01(a) 55 (1992)). See also Melvin Aron Eisenberg, *An Overview of the Principles of Corporate Governance*, 48 BUS. LAW. 1271 (1993).

³⁵ *Money in Politics*, COMMON CAUSE, www.commoncause.org/issues/money-in-politics/.

³⁶ Elizabeth Kennedy, *Protecting Shareholders after Citizens United*, BRENNAN CENTER FOR JUSTICE (July 13, 2011), www.brennancenter.org/blog/protecting-shareholders-after-citizens-united.

³⁷ Jamie B. Raskin, *A Shareholder Solution to 'Citizens United'*, WASH. POST (Oct. 3, 2014), www.washingtonpost.com/opinions/a-shareholder-solution-to-citizens-united/2014/10/03/5e07c3ee-48be-11e4-b72e-d60a9229cc10_story.html.

This is all shareholder primacy language brought to bear in fighting *Citizens United*.

Wall Street loves talk of shareholder rights. To be sure, many Americans are shareholders through our retirement accounts and the like. But “widows and orphans” are still the minority; most stock held in American businesses is owned by the very wealthy. (The richest 5 percent of Americans own over 2/3 of all stock assets. The bottom 40 percent—125 million working class people—essentially own nothing in terms of stock.³⁸) So when opponents of *Citizens United* focus on shareholder rights, they are singing Wall Street’s tune.

I wish this shareholder-protective rhetoric was just that, but it is not. Corporate personhood opponents urge, as an intermediate measure short of a constitutional amendment, that corporations be required to seek shareholder approval before spending corporate money on political campaigns.³⁹ There is something tempting in this position, if only because such a rule would help ensure executives do not spend corporate monies on issues and candidates opposing company interests. But that benefit is probably marginal and comes at the risk of validating corporate involvement in the political process in furtherance of shareholder value and to the detriment of other stakeholders. A rule that corporations could speak out in favor of Wall Street but not employees could be worse, not better, than our current broad allowance of corporate speech.

Instead, corporations should be constrained by requirements within corporate law itself that their managers take into account the interests of all of the company’s major stakeholders. Companies should not be contributing their monies and their voices only to further the interests of their wealthiest investors. If corporations were required to think of their social obligations as broader and more robust than simply maximizing shareholder value, then their involvement in politics would more likely be in furtherance of the interests of their stakeholders. It would be less “them” and more “us.” There is nothing inherently undemocratic in corporate speech, unless corporations themselves are undemocratic. Essentially, we could take the *Citizens United* Court at its word and seek to make corporations themselves more like the “associations of citizens” that the Court assumed they are.⁴⁰

³⁸ *Wealth Groups’ Shares of Assets, by Asset Type, 2010*, ECON. POL’Y INST. (Aug. 20, 2012), www.stateofworkingamerica.org/chart/swa-wealth-table-6-6-wealth-groups-shares/; *Wealth Groups’ Shares of Total Household Stock Wealth, 1983–2010*, ECON. POL’Y INST. (Aug. 24, 2012), www.stateofworkingamerica.org/chart/swa-wealth-figure-6g-wealth-groups-shares/.

³⁹ Ciara Torress-Spelliscy, *Corporate Campaign Spending: Giving Shareholders A Voice*, BRENNAN CENTER FOR JUSTICE, www.brennancenter.org/publication/corporate-campaign-spending-giving-shareholders-voice.

⁴⁰ *Citizens United v. FEC*, 558 U.S. 310, 356 (2010).

Is this change too much of a long shot? In a sense it is—if only because it would require a profound change in how we conceptualize corporations. Corporations would shift from pieces of property owned by a sliver of the financial elite into collective enterprises benefitting from the contributions of stakeholders who have a role in governing the company because of their stake in the company's long-term wellbeing. Once this conceptual change takes hold, the legal adjustments are straightforward and much less demanding than a constitutional amendment. A national corporate governance law would require a simple majority vote in Congress followed by the president's signature. In fact, a national law need not be the first step. Because corporate governance has traditionally been a function of state law, many of these changes could take place one state at a time.⁴¹

Citizens United recognized the corporate right to speak in the American public square. Now, that poses a major problem for our democracy because corporations amplify the voices of a tiny number of the financial and managerial elite—the notorious 1 percent. If companies gave voice to a more diverse and pluralistic set of interests, the fact that corporations speak would not undermine democracy. On the contrary, corporate speech would amplify it.

III. IDEA NUMBER TWO: CHANGE CORPORATE TAX LAW

Because the Supreme Court's decision in *Citizens United* was based on its reading of the First Amendment, the legislative options are quite narrow. Congress cannot, of course, simply overturn the decision by statute. But one legislative option is still open as a constitutional matter: to limit political activity as a condition of favorable tax status.

Consider first the fact the Supreme Court—in the 1983 case of *Regan v. Taxation with Representation of Washington*—has expressly upheld limits on the political activity of certain charitable corporations.⁴² Under section 501(c)(3) of the Internal Revenue Code, organizations with charitable, religious, or educational missions can be exempt from income taxes, and donations to them are deductible by donors. As a condition of this very valuable tax benefit, such charitable organizations may not participate in lobbying or partisan political activities. In *Regan*, the Court upheld conditioning the benefit of special

⁴¹ States would merely have to resist Delaware's dominance and assert the authority to govern the corporations based in their own jurisdictions. See Kent Greenfield, *Democracy and Dominance of Delaware in Corporate Law*, 67 LAW & CONTEMP. PROBS. 135 (2004).

⁴² *Regan v. Tax'n with Representation of Wash.*, 461 U.S. 540 (1983).

tax status on the voluntary relinquishment of a right to engage in political activity by corporate groups.

Note how serious an infringement of political speech this is. Charities are often organized around political, social, or economic ideas. Limits on their electioneering and lobbying go to the heart of why they exist and what they stand for. But the Court nevertheless upheld these limits as constitutional. Tax deductibility was seen as a subsidy, and the Court held that the government was under no obligation to subsidize the groups' political activities.⁴³ Implicit in the Court's reasoning was that these restrictions were optional; if the founders of an organization wanted it to be politically active, they could operate under a separate part of the IRS Code. Alternatives were available for those institutions that wanted to engage in politics.

Regan is among a number of cases in which the Court considers the notoriously tricky question of "unconstitutional conditions." The Court has not always been clear about which conditions survive and which do not.⁴⁴ The Court seems to apply two analytical touchstones. First, the Court looks at the degree of connection between the benefit offered and the right waived, limited, or conditioned. The closer the nexus the more likely the condition will be upheld.⁴⁵ Additionally, the Court is attentive to the level of pressure applied. Conditions cannot coerce; they should be voluntary.⁴⁶ This analytical touchstone operates independently from the nexus consideration, so not every

⁴³ *Id.* at 544.

⁴⁴ *Cf.* *Speiser v. Randall*, 357 U.S. 513 (1958) (striking down condition); *Fed. Comm. Comm'n v. League of Women Voters of Cal.*, 468 U.S. 364 (1984) (same); *Rust v. Sullivan*, 500 U.S. 173 (1991) (upholding condition); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001) (striking down condition); *Rumsfeld v. Forum for Acad. and Inst. Rts., Inc.*, 547 U.S. 47 (2006) (upholding condition); *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205 (2013) (striking down condition). Also relevant are spending clause cases conditioning government benefits to states on the states' willingness to further certain federal policies. *See, e.g.,* *South Dakota v. Dole*, 483 U.S. 203 (1987) (upholding condition as not coercive); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012) (striking down condition as coercive).

⁴⁵ *Open Soc'y Int'l*, 570 U.S. at 215 (describing problem of limiting speech beyond the "contours of the program itself"); *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 580 (describing problem that conditions on Medicaid funds on the states "tak[e] the form of threats to terminate other significant independent grants") (plurality). But the Court does not always follow this principle, especially when the second rule of avoiding coercion does not apply. *See* *Rumsfeld v. Forum for Acad. and Inst. Rts., Inc.*, 547 U.S. 47 (upholding condition on entire federal funding going to universities on whether subparts of those universities accept military recruiters); *Dole*, 483 U.S. 203 (upholding condition on federal highway funds to states on states' willingness to change drinking age).

⁴⁶ *See* *Open Soc'y Int'l*, 570 U.S. at 221 (policy requirement "compels" the affirmation of belief); *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 581 (describing Medicaid condition as "a gun to the head") (plurality); *Dole*, 483 U.S. at 211 (conditions cannot be structured so that "pressure turns into compulsion").

condition will both be coercive and impose attenuated limitations. But when a condition has a loose nexus and imposes such pressure on the beneficiary that it has no genuine choice, there is a good chance the condition will be struck down.

Even with these restrictions on the ability of government to condition benefits, it is possible to structure a fix to the worst aspect of *Citizens United*—empowering for-profit companies to engage in unlimited political activity. Congress need only apply the model used for charities to corporations. A limit on the partisan political activities of corporations can be imposed as a condition of an alternative tax status offering some kind of benefit in exchange.

As long as such tax benefit is not so great as to be coercive, and corporations can voluntarily choose to opt in, the Court would not likely strike down such a condition. That would be true even if the condition was seen to be reaching beyond the scope of the benefit to constrain political speech that had little connection with that benefit. The condition on speech upheld in *Regan* was not closely tied to the scope of the benefit—tax deductibility—yet the Court upheld it. The same would likely be true here.

In fact, this policy idea provides an opening for a bipartisan effort.

Consider that the business community has long complained about so-called “double taxation,” the practice of taxing corporate profits once at the corporate level and again when distributed to shareholders as dividends.⁴⁷ Double taxation is the source of the conventional argument that it is fair to tax dividends at a lower rate than ordinary income since they have already been taxed once at the corporate level.

Congress could enact a new tax status, available for corporations to opt into. Call it Status NP—for “no politics.” “NP corporations” would be subject to one benefit and one limit. The benefit would be that they will be able to deduct issued dividends from their taxable income, ending double taxation. The limit would be that they would be subject to the same constraints on political activity now applicable to 501(c)(3) charities. Because the status would be optional, there is little risk that the provision would run afoul of the doctrine of unconstitutional conditions.

The upside of this compromise could be significant. By opting into the status, corporations would be opting out of the political contribution arms race. (In fact, the law should allow exemptions to antitrust restrictions, so that corporate leaders can discuss and agree with competitors to opt-in collectively.) Shareholders could expect more dividends, since corporations can

⁴⁷ See, e.g., Robert C. Pozen, *Eliminating Corporate Double Taxation*, BROOKINGS (Apr. 11, 2016), www.brookings.edu/opinions/eliminating-corporate-double-taxation/.

deduct them from their taxable income. The progressive left, the most vocal critics of *Citizens United*, can use the availability of Status NP as an organizational tool for shareholder activists seeking to bring corporations to heel.

Depending on how many corporations opt in, the budgetary cost may have to be mitigated, perhaps by increasing the individual tax rate on dividends or by rationalizing the currently broken system of international corporate taxation. But it would be worth the cost. While it would not unravel all of the defects of *Citizens United*, it could make a significant impact while avoiding constitutional difficulties or requiring a constitutional amendment.

IV. IDEA NUMBER THREE: CHANGE CORPORATE CHARTERS

One element is consistent across all Supreme Court cases ruling on the First Amendment rights of corporations in politics, from *First National Bank of Boston v. Bellotti*⁴⁸ to *Citizens United*. In each case the limits on corporate spending have come as a matter of campaign finance reform, external to corporate law and outside the corporate form. In none of these cases did the limits on corporate rights arise as an organic matter within the corporate form itself. That is, in every case the role and power of the corporate parties were taken as given, and the Court (rightly) assumed the corporations were asserting rights that they could properly exercise as a matter of corporate law and prerogative.

This opens a third possibility for reform: imbed limitations on corporate political activity within the corporate form as a matter of corporate law.

Business corporations are creatures of state law, chartered as legal forms to engage in business for profit. States identify the powers of corporations chartered in their jurisdiction and provide the laws of corporate governance for those businesses. A corporation is born only when its founders petition for a charter, which in turn bestows benefits such as separate legal personality (“corporate personhood”) and perpetual existence uncoupled from their founders and investors. Their investors also receive limited liability, which protects them from the liabilities of the corporate form. All of these benefits are in reality state subsidies, bestowing financial advantages upon businesses adopting the corporate form. In theory at least, in exchange for these benefits the state receives the economic advantages derived from having thriving businesses creating goods, services, and financial profit.

The chartering document also typically identifies the purposes of the corporation and its corporate powers. For most of the early history of the nation, states chartered companies only for specific purposes and often imposed

⁴⁸ *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765 (1978).

significant constraints on the powers of those companies. For example, some states prohibited corporations from owning stock in other corporations. But beginning in the late nineteenth century, states began the so-called “race to the bottom,” permitting charters for “any lawful purpose” and relaxing financial and economic limits on corporate powers.⁴⁹ Corporate charters now offer wide powers to corporations pursuant to their corporate “personhood,” such as the capacity to sue and be sued, to enter into contracts and own property in their own name, and to make charitable donations.⁵⁰

In any event, there is no doubt that corporations exist only by grace of the state. In the words of Chief Justice John Marshall, writing for the Court in *Dartmouth College v. Woodward*, “A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it either expressly or as incidental to its very existence.”⁵¹

This language and the history on which it is based suggest that the secret to limiting corporate political activity is to focus on the *source* of corporate power—the charters bestowed by state law, which outline the various powers and capacities of corporations. Because a corporation possesses “only those properties” state law bestows “expressly or as incidental to its very existence,” then states may simply choose to form corporations without the legal capacity to engage in political activity. In other words, if corporations were formed under charters limiting their political capacity, any political engagement beyond the strictures of the charter would be *ultra vires* (“beyond the power”) and be subject to regulation by the state or injunctive action by shareholders or state attorneys general.⁵²

These limits would pose fewer constitutional problems than bans on corporate expenditures imbedded in campaign finance law. The power of states to constrain corporate authority has a constitutional pedigree that stretches back for nearly two centuries to *Dartmouth College* itself. It would be difficult for the Court to deny the prerogative of the states to define the power and legal capacities of corporations that the states themselves choose to charter. (Similar reasoning would apply if the federal government stepped into the role as provider of federal corporate charters.⁵³)

⁴⁹ For more on the history of corporate purpose, see Kent Greenfield, *Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality (With Notes on How Corporate Law Could Reinforce International Law Norms)*, 87 VA. L. REV. 1279 (2001).

⁵⁰ See, e.g., DEL. CODE ANN. tit. 8, § 122 (2015).

⁵¹ *Dartmouth Coll. v. Woodward*, 4 U.S. (Wheat.) 518, 636 (1819).

⁵² For more on how the doctrine of *ultra vires* could work in modern times, see Greenfield, *Ultra Vires Lives!*, *supra* note 49.

⁵³ See Greenfield, *End Delaware’s Corporate Dominance*, *supra* note 26.

The central objection to this argument would point to the notion from *Dartmouth College* that the state cannot in fact take away powers “incidental to [the] very existence” of corporations. Some powers of corporations are so inherent in the corporate form itself that to remove them, or make them conditional, would be to erase the significance of the form itself. In this light, few statements can improve on that of then-Justice William Rehnquist, dissenting in *Bellotti*: “Since it cannot be disputed that the mere creation of a corporation does not invest it with all the liberties enjoyed by natural persons, ... our inquiry must seek to determine which constitutional protections are ‘incidental to its very existence.’”⁵⁴

This inquiry must necessarily begin with a discussion of what corporations are for, what purposes they serve. This in turn draws on a broad scholarly literature, in the corporate law field for the most part, about the purpose of the corporation. There is much disagreement about the question of for whom are corporate managers trustees, that is, whether corporations should be managed primarily to serve shareholder interests or to serve a more robust set of stakeholder interests. But there is indeed broad consensus that corporations are economic entities, created for the purpose of benefiting society by creating wealth through the production of goods and services. The constitutional analysis should begin, then, with the presumption that corporations should receive the rights necessarily incidental to serving that economic purpose, and should not receive those that are not germane to that purpose. This presumption may be overcome in specific contexts or to further other constitutional values, but that is the starting place for analysis.

The best example of an incidental power would be the right of corporations to own property. A corporation without property rights is unworthy of the name. Property rights are “incidental to the very existence” of corporations. It would be impermissible to condition the grant of corporate status on the waiver of property rights. Similarly, corporations could not be required as a condition of their existence to waive their Fifth Amendment rights to be free of governmental takings without just compensation.

Notice how this analysis mimics the unconditional conditions analysis. Some conditions are permissible; some are not. Some powers are incidental to the creation of the corporate form; some are not. The best reading of *Dartmouth College* and its progeny is that the more central a corporate power is to the nature of the corporation itself, the less likely it can permissibly limit it or make it the subject of a condition. Another way to conceptualize this

⁵⁴ First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 824 (1978) (Rehnquist, J., dissenting).

point is to say the state need not grant corporate charters, but if it does so such charters must contain the “core” rights and powers of corporations.

This begs the First Amendment question. Can states condition the grant of corporate status on the limitation of the resulting entity’s speech rights? Unsurprisingly, this is a complex issue.⁵⁵ But it is the correct question to ask, and it is a different question than the Court has been asking.

The answer depends on whether the asserted right is core to, or inconsistent with, corporations’ economic purpose. Sometimes it makes little sense to protect the First Amendment rights of corporations. Securities laws, for example, routinely require corporations to disclose to the public their financial well-being. If human beings were required to reveal personal finances, they would rightly object to the requirement as coerced speech, a violation of the First Amendment. But corporations’ arguments along those lines would fail, and they should. On the other hand, it is closer to the core of the purpose of a corporation to have the ability to speak publicly about matters germane to its economic role. That is, speech that is “incidental” to its very existence in the marketplace should receive the protection of constitutional scrutiny. This includes commercial speech at least, and presumptively even that political speech concerning economic matters germane to the business.

There is more to be said here. The legal context is difficult, and crafting the proper level of constraint on corporate political activity may require doctrinal trial and error. But I do believe that the Court, notwithstanding *Citizens United*, could (and should) uphold organic, corporate law limits on the capacity of corporations to engage in electoral politics not germane to its business. Such limits could appear in corporate law statutes with language akin to the following:

As a condition of these powers and privileges, no business corporation chartered under this title shall have the capacity to expend general treasury funds to influence the outcome of any federal, state, or local election, unless such expenditure pertains to matters germane to its primary business activities or takes place in the normal operations of a business corporation whose primary business activities include the dissemination of information or opinion.

V. CONCLUSION

Corporate law offers real possibilities for dealing with the harmful effects of *Citizens United*. Most opponents of corporate power have focused on

⁵⁵ And I am trying to answer it. See GREENFIELD, CORPORATIONS ARE PEOPLE TOO, *supra* note 1.

constitutional remedies and have ignored the potential corporate law remedies. This blind spot might originate, frankly, simply from the fact that *Citizens United* was a constitutional case and most constitutional law professors do not claim expertise in corporate law. Constitutional law is public law; corporate law is seen as private law. Not many legal scholars bridge this gap. But the need to do so is clear and should no longer be ignored. Indeed, the purposes of campaign finance reform would be well served by such bridges.