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THEORY AND *CITIZENS UNITED*

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Abstract

One important aspect of Citizens United has been overlooked: the tension between the conservative majority's view of for-profit corporations, and the theory of for-profit corporations embraced by conservative thinkers. This article explores the tension between these conservative schools of thought and shows that Citizens United may unwittingly strengthen the arguments of conservative corporate theory's principal rival.

Citizens United posits that stockholders of for-profit corporations can constrain corporate political spending and that corporations can legitimately engage in political spending. Conservative corporate theory is premised on the contrary assumptions that stockholders are poorly-positioned to monitor corporate managers for even their fidelity to a profit maximization principle, and that corporate managers have no legitimate ability to reconcile stockholders' diverse political views. Because stockholders invest in for-profit corporations for financial gain, and not to express political or moral values, conservative corporate theory argues that corporate managers should focus solely on stockholder wealth maximization and non-stockholder constituencies and society should rely upon government regulation to protect against corporate overreaching. Conservative corporate theory's recognition that corporations lack legitimacy in this area has been strengthened by market developments that Citizens United slighted: that most humans invest in the equity markets through mutual funds under section 401(k) plans, cannot exit these investments as a practical matter, and lack any rational ability to influence how corporations spend in the political process.

Because Citizens United unleashes corporate wealth to influence who gets elected to regulate corporate conduct and because conservative corporate theory holds that such spending may only be motivated by a desire to increase corporate profits, the result is that corporations are likely to engage in political spending solely to elect or defeat candidates who favor industry-friendly regulatory policies, even though human investors have far broader concerns, including a desire to be protected from externalities generated by corporate profit-seeking. Citizens United thus undercuts conservative corporate theory's reliance upon regulation as an answer to corporate externality risk, and strengthens the argument of its rival theory that corporate managers must consider the best interests of employees, consumers, communities, the environment, and society — and not just stockholders — when making business decisions.

Keywords: Corporate governance, political spending, Citizens United, conservative corporate theory, regulatory externalities, lobbying, profit maximization

JEL Classification: D72, G34, G38, K22

Introduction

Since the Supreme Court's decision in *Citizens United*¹ there has been vigorous debate about the wisdom of that decision, both as a matter of constitutional interpretation and public policy. *Citizens United* has been characterized as a "conservative" decision, in the sense that it was the product of the five more conservative judges on the Court.² But critics have argued that although the judicial majority in the case come from the political right, the decision is difficult to reconcile with certain traditional conservative constitutional principles,³ which include judicial restraint and reluctance to override decisions made by the political branches.⁴

¹ *Citizens United v. FEC*, 558 U.S. 310 (2010).

² *E.g.*, Erwin Chemerinsky, *Supreme Court—October Term 2009 Foreword: Conservative Judicial Activism*, 44 LOY. L.A. L. REV. 863 (2011) (criticizing *Citizens United* as an example of "conservative judicial activism" and noting that the Court split along ideological lines); Geoffrey R. Stone, *Citizens United and Conservative Judicial Activism*, 2012 U. ILL. L. REV. 485 (same).

³ *See, e.g.*, Reza Dibadj, *Citizens United as Corporate Law Narrative*, 16 CHAPMAN J.L. & POL'Y 39, 40-45 (2011) (*Citizens United* could have been decided on narrower grounds and thus deviated from principles of judicial restraint); Jeffrey Rosen, *Originalism, Precedent, and Judicial Restraint*, 34 HARV. J.L. & POL'Y 129, 133-35 (2011) (*Citizens United* ignored precedent); Stone, *supra* note 2, at 496-97 ("[U]nder an approach embracing judicial restraint and deference to the elected branches of government, the Court would have had to uphold the challenged provisions" in *Citizens United*).

⁴ *E.g.*, William P. Marshall, *Abstention, Separation of Powers, and Recasting the Meaning of Judicial Restraint*, 107 NW. U. L. REV. 881, 897 (2013) ("Those who believed that the federal courts should be reluctant to interfere with the actions of the political branches, when possible, were considered judicial conservatives who favored judicial restraint."); *United States v. Windsor*, 133 S. Ct. 2675, 2698 (2013) (Scalia, J., dissenting) (describing the majority opinion as a "jaw-dropping . . . assertion of judicial supremacy over the people's Representatives in Congress and the Executive"); *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313-14 (1993) (Thomas, J.) ("Where there are 'plausible reasons' for Congress' action, 'our inquiry is at an end.' This standard of review is a paradigm of judicial restraint. 'The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how

In this essay, however, we address a less contestable, but nonetheless important implication of that decision, which is that to the extent that *Citizens United* is viewed as a conservative ruling, it is one that is in tension with another school of conservative thought that has a longer tradition. That school of conservative thought addresses for-profit corporations specifically and the proper end of their governance.

As an initial matter, it is critical to make a point about our use of the term “conservative.” In reference to corporate law, we refer to the basic theory of the for-profit firm that is most associated with legal and economic thinkers who are typically labeled as conservatives. Conservatism has a long lineage, and we do not attempt to argue that important figures who adhere to what we describe as the conservative theory of corporate law, such as Milton Friedman or Friedrich Hayek, are conservative in any particular sense.⁵ Rather, we make a non-controversial point, which is that the theory of the firm we describe as conservative corporate theory is that traditionally associated with thinkers on the political right, and that the political right embraces the term conservative as its own moniker. Likewise, when we describe the *Citizens United* majority as conservative, we do so based on our understanding that each of the Justices comprising the majority is commonly described in such terms and has a political background consistent with that ascription. We do not enter any argument about whether the

unwisely we may think a political branch has acted.” (citations omitted)); *PDK Labs., Inc. v. Drug Enforcement Admin.*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment) (“[T]he cardinal principle of judicial restraint — if it is not necessary to decide more, it is necessary not to decide more — counsels us to go no further”).

⁵ For example, we are not concerned about whether any of them would be described as a Burkean conservative, as opposed to a libertarian conservative, a social conservative, or any other kind of conservative.

majority's individual approaches to jurisprudence would qualify as conservative in some normative sense. Rather, we simply observe the reality that the *Citizens United* majority was comprised of Justices who are associated with the political right and regarded as conservative in the colloquial sense.

In Part I, we discuss this modern conservative notion of the corporation. Under the conservative view embraced by conservative icons like Friedrich Hayek, Milton Friedman, and Frank Easterbrook, for-profit corporations should be governed with one end in mind, the generation of the most profit for their stockholders. Because stockholders entrust their capital to for-profit corporations to make money and not as an expression of their moral values, conservative corporate law regards boards of directors as having no legitimate right to use the corporation's funds to pursue their idiosyncratic vision of the social good. Moreover, because it is difficult, and often irrational, for stockholders to use their rights to hold corporate managers accountable even for the limited goal of profit creation, conservative corporate theory worries that allowing managers to justify their actions by reference to diverse ends will result in them being effectively unaccountable for achieving any of them. For these reasons, conservative corporate theory argues that corporate managers must have only one end in mind when they make decisions: profit. This does not mean that other interests cannot be considered, but it does mean that those interests can only be considered instrumentally in terms of their utility to producing the most profit for stockholders.

Conservative corporate theory is not blind to the argument that a corporate focus on profit maximization as the sole goal will result in callous behavior. But conservative

corporate theorists note that, in many situations, paying employees more or being a responsible “corporate citizen” by supporting charitable institutions in communities where the corporation operates are sound instruments to producing the most profits over the long term. Even more important, conservative corporate theorists note that other constituencies affected by corporate behavior — workers, neighbors, customers, communities, and those affected by the corporation’s impact on the environment — are protected by societal regulation. Conservative corporate theory acknowledges that corporations have a rational incentive to try to externalize the costs of their conduct to society (e.g., by taking environmental short cuts), while internalizing the resulting excess profits reaped from those short cuts. The answer of conservative corporate theory is that the duty of corporate managers to pursue profit is checked by their duty to do so within the “rules of the game” — the laws and regulations enacted by legislators, who represent not corporations but society as a whole.

Conservative corporate theory’s major historical rival is a view that regards the for-profit corporation as a distinct legal entity formed by statutory authorization of the chartering government and granted special legal privileges. Because the for-profit corporation is a legal entity distinct from its stockholders or any other particular corporate constituency, the board is entitled (and, in stronger forms of this rival theory, required) to govern the corporation in a manner that considers the best interests of all constituencies affected by the corporation’s conduct, including its workers, its customers, the communities in which it operates, and society generally. Because all these

constituencies are important to corporate success, the managers may give these interests weight as ends, not just as a means to stockholder wealth maximization.

This rival to the conservative theory of the corporation has long argued that external regulation is an insufficient protection for society and corporate constituencies such as employees and consumers. Its proponents argue that these interests must be given priority within corporate law itself, and that corporate law should empower corporate managers to conduct the affairs of the corporation in a manner that gives weight to the best interests of the corporation's employees, consumers, the communities it affects, and society as a whole. For-profit corporations, in this view, are too powerful and have been accorded too many rights similar to those given to actual humans for them not to behave in a socially responsible manner that reflects the full range of concerns that actual humans consider important, concerns that go beyond a desire for lucre.

In Part II, we discuss the *Citizens United* decision and the McCain-Feingold Act, which *Citizens United* invalidated in part. Under *Citizens United*, corporations have the constitutional right to spend unlimited amounts of corporate funds to influence the outcome of elections by expressly advocating the election or defeat of particular political candidates. This right is not dependent on the corporation securing from its individual stockholders their specific assent to having corporate funds used in this manner. Rather, the corporation itself has a constitutional right to speak in this manner as a distinct "person," and its managers are the ones who, under traditional principles of corporate law, make spending decisions.

In Part III, we illustrate how certain assumptions of *Citizens United* about corporations and their investors are inconsistent with conservative corporate theory. *Citizens United* rests on the notion that stockholders in corporations are well positioned to exercise influence over corporate political spending decisions and that corporate political spending will therefore be a legitimate reflection of stockholder sentiment. But conservative corporate law theory is founded in important part on the premise that stockholders are poorly positioned to monitor corporate managers even for their fidelity to a profit maximization goal. Indeed, conservative corporate law theory teaches that it is often irrational for stockholders to exercise voice over even profit-related issues, much less to influence a particular corporation's approach to political spending. Conservative corporate law theory has long been concerned that corporate managers lack legitimacy to act for any end other than profit, because stockholders of for-profit corporations typically invest solely for profit, have diverse political and moral views that corporate managers have no legitimacy or effective capacity to reconcile, and cannot be fairly said to have authorized corporate managers to use corporate funds to speak on their behalf as to debatable issues of social policy.

Part IV enriches this discussion by introducing a reality that the *Citizens United* decision seemed to elide, which is that most of the stock of the wealthiest corporations in our society is not owned directly by human beings. Because of the "separation of

ownership from ownership,”⁶ most corporate stock is owned by intermediate institutions — which are often business entities themselves — on behalf of the human beings whose money is ultimately at stake. Increasingly, Americans are required as a practical matter to save for retirement by putting aside much of their wealth in eligible investments under their employer’s tax-advantaged 401(k) plan. Typically, such plans give the investors a choice of funds from a few mutual fund companies, and do not allow investors to pick and choose individual stocks. This wealth is effectively impounded in mutual funds until the individual investors reach retirement age. If Americans attempt to take this wealth out before then, they face expropriation of a majority of the proceeds, and if they don’t take advantage of § 401(k), they will likely not be able to fund a secure retirement, owing to the decline in defined benefit plans and the difficulty of funding a retirement with investments of post-tax income dollars.

As a result, end-user human investors are in fact more distant from the public corporations that have their capital than ever. To have a say over whether their dollars are being used by Exxon Mobil, Apple, Starbucks, etc. to support the election of candidates they do not support, end-user investors have to fight through two layers of agency by, first, causing their mutual fund to take action, and then having that mutual fund rally support from other stockholders to constrain the corporation’s conduct.

Citizens United took little account of this reality, which is becoming more and more the

⁶ Leo E. Strine, Jr., *Toward Common Sense and Common Ground? Reflections on the Shared Interests of Managers and Labor in a More Rational System of Corporate Governance*, 33 J. CORP. L. 1, 6-7 (2007).

model of stock ownership.⁷ As it is, institutional investors already employ proxy advisory firms to help them deal with an ever-growing number of votes each year. The idea that a mutual fund that invests on a broad indexed basis or funds like the Vanguard Dividend Growth Fund will be legitimately positioned to provide effective oversight over corporate political spending or find it rational to try is strained. Indeed, prominent mutual fund complexes like Vanguard and Fidelity do not see it as their job to even vote on social proposals put forward by stockholders and thus typically abstain. Moreover, conservative corporate theory would regard the use of investor resources for this purpose to be wasteful and detrimental to the core purpose of sound wealth creation.

Interestingly, conservative jurists in the past have found it a violation of First Amendment rights for the government to put human Americans in a situation where their wealth is required to be given to others who might, without their choice, use it to make political expenditures.⁸ As will be explained, in *Abood v. Detroit Board of Education*, the Supreme Court, speaking through Republican Justice Stewart, held that union employees could not be required to pay union dues that would be used for ideological purposes that were unrelated to the collective bargaining process.⁹ Under this reasoning, there is an argument that the structure of federal retirement incentives set up by § 401(k)

⁷ The dissent spotted it, by contrast. *Citizens United v. FEC*, 550 U.S. 310, 477 (2010) (Stevens, J., dissenting) (“Most American households that own stock do so through intermediaries such as mutual funds and pension plans, which makes it more difficult both to monitor and to alter particular holdings.” (citation omitted)).

⁸ In a recent article, Professor Fisk and Dean Chemerinsky have traced the path of the Supreme Court’s jurisprudence on associational speech and highlighted the Court’s inconsistent treatment of corporations and unions, on which we focus in the latter part of this article. Catherine L. Fisk & Erwin Chemerinsky, *Political Speech and Association Rights After Knox v. SEIU*, Local 1000, 98 CORNELL L. REV. 1023 (2013).

⁹ 431 U.S. 209 (1977).

of the tax code is unconstitutional, because it, as a matter of effective mandate, forces Americans to turn over their wealth to institutions that are permitted to use it for expressive purposes that they do not support. *Abood* arguably calls for an end to any political spending by corporations that accept investments from mutual funds unless that spending is authorized not just by the funds, but through pass-through voting by individual end-user investors. As a practical matter, the reality is that it is now easier to find employment with a non-union employer than to avoid having most of one's savings entrusted to mutual funds and through them, to the stock market, for generations. There is no escaping from § 401(k) without paying expropriatory levels of taxation or underfunding one's retirement. And it is difficult to save for children's college educations without facing the same problem.

In Part V, we identify the most fundamental problem that *Citizens United* poses for conservative corporate theory: it undermines conservative corporate theory's reliance upon the regulatory process as an adequate safeguard against corporate overreaching for non-stockholder constituencies and society generally. But that reliance on societal regulation as an answer to externality risk grew up against a backdrop where it was recognized that corporations were appropriately limited in their conduct by the governments which granted them the important concessions that come with the corporate form. After *Citizens United*, the very success of the corporate form as a wealth-generating tool is in tension with conservative corporate theory because if the wealth impounded in corporations can be used in unlimited amounts to influence who is elected to the offices that determine the "rules of the game," the range of policy options is likely

to move in a direction where there is greater danger of externality risk. Because, under conservative corporate theory, corporate managers can only make political expenditures as an instrument toward the end of profit maximization, those expenditures would likely to be made in aid of electing candidates solely for the reason that these candidates would embrace the regulatory policies that the corporation finds most favorable. Conservative economic thought would accept the mundane notion that corporations seeking to maximize returns solely to stockholders, which stand to gain more for their stockholders if they can externalize costs, will tend to support a reduction in regulation designed to minimize externality risk to society and designed to protect constituencies other than stockholders. After all, conservative corporate law theory is grounded precisely on the reality that for-profit corporations are distinctly different from the flesh-and-blood humans whose equity capital they ultimate control. These flesh-and-blood humans often have diverse concerns — relatives with medical conditions, a love for the environment, beliefs about helping the poor, views about social issues like abortion or national security — that lead them to vote for political candidates for reasons other than the prospect that the candidate will vote for the policies most likely to increase their household wealth. Conservative corporate law theory posits that corporate managers are not elected by stockholders to act on values like these — especially because stockholders are likely to have diverse and irreconcilable thoughts on these subjects — but to embrace a singular goal that all stockholders presumably agree upon, which is that the corporation should

increase its profits for their benefit. These stockholders can then use the resulting wealth as they wish to express their own values in a legitimate, direct way.

Citizens United puts great stress on this model. If corporate managers follow conservative corporate theory, they will tend to make political expenditures to elect candidates supportive of lax regulation. Precisely because actual human investors are also consumers, employees, and breathers of the air, this singular focus is inconsistent with the full range of values that would influence their own electoral preferences. And if corporate managers respond to this concern by attempting to make political expenditures that somehow take into account the full range of concerns held by diverse human voters, they will be acting in a manner that conservative corporate theory has long seen as illegitimate.

Part VI addresses the extent to which the bipartisan McCain-Feingold bill and pre-*Citizens United* precedent, while having the imperfections inherent in any human product, took into account the realities of the actual corporate governance system we have in a manner that did not place stress on conservative corporate theory. In prior decisions, the Supreme Court had adroitly protected the ability of individuals to use nonprofit corporations as an aggregating tool for effective speech on their collective behalf, and had restricted statutory limitations on corporate political spending largely to for-profit corporations.¹⁰ And under McCain-Feingold and prior statutory law, even for-

¹⁰ See *FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449 (2007) (Section 203(b) of the McCain-Feingold Act, which makes it a crime for a corporation to broadcast shortly before an election a communication naming a candidate and targeted to the electorate, was unconstitutional as applied to a nonprofit, nonstock corporation organized for advocacy purposes); *Austin v. Mich.*

profit corporations were not inhibited from using corporate funds to employ lobbyists to advance the corporation's views.¹¹ Nor were for-profit corporations barred entirely from influencing the election process directly. McCain-Feingold left corporations able to form political action committees ("PACs") by raising funds through voluntary contributions from their stockholders and employees.¹² These PACs could make both direct contributions to political candidates within statutory limits and engage in unlimited spending to make electioneering communications. But these expenditures could not come from the corporate treasury itself, but only from the resources raised by the PAC from contributors fully on notice that the PAC would engage in expenditures of those kinds. Thus, McCain-Feingold fit nicely with conservative corporate law theory regarding for-profit firms. By preventing unlimited use of the corporate treasury to directly influence the election process, McCain-Feingold addressed in a proportionate manner the concern that managers solely charged with focusing on profit would have too much ability to use corporate wealth to unfairly tilt the regulatory policymaking process in a manner that would be unfair to other corporate constituencies and society as a whole.

Chamber of Commerce, 494 U.S. 652 (1990) (upholding the constitutionality of the Michigan Campaign Finance Act, which prohibited corporations from making independent expenditures out of their treasuries, and ruling that the act could be applied to a nonprofit corporation that served as a mouthpiece for for-profit corporations); *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 263-64 (1986) (Section 441(b) of the Federal Election Campaign Act, which prohibited corporations from making expenditures out of their treasuries "in connection with" a federal election, could *not* be applied to a nonprofit, nonstock corporation organized for advocacy purposes, because the "concern that organizations that amass great wealth in the economic marketplace not gain unfair advantage in the political marketplace" did not apply to them).

¹¹ See generally Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 STAN. L. REV. 191 (2012).

¹² 2 U.S.C. § 441b(b)(2) (2012) (defining "contribution" to exclude contributions to "separate segregated funds" established by corporations, i.e. PACs); see also 11 C.F.R. § 114.2 (2013) (setting out regulations for contributions by corporations, and by and to their PACs).

By providing a means for corporations to raise funds in a voluntary manner through PACs, McCain-Feingold enabled corporations to rally the expressive concerns of those stockholders who specifically desired that their funds be used in that way, while respecting the traditional conservative corporate theory view that it is illegitimate for corporate managers to use the entrusted equity of diverse stockholders for their idiosyncratic views of the common good. Notably, these means reflected the values undergirding the Supreme Court's decision in *Abood* and its related cases of regarding respect for the expressive rights of workers who did *not* want their wealth used by their union for political purposes. As a matter of economic reality, moreover, McCain-Feingold did not leave corporations outgunned by other societal interests. Precisely because the corporate form is such a powerful tool for wealth creation and impounds much of the wealth of individuals, for-profit corporations hold and control far more wealth than individuals and the representatives of other corporate constituencies. Even before *Citizens United*, this reality meant that corporate interests spent far more on lobbying and political activity than labor unions, environmental groups, and others.

Part VII concludes by noting that *Citizens United* further imbalanced this dynamic by allowing for the unlimited use of the for-profit corporate treasury to influence the electoral process directly. As a result, *Citizens United* can be rationally understood as buttressing conservative corporate law theory's primary rival.¹³ Under that very different

¹³ The more recent case of *Burwell v. Hobby Lobby Stores, Inc.*, No. 13-354, **Error! Main Document Only.** 573 U.S. — (2014), bears out this understanding. There, the same conservative five-Justice majority that decided *Citizens United* held explicitly that profit is *not* the sole end of corporate governance:

rival theory, corporate managers not only may, but are required to, consider the best interests of all those affected by the corporation's conduct when exercising their power. As those of this school argue, by making clear that the for-profit corporation is a citizen like any other, *Citizens United* logically supports the proposition that a corporation's governing board must be free to think like any other citizen and put a value on things like the quality of the environment, the elimination of poverty, the alleviation of suffering among the ill, and other values that animate actual human beings. Otherwise, a creation of human legislators — the for-profit corporation — may become a ruthless Leviathan that is a danger to the society that gave it life.¹⁴ Having failed to address the practical differences between human beings and corporations and invested for-profit corporations with full human rights, *Citizens United* has, these rival corporate theorists would say, made plain that making profit the sole end of corporate governance is an irresponsible and pernicious public policy. Otherwise, they would contend, the values that the end user

Some lower court judges have suggested that . . . the purpose of [for-profit] corporations is simply to make money. This argument flies in the face of modern corporate law. Each American jurisdiction today either expressly or by implication authorizes corporations to be formed under its general corporation act for *any lawful purpose* or business. While it is certainly true that a central objective of for-profit corporations is to make money, modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so.

Hobby Lobby, No. 13-354, slip op. at 22–23 (internal quotation marks and citation omitted).

As we discuss in Part I below, conservative corporate legal theory rejects this view. The *Hobby Lobby* case thus confirms that the view of corporate law held by the five Justices making up the *Citizens United* majority is at odds with traditional conservative thought.

¹⁴ The term Leviathan is apt. Theodore Levitt, a conservative, also described the corporation that spends stockholders' money on social responsibility as a "leviathan." Theodore Levitt, *The Dangers of Social Responsibility*, 36 HARV. BUS. REV. 41 (Sept.-Oct. 1958).

investors whose capital is ultimately at stake may be compromised by corporate managers using their wealth in the blinkered, soulless manner of the pre-reform Scrooge.

I. Conservative Corporate Law Theory

A. The Stockholder Wealth Maximization Norm

It is hardly adventurous to assert that the predominant conservative theory of the for-profit corporation is one that embraces the view that the managers of for-profit corporations must govern the corporation with only one end in mind: the best interests of their stockholders. Prominent conservatives who have embraced this view include Friedrich Hayek,¹⁵ Milton Friedman,¹⁶ Kenneth Arrow,¹⁷ Frank Easterbrook,¹⁸ and

¹⁵ 3 FRIEDRICH A. HAYEK, *LAW, LEGISLATION AND LIBERTY: THE POLITICAL ORDER OF A FREE PEOPLE* 82 (1979). Hayek feared that management would become accountable to the government:

So long as the management has the one overriding duty of administering the resources under its control as trustees for the shareholders and for their benefit, its hands are largely tied; and it will have no arbitrary power to benefit this or that particular interest. But once the management of a big enterprise is regarded as not only entitled but even obliged to consider in its decisions whatever is regarded as the public or social interest, or to support good causes or generally to act for the public benefit, it gains indeed an uncontrollable power — a power which could not long be left in the hands of private managers but which would inevitably be made the subject of increasing public control.

Id.

¹⁶ MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 133-36 (1962) [hereinafter FRIEDMAN, *CAPITALISM*]; Milton Friedman, *The Social Responsibility of Business Is To Increase Its Profits*, *N.Y. TIMES MAG.*, Sept. 17, 1970, at 5 [hereinafter Friedman, *Social Responsibility*].

¹⁷ Kenneth J. Arrow, *Social Responsibility and Economic Efficiency*, 21 *PUB. POL'Y* 303 (1973), reprinted in 6 *COLLECTED PAPERS OF KENNETH J. ARROW: APPLIED ECONOMICS* 130 (2d ed., 1985). Arrow writes that “[u]nder the proper assumptions profit maximization is indeed efficient in the sense that it can achieve as high a level of satisfaction for any one consumer without reducing the levels of satisfaction of other consumers or using more resources than society is endowed with.” *Id.* at 132. These include that the profit-maximizing firms are not natural monopolies, that corporations pay for all the costs they cause, and that consumers are informed about the safety of corporations’ products.

¹⁸ *E.g.*, FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 15-22 (1991) (arguing that stockholders have implicitly contracted for a promise that firm will maximize profits in long run).

Richard Posner,¹⁹ and also include many other respected conservative economists and corporate law scholars, including Henry Manne,²⁰ Michael Jensen,²¹ Henry Butler,²² and Stephen Bainbridge.²³

For many reasons, conservative corporate law theory believes it is socially and morally optimal that corporate managers make decisions solely based on what will produce the most profits for stockholders. Under this theory, that does not mean that corporate managers cannot think long-term and must pursue the action that will generate the most short-term profit, if that would impair the corporation's ultimate ability to generate the highest returns for stockholders.²⁴ Under this theory, that does not mean that corporate managers cannot consider other constituencies and interests affected by the

¹⁹ RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW*, 572-73 (8th ed. 2010).

²⁰ HENRY G. MANNE & HENRY C. WALLICH, *THE MODERN CORPORATION AND SOCIAL RESPONSIBILITY* (1972).

²¹ Michael C. Jensen, *Value Maximization, Stakeholder Theory, and the Corporate Objective Function*, 7 *EUR. FIN. MGMT.* 297, 302 (2001).

²² E.g., Henry N. Butler & Fred S. McChesney, *Why They Give at the Office: Shareholder Welfare and Corporate Philanthropy in the Contractual Theory of the Corporation*, 84 *CORNELL L. REV.* 1195, 1223-24 (1999) (stockholders have a "contractual expectation" to the residual cash flows from a corporation, and managers who engage in philanthropy not motivated by profits "are giving away the shareholders' money").

²³ STEPHEN M. BAINBRIDGE, *CORPORATION LAW AND ECONOMICS* 410 (2002) ("[L]ong-run shareholder wealth maximization is the only proper end of corporate governance."); Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 *NW. U. L. REV.* 547, 574 (2003) (the "director primacy" means of corporate governance encompasses the stockholder wealth maximization end as a norm); see also ROBERT CHARLES CLARK, *CORPORATE LAW* 678 (1986) (the "traditional" view of corporate governance is one by which corporations will attempt to maximize stockholder profits); MARK J. ROE, *POLITICAL DETERMINANTS OF CORPORATE GOVERNANCE* (2003) (stockholder wealth maximization is the end American corporate law typically accepts); Jonathan R. Macey, *Externalities, Firm-Specific Capital Investments, and the Legal Treatment of Fundamental Corporate Changes*, 1989 *DUKE L.J.* 173, 185 ("[M]anagers have an overarching duty to maximize their firm's value for shareholders."); Roberta Romano, *The Political Economy of Takeover Statutes*, 73 *VA. L. REV.* 111, 113 (1987) (core goal of corporate law is maximizing share prices).

²⁴ See William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 *CARDOZO L. REV.* 261, 272-73 (1992).

corporation's conduct — such as employees, customers, communities in which it operates, and society generally — but it does mean that they can only do so when that is instrumental to profit generation.²⁵ Put simply, conservative corporate theory embraces the notion that seeking profit for the stockholders is the only proper end.

The historical rival for this viewpoint has been that corporations are artificial entities authorized by government itself and granted special privileges, and not because the government viewed them solely as a method to advance the interests of their investors.²⁶ Rather, state governments authorized corporations to have a distinct legal identity from their stockholders and any particular constituency, and corporations were chartered to facilitate diverse social goals.²⁷ In this view, the for-profit corporation is seen as “an economic institution which has a social service as well as a profit-making function.”²⁸ Although the law may give stockholders certain rights not given to other constituencies, corporate directors while in office may exercise their disinterested discretion (in the narrow sense of not financially lining their own pockets) in a manner that does not put stockholders above other corporate constituencies, but that considers the best interests of those constituencies as a proper end of corporate governance. Unless this is the case, corporations, adherents to this theory argue, will pose an excess

²⁵ *Id.*

²⁶ See, e.g., Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Law Theory*, 88 W. VA. L. REV. 173, 181 (1985); David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 205-212 (1990).

²⁷ Horwitz, *supra* note 26, at 181; Millon, *supra* note 26, at 207.

²⁸ E. Merrick Dodd, *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1148 (1932); see generally Allen, *supra* note 24, at 265 (1992) (discussing this long-standing conception of for-profit corporate governance, which emphasizes the broader social purposes served by corporations).

externality risk to society because their singular focus on profits will be likely to induce them to take short-cuts that could result in harm to others through product defects, environmental spoilage, and firm failures, that hurt not only stockholders, but employees, creditors, and all who breathe the air and pay taxes.²⁹

Furthermore, this theory argues that even stockholders are likely to make more profits if the interests of other corporate constituencies important to value creation, such as employees, creditors, suppliers, customers, and even government³⁰ are respected, because that will encourage those constituencies to make firm specific investments that raise firm value and thus aid stockholders, too. In stronger conceptions, corporate managers may not only do this but are seen as owing just as great a duty of loyalty to all corporate constituencies as they do to stockholders. Although we personally are loath to describe corporate law theories in ideological terms that translate directly into where adherents lie on the political spectrum, it is fair to say that the strongest form of this rival theory to conservative corporate theory — the so-called social responsibility movement

²⁹ See, e.g., KENT GREENFIELD, *THE FAILURE OF CORPORATE LAW* 127-30 (2007) (corporations should serve “society as a whole”); Barnali Choudhury, *Serving Two Masters: Incorporating Social Responsibility into the Corporate Paradigm*, 11 U. PA. BUS. L.J. 631, 655 (2009) (“[E]ven if a corporation’s purpose is not to pursue the maximization of aggregate social welfare, it should refrain from actions that negatively impact social welfare”); Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 738-39 (2005) (law cannot optimally regulate corporate conduct, and managers need discretion to act in the public interest to correct this deficiency).

³⁰ Government often provides important subsidies to the private sector, through tax breaks, direct capital investments in supportive infrastructure, technology sharing, and market opening. See, e.g., Lynn A. Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189, 1197-98 (2002) (governments frequently support businesses through tax breaks and financing).

— is embraced more by scholars of the political left.³¹ Moreover, as the current debate stands, even the weaker form of this rival theory — which simply argues that corporate managers have discretion to balance the interests of corporate constituencies — has more currency among thinkers whose everyday politics seem more left-of-center.³²

A torrent of prose is still being generated by these contesting schools of thought.³³ For present purposes, though, a mundane proposition is all that is important, which is that the predominant conservative theory of the corporation is one that asserts that the sole legitimate goal of the for-profit corporation is maximizing profits for the benefit of stockholders.³⁴

³¹ See, e.g., JOHN KENNETH GALBRAITH, *THE NEW INDUSTRIAL STATE* 116-35 (4th ed. 1985) (arguing against the profit maximization norm); GREENFIELD, *supra* note 29; MANNE & WALLICH, *supra* note 20, at 37, 71 (views of Henry Wallich); Ralph Nader, *The Case for Federal Chartering*, in *CORPORATE POWER IN AMERICA* 90 (Ralph Nader & Mark J. Green eds., 1977); Margaret A. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999); David Millon, *Communitarians, Contractarians, and the Crisis in Corporate Law*, 50 WASH. & LEE L. REV. 1373 (1993); Lawrence E. Mitchell, *A Critical Look at Corporate Governance*, 45 VAND. L. REV. 1263 (1992); Wendy E. Wagner, *Imagining Corporate Sustainability as a Public Good Rather than a Corporate Bad*, 46 WAKE FOREST L. REV. 561 (2011); Steven M.H. Wallman, *The Proper Interpretation of Corporate Constituency Statutes and Formulation of Director Duties*, 21 STETSON L. REV. 163 (1991).

³² Blair & Stout, *supra* note 31, at 304; Martin Lipton, *Takeover Bids in the Target's Boardroom*, 35 BUS. LAW. 101, 112-24 (1979); Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579, 629-30 (1992).

³³ See, e.g., COLIN MAYER, *FIRM COMMITMENT: WHY THE CORPORATION IS FAILING US AND HOW TO RESTORE FAITH IN IT* (2013); LYNN STOUT, *THE SHAREHOLDER VALUE MYTH* (2013); Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833 (2005) [hereinafter Bebchuk, *Shareholder Power*]; Lucian Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675 (2007) [hereinafter Bebchuk, *Shareholder Franchise*]; Martin Lipton & William Savitt, *The Many Myths of Lucian Bebchuk*, 93 VA. L. REV. 733 (2007).

³⁴ Conservative corporate theory's embrace of the idea that corporate directors must, within their legal ability to do so, act for the end of generating profits is not universally shared. The state where the most public corporations are incorporated, Delaware, does embrace that idea, albeit in a form that gives managers broad discretion to determine the means by which stockholder wealth is to be advanced. Although some scholars disagree, the case of *Revlon* as a practical matter

It is also important to highlight several of the key reasons why conservative corporate theory contends that singular focus is optimal, as a moral and practical matter, and as a matter of social welfare. We also underscore the stress that conservative corporate theory places on the political process and resulting regulation of for-profit corporations as the safeguard that ensures that focusing corporate governance solely on profit maximization will not injure other corporate constituencies or interests affected by corporate conduct.

B. Conservative Corporate Theory Believes Corporate Managers Have No Legitimate Right To Use Corporate Funds For Ends Other Than Stockholder Profit

Conservative corporate theorists view corporate managers as having no legitimate right to use corporate funds for an end other than ultimate stockholder profit. The reasons why are easy to understand and have considerable historical and logical support.

settled the question in Delaware, by making clear that other corporate constituencies may only be considered instrumentally in terms of their relationship to creating profits for stockholders. *See Revlon, Inc. v. MacAndrews & Forbes Hldgs., Inc.*, 506 A.2d 173, 182 (Del. 1986) (a board may consider the interests of nonstockholder constituencies, but there must always be “rationally related benefits accruing to the stockholders.”). Other decisions make this plain. *E.g.*, *N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla*, 930 A.2d 92, 101 (Del. 2007); *In re Trados Inc. S’holder Litig.*, 73 A.3d 17, 40-41 (Del. Ch. 2013); *eBay Domestic Hldgs., Inc. v. Newmark*, 16 A.3d 1, 33 (Del. Ch. 2010); William T. Allen, *Ambiguity in Corporation Law*, 22 DEL. J. CORP. L. 894, 896-97 (1997) (“[T]he proper orientation of corporation law is the protection of long-term value of capital committed indefinitely to the firm.”).

That said, a majority of American states have statutes corporate boards to consider constituencies and interests other than the stockholders as ends, not means. *See* Jonathan D. Springer, *Corporate Constituency Statutes: Hollow Hopes and False Fears*, 1999 ANN. SURV. AM. L. 85 (1999). None of these statutes allows other constituencies to have a role in electing the board and it is not clear that other constituencies have received greater protection as a result of their enactment. *See* John W. Cioffi, *Fiduciaries, Federalization, and Finance Capitalism: Berle’s Ambiguous Legacy and the Collapse of Countervailing Power*, 34 SEATTLE U. L. REV. 1081, 1112 (2011); Joseph William Singer, *Jobs and Justice: Rethinking the Stakeholder Debate*, 43 U. TORONTO L.J. 475, 503 (1993); Gary von Stange, *Corporate Social Responsibility Through Constituency Statutes: Legend or Lie?*, 11 HOFSTRA LAB. & EMP. L.J. 461, 483 (1994).

For starters, conservative corporate theory takes the practical view that stockholders invest in for-profit corporations not as an expression of their social values or moral beliefs, but to make money.³⁵ Had stockholders wished to feed the poor, subsidize a hospital, or help a local art museum, they could have done so directly. But they invested in a for-profit widget, chip, software, tire, etc. company. Can a rational inference be drawn that by making such an investment, the stockholders were making a choice to have the board act as a United Way on their behalf? And if they wanted their money used that way by a disinterested body, wouldn't they have chosen the United Way, Salvation Army, Catholic Charities, a foundation or some other similar vehicle to which to donate?

As conservative corporate theory notes, if the managers of a for-profit corporation focus on profits, they will generate wealth for their stockholders that those stockholders can determine how to use. That wealth can then be directly applied by the stockholders to causes they choose for themselves.³⁶ Because those causes will be chosen for them, their money will not be used for purposes they do not embrace.³⁷ This is an important moral and practical point for conservative corporate theory. That theory recognizes that the only thing that is common to all stockholders who hold a pure long position in the corporation should be a desire to see the corporation increase its profits and stock price.³⁸

³⁵ EASTERBROOK & FISCHER, *supra* note 18, at 36-37; Friedman, *Social Responsibility*, *supra* note 16, at 5; Levitt, *supra* note 14.

³⁶ See, e.g., FRIEDMAN, *CAPITALISM*, *supra* note 16, at 135.

³⁷ See POSNER, *supra* note 19, at 575.

³⁸ See, e.g., EASTERBROOK & FISCHER, *supra* note 18, at 70 (“[W]hen voters hold dissimilar preferences it is not possible to aggregate their preferences into a consistent system of choices. . . . [S]ingle objective firms are likely to prosper relative to others. This suggests . . . why the law makes no effort to require firms to adhere to any objective other than profit maximization (as constrained by particular legal rules).”); POSNER, *supra* note 19, at 556-57 (“The typical

Even on that level, stockholders may have different investment horizons and objectives, but they do share a basic objective in having firm value increase if that can be done in a sensible, durable way.³⁹ But when the corporation begins to pursue as an end other values, there is no rational reason to believe that the stockholders are of one mind on those issues, and much less that they invested to have the board of directors choose one perspective on the matter to pursue with the corporation's funds.⁴⁰

C. Conservative Corporate Theory Views The Realities Of The
Stockholder–Manager Relationship As Supporting Constraints On
Managers To Focus Solely On Stockholder Welfare As An End

Conservative corporate theory also grounds its focus on stockholder wealth maximization on the practical realities of the relationship between managers and stockholders. Even before the emergence of public corporations with widely diverse stockholder bases, there was a concern that the legal rights granted to stockholders left them vulnerable to corporate managers. Because corporate managers were on the job full time and had access to inside information, they were in a comparatively stronger

shareholder . . . has only a casual . . . relationship with the firm. His interest, like that of a creditor, is a financial rather than managerial interest.”); Butler & McChesney, *supra* note 22, at 1224-25 (“[S]hareholders may have very different views on what is good for society. Even if they do not, there is no reason to channel non-profit-maximizing charity through the firm. The firm has no advantage — in greater benefits or lower costs — in making donations that profit-maximization does not justify.”); *see also* Daniel J.H. Greenwood, *Essential Speech: Why Corporate Speech Is Not Free*, 83 IOWA L. REV. 995, 1004 (1998) (“Both the law and the market force corporate actors to run the corporation on behalf of the interest of fictional shareholders [as] a useful simplification Fictional shareholders, thus, will sacrifice almost anything in the interests of higher profit . . . ; in contrast, the citizens behind the fiction can be expected to have far more diverse and conflicted opinions on these important political struggles.”).

³⁹ Levitt, *supra* note 14, at 44, 49.

⁴⁰ *See, e.g.*, EASTERBROOK & FISCHER, *supra* note 18, at 32.

position.⁴¹ Moreover, minority stockholders who attempted to protect themselves by exercising their legal rights would bear most of the costs of that use of legal rights while sharing the benefits with other investors, and thus it was more rational for them to be passive.⁴² When corporations began to grow larger and have diverse stockholder bases, Adolf Berle famously focused on the growing separation between the ownership and control of corporations, with the stock being increasingly owned by diverse stockholders with small stakes and control being invested in professional management.⁴³ As a matter of pure corporate law, Berle pointed out that the legal doctrines extant in the early twentieth century gave stockholders relatively weak protections against managerial misuse of its authority.⁴⁴ He feared that allowing corporate managers to justify their actions by reference to many possible ends — such as the best interests of other corporate

⁴¹ See Naomi Lamoreaux & Jean-Laurent Rosenthal, *Corporate Governance and the Plight of Minority Shareholders in the United States Before the Great Depression*, in CORRUPTION AND REFORM: LESSONS FROM AMERICA'S ECONOMIC HISTORY 126-29 (Edward Glaeser & Claudia Goldin eds., 2006).

⁴² Henry N. Butler, *The Contractual Theory of the Corporation*, 11 GEO. MASON U.L. REV. 99, 107 n.20 (1989) (“Shareholders are characterized as rationally ignorant because of the large costs associated with staying informed about the corporation’s internal affairs and the very small expected benefits to the individual shareholder of being informed. After bearing the costs of becoming informed, such shareholders are unlikely to be able to influence the corporation’s policies and in any event they must share the benefits of intervention if they are successful.”); Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J.L. & ECON 395, 420 (1983) (“Because of the easy availability of the exit option through the stock market, the rational strategy for dissatisfied shareholders in most cases, given the collective action problem, is to disinvest rather than incur costs in attempting to bring about change through the voting process.”); see also Harold Demsetz, *The Structure of Ownership and the Theory of the Firm*, 26 J.L. & ECON. 375, 390 (1983) (shareholder passivity is profit-maximizing); Bernard S. Black, *Shareholder Passivity Reexamined*, 89 MICH. L. REV. 520, 526-28 (1990) (describing “[t]he modern, law-and-economics rendition of the passivity story”).

⁴³ ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 84-118 (1932) (describing the separation between ownership and control in the 200 largest American corporations).

⁴⁴ A.A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049 (1931).

constituencies — rather than by reference to whether their actions were in the best interests of stockholders, would leave them accountable to no one.⁴⁵ He thus argued that within the domain of fiduciary duty established by the equitable common law of corporations, corporate managers should be expected to focus solely on being faithful to the stockholders.⁴⁶

Although Berle was a complex figure who was a political liberal and influential New Dealer,⁴⁷ this aspect of his thinking continues to be a central component of conservative corporate theory. Building upon Berle's rich description of the comparative strength and weakness of managers and stockholders in the emerging economy that was heavily reliant on public corporations as the major driver of societal economic growth, conservative thinkers embraced the notion that corporations would be dangerously unaccountable if the managers were given broad discretion to pursue diverse ends.⁴⁸ Although not unaware that the business judgment rule might give managers a license to

⁴⁵ A.A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365, 1367 (1932).

⁴⁶ Berle, *supra* note 44, at 1049.

⁴⁷ See JORDAN A. SCHWARZ, LIBERAL: ADOLF A. BERLE AND THE VISION OF AN AMERICAN ERA 37-113 (1987); William W. Bratton & Michael L. Wachter, *Shareholder Primacy's Corporatist Origins: Adolf Berle and The Modern Corporation*, 34 J. CORP. L. 99 (2008); Dalia Tsuk, *From Pluralism to Individualism: Berle and Means and 20th-Century American Legal Thought*, 30 L. & SOC. INQUIRY 179, 182 (2005).

⁴⁸ E.g., Butler & McChesney, *supra* note 22, at 1225 (“Corporate managers have enough trouble meeting the challenges of maximizing shareholder value without diverting their attention to saving the world.”); Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161, 1191-92 (1981) (“a manager responsible to two conflicting interests is in fact answerable to neither”); Jonathan R. Macey, *An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties*, 21 STETSON L. REV. 23, 32 (1991) (“[T]he primary beneficiaries of nonshareholder constituency statutes are incumbent managers, who can justify virtually any decision they make on the grounds that it benefits some constituency of the firm.”).

cloak decisions in fact motivated by considerations other than stockholder profit as an instrument to that end and therefore entitled to judicial deference, conservative corporate theorists nonetheless thought that if that was so there was still utility — or even a more compelling necessity — to recognizing that stockholder wealth maximization was the only proper end of corporate governance.⁴⁹ By being clear about that singular end, at least the law would make pretense by managers easier to expose and check their ability to pursue idiosyncratic ends with corporate funds.

Economists and legal scholars, working within the emerging law and economics movement, added to the lexicon with terms such as agency costs (to reflect the potential that the managers on the control side of the ownership and control equation would extract “rents” at the expense of stockholders⁵⁰) and rational passivity (to describe why stockholders would rationally diversify and primarily use their right to exit their investments rather than their legal rights to vote and sue to protect themselves as investors), to explain why it was important to focus managers on the singular end of profit maximization.⁵¹

⁴⁹ See, e.g., BAINBRIDGE, *supra* note 23, at 422 (“Directors who are responsible to everyone are accountable to no one. . . . [T]he shareholder wealth maximization norm . . . provides a forceful reminder of where the director’s loyalty lies.”).

⁵⁰ Michael C. Jensen and William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976); see also POSNER, *supra* note 19, at 529-32.

⁵¹ EASTERBROOK & FISCHER, *supra* note 18, at 197, 286-90; MANNE & WALLICH, *supra* note 20, at 69 (rebuttal of Manne).

D. The Social Good: Business Should Focus On What It Does Best — Creating Wealth — And Leave The Protection Of Other Interests To The Political Process

The notion that corporations are devoted to making money leads to the question: What about the rest of society? Conservative corporate theory has two answers.

First and foremost, conservative corporate theory believes that for-profit corporations can and do benefit society generally by increasing societal wealth.⁵² If corporations are profitable, that will make their investors better off, and those investors can spend that wealth not only on their own families, but in buying goods and services, increasing demand and the potential for others to get jobs and become wealthier. Moreover, to make profits, corporations have an incentive to develop new products and services, which have the potential to increase the quality of life of consumers. To make and deliver such goods, corporations employ workers and buy

⁵² This theory was set out by EASTERBROOK & FISCHER, *supra* note 18, at 38:

[M]aximizing profits for equity investors assists the other “constituencies” automatically. . . . A successful firm provides jobs for workers and goods and services for consumers. The more appealing the goods to consumers, the more profit (and jobs). Prosperity for stockholders, workers, and communities goes [invisible] hand in glove with better products for consumers. Moreover, as stock ownership among workers and consumers has grown in recent decades — through pension and mutual funds — corporate profits are now being spread to a much larger percentage of the population, giving more people a direct stake in maximizing the size of the corporate pie.

See also WILLIAM T. ALLEN & REINIER KRAAKMAN, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION 287-8 (2003) (“[F]raming the board’s mission as maximizing shareholder welfare also serves to maximize the welfare of other corporate constituencies and society as a whole”); FRIEDMAN, CAPITALISM, *supra* note 16, at 133 (quoting ADAM SMITH, THE WEALTH OF NATIONS 421 (Edwin Cannan ed., London, 1950) (1776)); Ronald J. Gilson & Reinier Kraakman, *Delaware’s Intermediate Standard for Defensive Tactics: Is There Substance to Proportionality Review?*, 44 BUS. LAW. 247, 261 n.45 (1989) (“[M]aximizing gains to target shareholders serves the broader objectives of shareholder and social welfare.”); Mark J. Roe, *The Shareholder Wealth Maximization Norm and Industrial Organization*, 149 U. PA. L. REV. 2063, 2073 (2001) (it is a “norm” in business circles that wealth will flow from shareholders to the benefit of other constituencies).

products and services from other businesses. Indeed, because stockholders are entitled to get dividends and other payments only if the corporation is able to meet its obligations to its creditors,⁵³ conservative corporate theory regards it as optimal for everyone that corporations be governed to maximize stockholder wealth, as that best assures (under their theory) that legal claimants will have their claims satisfied.⁵⁴ On a less theoretical level, conservative corporate theory also accepts the notion that corporate managers are likely to be much better and more legitimately positioned to determine what decision will produce the most profit, than to determine what corporate policies are most likely to advance a diverse set of debatable social and moral objectives. As a practical matter, it is best that managers stick to the most obvious purpose of the for-profit corporation, which is generating profits, and leave to actual human beings the pursuit of noneconomic social ends.⁵⁵

Recognizing that this could be seen as callous and as leaving society at risk from overly avid corporate pursuit of profit, conservative corporate theory has a clear answer. Rather than deny that corporations focused on maximizing stockholder profits might have a rational incentive to externalize costs to other constituencies and society as a whole through unfair treatment of their workers, environmental short-cuts, and other methods that leave the corporation with higher profits by off-loading risks to others,

⁵³ *E.g.*, DEL. CODE ANN. tit. 8, § 170 (2013) (corporations can only pay dividends if they have a statutory surplus).

⁵⁴ *See* EASTERBROOK & FISCHER, *supra* note 18, at 38 (“[M]aximizing profits for equity investors assists the other ‘constituencies’ automatically”).

⁵⁵ *E.g.*, POSNER, *supra* note 19, at 572-74.

conservative corporate theory accepts that externality risk must be addressed.⁵⁶ But conservative corporate theory takes a clear-eyed view of the matter.

Instead of entrusting corporate managers whose ultimate right to office depends solely upon election by stockholders to protect other constituencies and society from externality risk, conservative corporate theory looks to the political process as the legitimate and sound form of protection.⁵⁷ Relatedly, conservative corporate theory argues that certain constituencies — creditors and workers for example — can protect themselves by contracting.⁵⁸ But, as labor movement trends arguably show, the utility of contracting might itself be influenced by regulatory policy.⁵⁹ Elected officials have the

⁵⁶ BAINBRIDGE, *supra* note 23, at 425 (“Corporate conduct doubtless generates negative externalities. In appropriate cases, such externalities should be constrained through general welfare legislation, tort litigation, and other forms of regulation.”); Friedman, *Social Responsibility*, *supra* note 16, at 4; Donald J. Kochan, *Corporate Social Responsibility in a Remedy-Seeking Society: A Public Choice Perspective*, 17 CHAPMAN L. REV. (forthcoming Jan. 2014) (“One of the most important constraints on wealth-maximization is that a corporation is duty-bound to comply with the law. As [Professor Robert] Clark explains, the view holds that ‘[p]rofits should be made as large as possible, with the [limited legitimate] constraints,’ which first and foremost includes compliance with the law.” (citing CLARK, *supra* note 23, at 678)).

⁵⁷ BAINBRIDGE, *supra* note 23, at 429 (“[T]he federal government has intervened to provide through general welfare legislation many . . . protections for [workers]. The Family & Medical Leave Act grants unpaid leave for medical and other family problems. The Occupational Safety & Health Administration (OSHA) mandates safe working conditions. Plant closing laws require notice of layoffs. Civil rights laws protect against discrimination of various sorts. And so on. Such targeted legislative approaches are a preferable solution to the externalities created by corporate conduct. General welfare laws designed to deter corporate conduct through criminal and civil sanctions imposed on the corporation, its directors, and its senior officers are more efficient than stakeholderist tweaking of director fiduciary duties.”); Macey, *supra* note 48, at 42 (“If actions of a firm are genuinely detrimental to a local community, . . . that community can appeal to their elected representatives in state and local government for redress.”); *see also* ARROW, *supra* n.17, at 130 (recognizing the reality of externalities and the need for regulation to address them if profit maximization is to be the efficient goal of governance).

⁵⁸ *See, e.g.*, William J. Carney, *Does Defining Constituencies Matter?*, 59 U. CIN. L. REV. 385, 393-94 (1990); Macey, *supra* note 48, at 26.

⁵⁹ Although the decline in private sector unionism has many causes, scholars have argued that the decline in NLRA enforcement during recent decades contributed to the sharper decline in unions

ability to put in place forms of external regulation to protect society as a whole.⁶⁰ This view has been most forcefully articulated by conservatives responding to the debate over corporate social responsibility. Corporate social responsibility can be defined as the voluntary pursuit by corporations organized for profit of “social ends where this pursuit conflicts with the presumptive shareholder desire to maximize profit.”⁶¹ Like the profit-maximizing norm, the debate over corporate social responsibility can be traced back to

in the United States in comparison to our economic allies. *See, e.g.,* Morris M. Kleiner, *Intensity of Management Resistance: Understanding the Decline of Unionization in the Private Sector*, 22 J. LAB. RES. 519, 534-35 (2001), available at <http://wwwwhhh.oit.umn.edu/people/mkleiner/pdf/unionization.pdf>; W. Craig Riddell, *Unionization in Canada and the United States: A Tale of Two Countries*; in SMALL DIFFERENCES THAT MATTER: LABOR MARKETS AND INCOME MAINTENANCE IN CANADA AND THE UNITED STATES 143 (David Card & Richard B. Freeman eds., 1993), available at <http://www.nber.org/chapters/c11147>; Claude Fischer, *Labor’s Laboring Effort*, BERKELEY BLOG (Sept. 9, 2010), <http://blogs.berkeley.edu/2010/09/09/labor%E2%80%99s-laboring-effort/>; Kris Warner, *The Real Reason for the Decline of American Unions*, BLOOMBERG (Jan. 23, 2013, 11:43 AM), <http://www.bloomberg.com/news/2013-01-23/the-real-reason-for-the-decline-of-american-unions.html>.

⁶⁰ Lyman P.Q. Johnson, *Corporate Takeovers and Corporations: Who Are They For?*, 43 WASH. & LEE L. REV. 781, 792 n.46 (1986) (“[S]pecific legislation [is] designed to protect from the effects of corporate behavior. For example, there is anti-trust and product safety legislation to protect consumers; legislation to protect the health and safety, right to collectively bargain, and pension benefits of employees; fraudulent conveyance laws and federal bankruptcy laws to protect creditors; and state and federal legislation to protect the environment.”); *see also* BAINBRIDGE *supra* note 23, at 425 (“Corporate conduct doubtless generates negative externalities. In appropriate cases, such externalities should be constrained through general welfare legislation, tort litigation, and other forms of regulation.”).

⁶¹ David L. Engel, *An Approach to Corporate Social Responsibility*, 32 STAN. L. REV. 1, 3 (1979). The proviso in the definition is important. As Lord Bowen said, “[C]harity has no business to sit at boards of directors *quâ* charity. There is, however, a kind of charitable dealing which is for the interest of those who practise it, and to that extent and in that garb . . . charity may sit at the board, but for no other purpose.” *Hutton v. W. Cork Ry. Co.*, [1883] 23 Ch. D. 654, 673 (Eng.). More graphically, “[t]he law does not say that there are to be no cakes and ale, but there are to be no cakes and ale except such as are required for the benefit of the company.” *Id.*

the exchange between Merrick Dodd and Adolf Berle.⁶² By the 1950s, Berle had conceded defeat, but other scholars had not.⁶³ Theodore Levitt wrote in the *Harvard Business Review* in 1958 that corporations should focus on making profits, and leave charitable and welfare programs to the government and other societal actors.⁶⁴ Levitt believed that corporations could only function effectively if they concentrated on profit, and in fact was so bold as to claim that the trouble with corporations was that they were “not narrowly profit-oriented *enough*.”⁶⁵ But, he also believed that corporations were unsuited to running a welfare state. The net result, for Levitt, was that corporations should unashamedly stick to making money, and government should regulate corporations and society to ensure that our society is fair. Business had “only two responsibilities — to obey the elementary canons of everyday face-to-face civility (honesty, good faith, and so on) and to seek material gain.”⁶⁶ Otherwise, the corporation would turn into the “twentieth-century equivalent of the medieval Church . . . ministering to the whole man and molding him and society in the image of the corporation’s narrow ambitions and essentially unsocial needs.”⁶⁷

⁶² See *supra* notes 28, 44-46; see generally C.A. Harwell Wells, *The Cycles of Corporate Social Responsibility: An Historical Perspective for the Twentieth Century*, 51 U. KAN. L. REV. 77 (2002).

⁶³ ADOLF A. BERLE, *THE TWENTIETH CENTURY CAPITALIST REVOLUTION* 169 (1954).

⁶⁴ Levitt, *supra* note 14.

⁶⁵ *Id.* at 44.

⁶⁶ *Id.* at 49.

⁶⁷ *Id.* at 44.

Levitt's view was famously amplified by Milton Friedman in 1970. Friedman argued that "[t]he social responsibility of business is to increase its profits":⁶⁸

In a free-enterprise, private-property system, a corporate executive is an employee of the owners of the business. He has direct responsibility to his employers. That responsibility is to conduct the business in accordance with their desires, which generally will be to make as much money as possible *while conforming to their basic rules of the society, both those embodied in law and those embodied in ethical custom.*⁶⁹

Friedman pointed out that stockholders elect directors to act as their agents, and, if the directors are to exercise a "social responsibility" rather than act in their principals' interests, they must spend the corporation's money in a manner other than the stockholders would have wanted. Friedman argued that when corporations engage in social responsibility, they are undertaking governmental functions that they are not qualified to undertake, and that, in any case, directors have no good idea how to discharge their social responsibility duties.⁷⁰

For-profit corporations should therefore stick to trying to make money within the "rules of the game" set by government. It was government's job to set those rules in the public interest and to put in place what regulatory standards were needed to protect those affected by corporate profit seeking. Through this more legitimate means along with the legal priority over equity as claimants to corporate assets in the event of shortfalls and the

⁶⁸ Friedman, *Social Responsibility*, *supra* note 16, at 5 (emphasis added); *see also* Bainbridge, *supra* note 23, at 564 ("Milton Friedman's famous essay [on] corporate responsibility remains the classic statement of the shareholder primacy model.").

⁶⁹ *Id.*

⁷⁰ *Id.*; *see also* FRIEDMAN, *CAPITALISM*, *supra* note 16, at 133-34; MANNE & WALLICH, *supra* note 20, at 30 (Manne: "[W]e have no definition of a social welfare function that is universally acceptable. This strongly suggests that any effort to maximize public good by private effort or otherwise is doomed to failure").

protections afforded by contract rights, other corporate constituencies were adequately protected. Everyone was better off by this divide, because it left corporations better positioned to do what they do best to improve social welfare — create wealth — while leaving protection of the public to institutions having more legitimacy to do so, because they owed their authority directly to a human electorate focused on the full range of human concerns.

II. Citizens United And Its Effect On Corporate Involvement In The Political Process

In 2002, Congress amended the Federal Election Campaign Act, the country’s consolidated election law governing campaign contributions and expenditures.⁷¹ The amendment came in the form of the Bipartisan Campaign Reform Act, better known as the McCain-Feingold Act (“McCain-Feingold”).⁷² Most importantly for the *Citizens United* case, Section 203 of McCain-Feingold prevented corporations and unions from spending money directly from their treasuries on any “electioneering communication,” which was defined as any broadcast that referred to a clearly identified federal candidate within 30 days of a primary or 60 days of a general election.⁷³ Even before McCain-Feingold, corporations and unions were not permitted to make direct contributions to candidates or independent expenditures that expressly advocated the election or defeat of a candidate.⁷⁴ Nonetheless, McCain-Feingold did not prevent corporations and unions

⁷¹ Federal Election Campaign Act of 1971, Pub. L. 92-225, 86 Stat. 3 (codified as amended at 2 U.S.C. § 431).

⁷² Pub. L. No. 107-155, 116 Stat. 81 (codified at 18 U.S.C. § 607, 36 U.S.C. § 510, 47 U.S.C. § 315, and in sections of 2 U.S.C. (2006)).

⁷³ 2 U.S.C. § 441b (2006).

⁷⁴ 2 U.S.C. § 441b (2000).

from helping their employees, stockholders, and members to pool their resources; corporations and unions were allowed to use funds from their PACs for both electioneering communications and express advocacy.⁷⁵ But, of course, PACs could only use funds voluntarily contributed by corporate employees, stockholders, or union members who specifically chose to have the PAC act as a vehicle of expression on their collective behalf.

Citizens United was an unlikely case for the Supreme Court to render a broad ruling overruling the application of a statute passed with bipartisan support to the involvement of massive, for-profit corporations in the political process. The plaintiff and petitioner in *Citizens United* was a nonprofit advocacy group, Citizens United, which wanted to air a movie attacking Hillary Clinton, entitled *Hillary: The Movie*, during the 2008 Democratic primaries.⁷⁶ Citizens United sought a preliminary injunction against the FEC to enjoin it from enforcing the provisions of McCain-Feingold against it and declaratory relief that Section 203 was facially unconstitutional and unconstitutional as applied to the movie,⁷⁷ but then it voluntarily dismissed its facial challenge.⁷⁸ Citizens United also claimed that the disclosure requirements of McCain-Feingold were unconstitutional.⁷⁹ The three-judge district court denied the relief sought.⁸⁰

⁷⁵ 2 U.S.C. § 441b(b)(2) (2006) (“It is unlawful . . . for any corporation . . . , or any labor organization, to make a contribution or expenditure in connection with any [federal] election . . . or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices . . .”).

⁷⁶ 558 U.S. 310 (2010).

⁷⁷ See *Citizens United v. FEC*, 530 F. Supp. 2d 274, 278-80 (D.D.C. 2008).

⁷⁸ *Citizens United*, 550 U.S. at 397 (Stevens, J., dissenting).

⁷⁹ *Citizens United*, 530 F. Supp. 2d at 280-81.

⁸⁰ *Id.*

In its direct appeal to the Supreme Court, Citizens United did not press its abandoned claim that Section 203 of McCain-Feingold was facially unconstitutional. But after hearing oral argument, the Court itself broadened the case from a narrow challenge addressing the application of Section 203 to the nonprofit corporation Citizens United and the movie it made, to a sweeping facial challenge to the constitutionality of the restrictions that McCain-Feingold placed on corporate and union “independent expenditures” in federal elections. The Court asked for new briefing on this question, which had not been litigated previously, and scheduled the case for another round of oral argument.⁸¹

After broadening the case, the *Citizens United* majority struck down Section 203 to the extent that it limited corporations and unions to using PAC money for electioneering communications and express advocacy.⁸² The practical effect of *Citizens United* was that corporations or unions could make unlimited independent expenditures

⁸¹ *Citizens United v. FEC*, 557 U.S. 932 (2009).

⁸² *Citizens United*, 558 U.S. at 365-66. The requirements in McCain-Feingold that the Court struck down actually have the same effect as the “opt-in” approach that the Supreme Court has held that the First Amendment requires if a union is to create a special fund for use in an election campaign. In *Knox v. SEIU, Local 1000*, 132 S. Ct. 2277 (2012), the Court held that the First Amendment prohibited a union from assessing members a mandatory extra charge in order to fight California ballot propositions without giving the members to opt out. By contrast, in *Citizens United*, the Supreme Court took exactly the opposite view, and held that corporations were denied their First Amendment rights by being required to restrict their political funding to those funds raised specifically by voluntary, opt-in, contributions from stockholders who chose to give to the corporate PAC for that specific purpose. Distinguished scholars, such as Professor Fisk and Dean Chemerinsky, have found *Knox* and *Citizens United* difficult to reconcile, especially because, as they point out, union members have more protections over use of their funds and more rights to influence union conduct than stockholders of corporations do. Fisk & Chemersinsky, *supra* note 8, at 1069-70; *id.* at 1059-60 (“Members have rights under statute or under most unions’ constitutions and bylaws to vote on the assessment of dues, on ratification of a collective bargaining agreement, and on the leadership of the union. Shareholders have far fewer rights to protect their interests through the procedures of corporate democracy.”).

in support of candidates out of their own treasury. The decision also invalidated analogous state restrictions on independent corporate political expenditures.⁸³ In so ruling, the Court overturned two of its prior decisions, *Austin v. Michigan Chamber of Commerce*⁸⁴ and *McConnell v. FEC*,⁸⁵ which upheld similar campaign finance laws at times when the Court already had a conservative majority.

In *Austin*, the Court was asked to review the constitutionality of a Michigan law that prohibited a corporation from making independent political expenditures out of its general treasury. The law permitted corporations to make independent expenditures out of a “segregated fund” — i.e., its PAC — for which it could solicit contributions from certain persons “associated with the corporation.”⁸⁶ The *Austin* Court found, by a 6-3 vote, that Michigan’s statute did not violate the First Amendment. The Court accepted the holding of its previous ruling in *First National Bank v. Bellotti* that “[t]he mere fact that the [speaker] is a corporation does not remove its speech from the ambit of the First Amendment,” but held that Michigan’s statute was “narrowly tailored” to the

⁸³ In approximately half the states, state law restricted corporations and unions from making independent expenditures in elections. Ian Urbina, *24 States’ Laws Open to Attack After Campaign Finance Ruling*, N.Y. TIMES, Jan. 22, 2010, <http://www.nytimes.com/2010/01/23/us/politics/23states.html>. These laws, for all practical purposes, were invalidated by *American Tradition Partnership v. Bullock*, 132 S. Ct. 2490 (2012) (per curiam). Some states have reacted to *Citizens United* by imposing more stringent disclosure requirements for independent expenditures. See *Sunlight State by State After Citizens United*, CORPORATE REFORM COALITION (June 2012), <http://www.commoncause.org/atf/cf/%7BFB3C17E2-CDD1-4DF6-92BE-BD4429893665%7D/sunlight-state-by-state-report.pdf>.

⁸⁴ 494 U.S. 652 (1990). The *Austin* Court included Chief Justice Rehnquist and Justices White, Scalia, Kennedy, and O’Connor.

⁸⁵ 540 U.S. 93 (2003). The *McConnell* Court included Chief Justice Rehnquist and Justices Scalia, Kennedy, O’Connor, and Thomas.

⁸⁶ *Id.* at 656.

“compelling state interest” it was designed to serve.⁸⁷ *Austin* said that a state may prevent a corporation from using its general treasury funds for making political expenditures because of the distorting effect of such expenditures: Michigan’s statute was a bulwark against “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”⁸⁸

In *McConnell*, the Court was asked to review the same provisions of McCain-Feingold that it would later declare unconstitutional in *Citizens United*. There, however, the Court found that the statute was constitutional by a 5-4 vote. It found that federal restrictions on the use of corporate or union treasury funds to pay for electioneering communications did not violate the First Amendment, and specifically upheld Section 203.⁸⁹ The Court found that Congress had a compelling interest in stanching the “virtual torrent” of corporate and union funded advertising immediately preceding federal elections,⁹⁰ and repeated *Austin*’s concerns about “the corrosive and distorting effects” of aggregated corporate wealth on the political process.⁹¹

⁸⁷ *Id.* at 657 (citing *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 767 (1978)).

⁸⁸ *Id.* at 660.

⁸⁹ *McConnell*, 540 U.S. at 203-09.

⁹⁰ *Id.* at 207.

⁹¹ *Id.* at 205 (quoting *Austin*, 494 U.S. at 660). Since *Citizens United*, the Supreme Court has further weakened McCain-Feingold’s limits on money entering politics. In *McCutcheon v. FEC*, the Court struck down McCain-Feingold’s aggregate limits on how much individuals may contribute to candidates and committees. 134 S. Ct. 1434 (2014). Under McCain-Feingold, an individual was permitted in the 2013-14 election cycle to contribute no more than \$48,600 to federal electoral candidates and \$74,600 to other political committees. 2 U.S.C. § 441a(a)(3) (2012); 78 Fed. Reg. 8,530, 8,532 (Feb. 6, 2013) (inflation indexing). The *McCutcheon* Court ruled that these limits, which were originally part of the Federal Election Campaign Act of 1971 and had been explicitly approved in *Buckley v. Valeo* in 1976, were unconstitutional under the

III. Citizens United Is In Tension With Key Premises Of Conservative Corporate Theory

Under *Citizens United*, a corporation may make unlimited political expenditures. It is important to note that these expenditures will be made by the management of the corporation: under the traditional allocation of power within American corporations, stockholders will not have a vote on them.⁹² The corporate law premises on which *Citizens United* was decided can reasonably be seen as diverging from conservative corporate theory in several important respects.

First, in *Citizens United*, the majority rejected the notion that McCain-Feingold's restriction on direct use of the corporate treasury for political purpose could be justified by a desire to ensure that stockholders were not required to subsidize political views they did not embrace. The majority indicated that if stockholders did not like the way in which corporations were spending their funds, they could use the "procedures of corporate democracy" to elect different directors, amend the charter, or file a derivative suit to challenge the expenditure.⁹³

But conservative corporate theory is founded in important part on the observation that stockholders are not well-positioned even to monitor management's fidelity to a

First Amendment. See *Buckley*, 424 U.S. 1, 38 (1976) (per curiam). The Court left in place only the base limits of \$5,200 per candidate per electoral cycle, leaving wealthy donors to contribute to as many candidates and political committees as they chose. *McCutcheon*, 134 S. Ct. at 1442 (plurality opinion); see 2 U.S.C. § 441a(a)(1); 78 Fed. Reg. 8,530, 8,532 (2013). Central to the Court's reasoning in *McCutcheon* was its view—expressed in *Citizens United*—that the government may only attempt to limit money in politics for the very specific purpose of preventing legislators from receiving money for political favors. *McCutcheon*, 134 S. Ct. at 1441, 1450–51; *Citizens United v. FEC*, 558 U.S. 310, 359–360 (2010).

⁹² See, e.g., Bebachuk, *Shareholder Power*, *supra* note 33, at 843-47; Bebachuk, *Shareholder Franchise*, *supra* note 33, at 679-80.

⁹³ *Citizens United v. FEC*, 558 U.S. 310, 362 (2010) (quoting *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 794-95 (1978)).

profit maximization goal.⁹⁴ Furthermore, conservative corporate theory understands that it will often be irrational for stockholders to use their statutory rights to vote, propose corporate governance changes and new board members, or sue, rather than simply sell their stock, if they fear that management has strayed from the most profitable path or engaged in improper, disloyal conduct.⁹⁵ The notion that stockholders are therefore well-positioned to constrain managerial use of corporate funds for political purposes that they do not favor is arguably inconsistent with foundations of conservative corporate theory.⁹⁶

In addition to exposing stockholders to the increased risk of having managers make value-destroying political expenditures, the *Citizens United* majority lumps all corporations together and concludes that corporations are often formed as a method for their stockholders to pool resources that can be used by the corporate managers to engage

⁹⁴ BAINBRIDGE, *supra* note 23, at 414; POSNER, *supra* note 19, at 556; Berle, *supra* note 45, at 1367-68.

⁹⁵ *E.g.*, HENRY N. BUTLER & LARRY E. RIBSTEIN, *THE CORPORATION AND THE CONSTITUTION* 2 (1995) (“[S]hareholders rarely have the incentive to exercise their legal rights. For many individual shareholders, dissatisfaction with the management of the corporation results in the sale of the stock. The so-called Wall Street Rule is that ‘rationally ignorant’ shareholders sell their shares rather than become involved in the internal affairs of the corporation.”).

⁹⁶ A distinguished scholar has argued that there is empirical evidence suggesting that political spending by corporate managers has not been beneficial, even when viewed solely in terms of whether it increases firm profitability. In comments to the Securities and Exchange Commission in connection with a petition for an SEC rule requiring public companies to disclose corporate political spending, Professor Coates marshaled a “Non-Exhaustive List of Studies Inconsistent with Corporate Political Activity Being Generally Good For Shareholder Interests.” See Letter from John C. Coates IV to Elizabeth M. Murphy, SEC (Feb. 4, 2013); Letter from John C. Coates IV to Elizabeth M. Murphy, SEC (Apr. 30, 2013). That non-exhaustive list was comprised of seventeen empirical studies, including Coates’s own, casting doubt on the idea that political activity by corporations produces better returns for stockholders. See John C. Coates IV, *Corporate Politics, Governance and Value Before and After Citizens United*, 9 J. EMP. LEG. STUD. 657 (2012), available at <http://ssrn.com/abstract=2128608>.

in expression on behalf of the contributing providers of equity capital.⁹⁷ Of course, as to the actual plaintiff in the case, Citizens United, that conclusion might have been the case, as its name, nonprofit nature, and corporate purposes indicate that was exactly why the corporation was formed.⁹⁸ But it is, of course, likely that McCain-Feingold's restrictions on direct political activity by corporations were primarily directed at for-profit corporations, which hold most of the wealth in our society.⁹⁹ Conservative corporate theory is understandably focused on for-profit corporations, because the rules for their governance are broadly considered as having the most impact on society's welfare.

As has been pointed out, conservative corporate theory is founded on an understanding that stockholders have diverse moral and political beliefs and that their decision to invest in the stock of a for-profit corporation does not constitute any consent to having the corporate managers use corporate funds for political or social purposes.¹⁰⁰

⁹⁷ *Citizens United*, 558 U.S. at 355-56.

⁹⁸ *See What We Do*, CITIZENS UNITED, <http://www.citizensunited.org/what-we-do.aspx> (last visited Dec. 9, 2013) (“[D]edicated to informing the American people about public policy issues which relate to traditional American values”).

⁹⁹ The complaints against McCain-Feingold came from primarily from those who were worried that the bill would limit the free speech rights of nonprofit corporations. *See, e.g.*, Hearing on Campaign Finance Reform Before the Committee on House Administration, at 1-8 (June 28, 2001) (statement of House Rep. Bob Barr).

¹⁰⁰ *See, e.g.*, Roberta Romano, *Metapolitics and Corporate Law Reform*, 36 STAN. L. REV. 923, 961 (1984) (pursuing ends other than profit maximization is “especially disturbing because profit maximization is the only goal for which we can at least theoretically posit shareholder unanimity”); *see also* STEPHEN M. BAINBRIDGE, *CORPORATE GOVERNANCE AFTER THE FINANCIAL CRISIS* 215 (2012) (criticizing the SEC’s proxy access rules, because they allow a “small minority” of shareholders to use corporate funds to promote “general social and political causes,” rather than proposals that “a reasonable investor would believe . . . relevant to the value of his investment”); Greenwood, *supra* note 38, at 1040-41 (1998) (“The humans who stand behind the shares have various and conflicting goals, as all people do: they want their shares to increase in value, of course, but they may also want decent jobs for their kids or neighbors, attractive and safe cities, a clean environment, and other things that, from time to time, conflict

Conservative corporate theory believes that stockholders invest solely in for-profit corporations to make money for themselves, so it is illegitimate for corporate managers to spend corporate money for any end other than maximizing profits for stockholders.¹⁰¹ That is, conservative corporate theory is inconsistent with the idea that corporations like General Electric, Wal-Mart, McDonald's, etc. exist because their stockholders wish to come together and have those corporations, through their managers, "speak" on behalf of the stockholders.¹⁰² This tension is strengthened by a growing reality of which the *Citizens United* majority seemed to elide or of which it was even unaware: the ever-growing separation of ownership from ownership.¹⁰³

IV. The Separation Of Ownership From Ownership Increases The Tension Between *Citizens United* And Conservative Corporate Theory

Citizens United deepened an existing tension in the Supreme Court's First Amendment jurisprudence: its divergent treatment of corporations and unions.¹⁰⁴ In

with the increase in value of their shares. The corporate law system eliminates all these conflicting goals, leaving the agents with a simple and clear directive: maximize shareholder value.").

¹⁰¹ See *supra* notes 15-23.

¹⁰² In a prior dissent, a member of the *Citizens United* majority made this point, stating: "The Campbell Soup Company does not exist to promote a message." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 467 (2008) (Scalia, J. dissenting).

¹⁰³ Leo E. Strine, Jr., *Toward A True Corporate Republic: A Traditionalist Response to Bebchuk's Solution for Improving Corporate America*, 119 HARV. L. REV. 1759, 1765 (2006); see also Strine, *supra* note 6.

¹⁰⁴ On the final day of the 2013-14 Term, the Supreme Court decided *Harris v. Quinn*, No. 11-681, 573 U.S. — (2014), which may foreshadow an even greater disparity between the treatment of corporations and unions. As we describe in this Part, the Court held in the 1977 case of *Abood v. Detroit Board of Education* that public-sector employees may be required to contribute funds to union activities that are related to collective bargaining. 431 U.S. 209 (1977). But, in *Harris*, the Court criticized *Abood* at length, describing it as a "something of an anomaly" and "questionable on several grounds." *Harris*, No. 11-681, slip op. at 8, 17 (internal quotation marks omitted). The Court found it "unnecessary" to overrule *Abood* to decide the case before it.

Aboud v. Detroit Board of Education,¹⁰⁵ Justice Stewart authored a unanimous decision striking down as inconsistent with the First Amendment a Michigan law whereby a union and a local government employer were allowed to agree that every employee represented by a union in the bargaining process could be charged a service fee equal to union dues, even if he was not a member of the union.¹⁰⁶ The Court ruled that unions in closed shops were only allowed to charge non-union members costs associated with collective bargaining activities and had to refund dues spent on “ideological activities unrelated to collective bargaining.”¹⁰⁷ The rationale was that it violated the employees’ First Amendment right to be forced as a condition of employment to have their wealth used by the union for purposes — such as political activity — that the employees did not support.¹⁰⁸ Thus, unions were only allowed to use money raised from members “who do not object to advancing those ideas and who are not coerced into doing so against their will.”¹⁰⁹

Id. at 27 n.19. Nonetheless, the decision may portend that the Supreme Court will restrict the ability of the governing bodies of unions to collect funds from members to use for union activities by claiming that such use violates the expressive rights of union members. Simultaneously, the Court has held that the expressive rights of stockholders, by contrast, act as no barrier to the use by corporations of corporate funds for expressive speech of any kind, including speech encouraging the election or defeat of specific candidates. As we discuss in this Part, that inconsistency is hard to ground in the actual facts regarding the relationship between ordinary investors and the public companies in which their equity capital is ultimately invested.

¹⁰⁵ 431 U.S. 209 (1977).

¹⁰⁶ *Id.* at 211.

¹⁰⁷ *Id.* at 236.

¹⁰⁸ *Id.* at 234.

¹⁰⁹ *Id.* at 236.

But *Abood*'s reasoning that the right of union members against having their resources used for speech they did not approve is hard to confine solely to unions.¹¹⁰

Indeed, the Court admitted that its logic applied equally to the political speech of corporations. The Court held:

One of the principles underlying the Court's decision in *Buckley v. Valeo* was that contributing to an organization for the purpose of spreading a political message is protected by the First Amendment. Because "[m]aking a contribution . . . enables like-minded persons to pool their resources in furtherance of common political goals," the Court reasoned that limitations upon the freedom to contribute "implicate fundamental First Amendment interests."

The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State.¹¹¹

Scholars such as Victor Brudney have argued that the logic from *Abood* should extend to permit laws regulating political spending by corporations because investors have little control over the day-to-day business decisions of corporations and little choice but to invest.¹¹² Brudney suggested that the state had a compelling interest "in the need

¹¹⁰ See Fisk & Chemerinsky, *supra* note 8, at 1085 ("[C]orporations and unions should be treated the same. . . . [T]he question is whether to extend the treatment of corporations in *Citizens United* to unions or the treatment of unions in *Abood* to corporations.").

¹¹¹ *Citizens United*, 431 U.S. at 234-35 (citations omitted).

¹¹² Victor Brudney, *Business Corporations and Stockholders' Rights Under the First Amendment*, 91 YALE L.J. 235, 294 (1981) ("[W]ith respect to publicly held business corporations not engaged in the communications business, the First Amendment does not preclude a government requirement of stockholder consent that may effectively prohibit either some or all noncommercial speech."); see also Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83, 113-14 (2010); Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights After Citizens United*, 112 COLUM. L. REV. 800, 868 (2012); Adam Winkler, *Beyond Bellotti*, 32 LOY. L.A. L. REV. 133, 202-10

to protect individual stockholders against being forced to choose between contributing to political or social expressions with which they disagree or foregoing opportunities for profitable investment.”¹¹³ This was especially true because requiring corporations to make political expenditures from voluntary contributions raised through a PAC merely regulates how corporations may speak, not whether they may do so.¹¹⁴

But the precedent laid down in *Abood* with regard to unions was distinguished by the Court in *Bellotti* with regard to corporations for two reasons: stockholders had the opportunity to vote out directors who approved political expenditures they disagreed with¹¹⁵ or bring a derivative suit to challenge the decision,¹¹⁶ and, if those options failed, stockholders were able to sell their shares easily on the open market.¹¹⁷ These strategies can be simplified into two concepts familiar in corporate governance: voice and exit.¹¹⁸

(1998). Fisk and Chemerinsky, by contrast, suggest that *Citizens United* should be extended to unions. Fisk & Chemerinsky, *supra* note 8, at 1087.

¹¹³ Brudney, *supra* note 112, at 268.

¹¹⁴ *Id.* at 241 (“[W]hile other provisions of the Constitution may limit the government’s power to prescribe the allocation of decisionmaking authority, the restrictions on government power contained in the First Amendment do not address, or without more inhibit, the government’s power” to make that decision).

¹¹⁵ *See* *First Nat’l Bank v. Bellotti*, 435 U.S. at 794-95 (“Acting through their power to elect the board of directors or to insist upon protective provisions in the corporation’s charter, shareholders normally are presumed competent to protect their own interests.”).

¹¹⁶ *See id.* at 795 (“[M]inority shareholders generally have access to the judicial remedy of a derivative suit to challenge corporate disbursements alleged to have been made for improper corporate purposes or merely to further the personal interests of management”). This point was criticized by Victor Brudney: “It is hard to see any distinction of constitutional dimension between forbidding a corporation from engaging in certain behavior under penalty of criminal punishment for management, and permitting the threat of stockholder derivative suit against, or ouster of, management to deter such behavior.” Brudney, *supra* note 112, at 242.

¹¹⁷ *See Bellotti*, 435 U.S. at 794 n.34 (a stockholder “invests in a corporation of his own volition, and is free to withdraw his investment at any time and for any reason”).

¹¹⁸ *See generally* ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970).

The Court assumed in *Bellotti* that stockholders were active and knowledgeable, and their investments were voluntary and firm-specific.¹¹⁹

Those assumptions are much less tenable today. Even in the 1980s, the class of Americans who were invested in the stock market was likely to be far more affluent than the average person,¹²⁰ they were more likely to buy and sell individual stocks through a broker they chose,¹²¹ and ordinary American workers were typically not considered part of the investing class because they were more likely to look to a defined-benefit pension plan, social security, and quaintly, money in savings accounts at banks as providing the basis for their retirement.¹²² Moreover, union workplaces were more common at the

¹¹⁹ *Bellotti*, 435 U.S. at 793-94; *see generally* Charles R. O’Kelley, Jr., *The Constitutional Rights of Corporations Revisited: Social and Political Expression and the Corporation after First National Bank v. Bellotti*, 67 GEO. L.J. 1347, 1377 (1979) (discussing this premise of *Bellotti*).

¹²⁰ *See, e.g.*, 2010 SCF Chartbook, FEDERAL RESERVE 509-10 (2010), http://www.federalreserve.gov/econresdata/scf/files/2010_SCF_Chartbook.pdf (showing that, in 1989, less than 30% of American families in the middle quintile by income had stock holdings, as opposed to over 75% of the top decile, and that the holdings of investors in the middle quintile were almost ten times less valuable than the holdings of investors in the top decile); *see also* Michael Haliassos & Carol C. Bertaut, *Why Do So Few Hold Stocks?*, 105 ECON. J. 1110, 1111 tbl. 1 (1995) (similar data for 1983).

¹²¹ *See, e.g.*, John C. Bogle, *Restoring Faith in Financial Markets*, WALL ST. J., Jan. 18, 2010, <http://online.wsj.com/news/articles/SB10001424052748703436504574640523013840290> (“Institutional investors held less than 10% of all U.S. stocks in the mid-1950s, 35% in 1975, and 53% a decade ago, and now institutional investors own and control almost 70% of the shares of U.S. corporations.”).

¹²² *See, e.g.*, LAWRENCE A. FROLIK & RICHARD A. KAPLAN, ELDER LAW 282-83 (2006) (describing the importance of social security to lower-income retirees, along with private savings); *Retirement Trends in the United States over the Past Quarter-Century*, EMP. BENEFIT RESEARCH INST. (June 2007), <http://www.ebri.org/pdf/publications/facts/0607fact.pdf> (showing the relative prevalence of defined benefit pension plans in the 1980s); Patricia E. Dilley, *Hope We Die Before We Get Old: The Attack on Retirement*, 12 ELDER L.J. 245, 251-53 (2004) (describing retirees’ traditional “three-legged stool” of social security, private pensions, and private savings).

time.¹²³ Thus, it was easier for the Court to embrace the idea that “shareholders possess far greater freedom because of competitive markets: They can easily shift their funds to other companies if they disapprove of policies, whereas the rank and file members of unions have no such option.”¹²⁴

The *Citizens United* majority appears to have adopted this simplistic idea of the relationship between stockholders and for-profit, public corporations. In terms of exercising their “rights” to constrain corporations from using corporate funds for political purposes they do not support, the Supreme Court seemed to think of their parents sitting at home and saying, “Damn it, I’m going to vote no against the management slate because they supported the election (or defeat) of candidate X because of his views on issue Y.” In the majority opinion, Justice Kennedy wrote that there was “little evidence of abuse that cannot be corrected by shareholders ‘through the procedures of corporate democracy.’”¹²⁵ And in his concurring opinion, Chief Justice Roberts asserted that modern technology makes shareholder objections more effective, because rapid disclosures “provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters.”¹²⁶

¹²³ See Gerald Mayer, *Union Membership Trends in the United States*, CONG. RESEARCH SERV. (Aug. 31, 2004), at CRS-10 & app. A tbl. A1, available at http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1176&context=key_workplace (noting that union membership peaked in 1979 with an estimated 21 million members — approximately 21.2% of all employed workers — and tracking the ensuing decline in union membership).

¹²⁴ Romano, *supra* note 100, at 1000.

¹²⁵ *Citizens United v. FEC*, 558 U.S. 310, 361-62 (2010) (quoting *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 794 (1978)).

¹²⁶ *Id.* at 370 (Roberts, C.J., concurring); *cf.* *McCutcheon v. FEC*, 134 S. Ct. 1434, 1460 (2014) (plurality opinion) (arguing that internet disclosure acts as a prophylactic against corruption, “[b]ecause massive quantities of information can be accessed at the click of a mouse”).

Many conservative corporate law theorists' own arguments suggest that even stockholders who own stock directly in a public corporation are unlikely to find it worth the time and effort to incur the costs of voice over an issue like corporate political spending.¹²⁷ It is unlikely that stockholders would ever take advantage of their rights of voice or exit to express their disagreement with corporate political spending that they disapproved of: even conservative commentators who support eliminating limits on corporate political spending, acknowledge that voting is usually irrational, and selling stock may leave the stockholders with a loss, particularly if the market as a whole also does not care for the corporation's political speech.¹²⁸ But, even more important, the practical realities of stock market ownership have changed in ways that deprive most stockholders of both their right to voice and their right of exit. There is now less reason to conclude that investors have any more ability to avoid subsidizing corporate speech they do not favor than workers have in subsidizing union speech.¹²⁹ Most of the stock of

¹²⁷ *E.g.*, MANNE & WALLICH, *supra* note 20, at 96 (discussion of Manne); POSNER, *supra* note 19, at 556; *see also* Greenwood, *supra* note 38, at 1025-29 (explaining why "exit" — the ability of stockholders to sell if they do not support the corporation's speech — is not a viable answer to the problem of corporations using treasury wealth for expressive purposes not shared by their investors).

¹²⁸ BUTLER & RIBSTEIN, *supra* note 22, at 2, 65-66. Scholars also point out the futility of exit in this situation, because exit "would leave the investor's enterprise free to use his previously contributed funds for the very purposes he finds offensive." Brudney, *supra* note 112, at 270; Winkler, *supra* note 112, at 168 (selling shares "does not so much as solve the problem of dissenting shareholders as ignore it" because "[t]he danger the state seeks to prevent — corporate managers using other people's money for electoral causes they disagree with — occurs when the money is spent").

¹²⁹ Professor Sachs notes that "[j]ust as there are alternatives to employment in unionized firms, there exist a range of alternatives to investing in corporate securities," but he also acknowledges that returns to bonds have historically been far lower than stock returns. Sachs, *supra* note 112, at 838-40. Given this, we believe that a typical person wishing to save for her retirement or her children's education has no rational choice but to invest in mutual funds that invest in stock of

American public corporations is no longer owned directly by human beings, but instead by institutional investors such as mutual or pension funds.¹³⁰ Most Americans have become “forced capitalists” who must give over a large portion of their wealth to the stock market to fund their retirements and their children’s educations.¹³¹ As a result, the actual human beings whose capital is invested by these intermediaries do not directly vote on who sits on corporate boards,¹³² do not have the option to buy and sell the securities of particular companies on any basis, and only retain very limited rights of exit from the market without facing expropriatory levels of taxation.¹³³

Even the few remaining Americans who have access to a so-called defined-benefit pension plan are usually required, as a condition of employment, to have a portion of their salary devoted to the funding of a pension plan.¹³⁴ That pension plan’s fiduciaries

public corporations. Sachs also acknowledges that state employees are generally under a direct compulsion to have their pension contributions invested in the stock market: forty-four states have a requirement that their employees invest in public pension plans, over which the employees have no control. *Id.* at 866-69.

¹³⁰ See, e.g., Marshall E. Blume & Donald B. Keim, *Institutional Investors and Stock Market Liquidity: Trends and Relationships* (Aug. 21, 2012), at 4, <http://www.wharton.upenn.edu/jacobslevycenter/files/14.12.Keim.pdf> (institutional investors held 67% of equities by the end of 2010, compared with only about 5% in 1945); Matteo Tonello & Stephan Rabimov, *The 2010 Institutional Investment Report: Trends In Asset Allocation and Portfolio Composition*, CONFERENCE BD. (2009), at 26, http://www.shareholderforum.com/e-mtg/Library/20101111_ConferenceBoard.pdf (institutional ownership of equities in the 1,000 largest U.S. companies increased from 57% in 1994 to 69% in 2008).

¹³¹ Leo E. Strine, Jr., *Breaking the Corporate Governance Logjam in Washington: Some Constructive Thoughts on a Responsible Path Forward*, 63 BUS. LAW. 1079, 1081-82 (2008).

¹³² See, e.g., Usha Rodrigues, *Corporate Governance in an Age of Separation of Ownership from Ownership*, 95 MINN. L. REV. 1822, 1826-38 (2011).

¹³³ Strine, *supra* note 6, at 4.

¹³⁴ See NRTA: AARP’s Educator Community, *Pension Contribution Requirements*, at *1-2 http://assets.aarp.org/www.aarp.org_/articles/work/contribution-requirements.pdf (last visited Dec. 9, 2013) (“[C]ontributions come from both employers (the city or state) and employees, who contribute to the pension directly out of their own paycheck each month. . . . On average, public sector employees contribute 5% of each paycheck to their pension.”).

will then make investments, consisting in material part of investments in the stocks of for-profit corporations (or of investments in investment funds making such investment, to add another layer), on behalf of the plan that will provide the source of the pension payments for beneficiaries of the plan. The pension plan's board then selects the investments for the plan, and the human pension beneficiaries have no influence over that process. It is implausible to think that the beneficiaries are choosing to empower the plan's fiduciaries to monitor on their behalf the political activity of corporations whose stock the plan buys.¹³⁵ It is equally difficult to imagine how the plan fiduciaries would come up with a responsible method by which to develop monitoring guidelines about political involvement, given that their plan beneficiaries presumably have diverse views about the range of issues that factor into actual voting by actual humans affected on the many dimensions actual humans are by public policy.

Furthermore, because a pension plan's board must act in accordance with certain federal standards under ERISA, a strong argument can be made that in considering guidelines on political spending by corporations plan fiduciaries have to limit themselves as a matter of law from considering any concern other than enhancing the investment value of the plan.¹³⁶ This is a narrow focus inconsistent with the full range of concerns

¹³⁵ See, e.g., Stephen J. Choi & Jill E. Fisch, *On Beyond CalPERS: Survey Evidence on the Developing Role of Public Pension Funds in Corporate Governance*, 61 VAND. L. REV. 315, 318 (2008) (the "vast majority of public pension funds do not participate extensively in corporate governance"); Michael E. Murphy, *Pension Plans and the Prospects of Corporate Self-Regulation*, 5 DEPAUL BUS. & COM. L.J. 503, 504 (2011) (pension plans are passive in the same way as other institutional investors); *id.* at 528 ("[Plan beneficiaries] are in fact very unlikely to be concerned with proxy voting . . .").

¹³⁶ Dep't of Labor, Interpretive Bulletin Relating to Exercise of Shareholder Rights, 73 FED. REG. 61731, 61734 (2008) ("The use of pension plan assets by plan fiduciaries to further policy or

that motivate their beneficiaries in making decisions how to vote in political elections. Indeed, conservative corporate theory would acknowledge that adding another level of agency between the ultimate humans whose capital is at stake and the control of that capital would increase, not decrease, the illegitimacy of the corporate board's use of corporate funds for political purposes.¹³⁷

Conservative corporate theory would also seem to acknowledge another factor that adds to this illegitimacy concern. As defined benefit plans decrease in prevalence, most American workers are being, as a practical matter, required to save for retirement by putting money aside from every paycheck into a 401(k) plan.¹³⁸ Typically, such plans do not give workers the option to use their funds to buy the stock of particular public companies directly; instead, workers must invest their money in one of the mutual fund

political issues through proxy resolutions that have no connection to enhancing the economic value of the plan's investment in a corporation would, in the view of the Department, violate the prudence and exclusive purpose requirements of [29 U.S.C. § 1104(a)(1)(A), (B)]."); *see* 29 U.S.C. § 1104 (2006) ("a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan"); *see also* Greenwood, *supra* note 38, at 1046-47 (explaining the difficulties for institutional investors of voting shares or investing on any other ground than maximizing the value of their own investors' investments).

¹³⁷ *See* Jensen & Meckling, *supra* note 50, at 308-10; *see also* Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777, 787-89 (1972); Eugene F. Fama, *Agency Problems and the Theory of the Firm*, 88 J. POL. ECON. 288 (1980).

¹³⁸ Anne Tucker, *Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in Citizens United*, 61 CASE W. RES. L. REV. 495, 535 ("Stock ownership is no longer a voluntary activity The rapid rise in stock ownership has been fueled by the proliferation of defined-contribution retirement plans provided by employers."); *see also* Jennifer S. Taub, *Able But Not Willing: The Failure of Mutual Fund Advisors To Advocate for Shareholders' Rights*, 34 J. CORP. L. 843, 848 (2009) ("[N]early two-thirds of fund investors invest through employer-sponsored retirement plans.").

options chosen by their employer.¹³⁹ As an economic matter, conservative corporate theory would also embrace the idea that workers would be foolish to try to buy and sell particular stocks for themselves, as opposed to buying an appropriate allocation of stock and bond mutual funds that are indexed to representative segments of the market.¹⁴⁰

As in the case of the beneficiaries of defined benefit pension plans, Americans investing in 401(k) plans do not have a direct vote on who constitutes the board of directors of American public corporations. Rather, the vote is controlled by the mutual funds themselves. As with pension funds, it is difficult to figure out how funds such as PIMCO Total Return, American Funds Capital Income Builder, Vanguard Total Stock Market Index Fund, Fidelity Contrafund, BlackRock Global Allocation Fund, or iShares Core S&P 500 would develop responsible policies to monitor corporate political spending to reflect the diverse views of their end-user investors.¹⁴¹

Perhaps unsurprisingly, major fund complexes such as Vanguard and Fidelity state that they abstain on such corporate social responsibility measures put forward by stockholders under SEC Rule 14a-8, because decisions on such measures should be taken

¹³⁹ Tucker, *supra* note 138, at 539 (“[T]he investments available in [retirement] plans are often severely restricted” to a list of participating mutual funds or approved stocks.).

¹⁴⁰ *E.g.*, POSNER, *supra* note 19, at 596. Studies show that funds that seek a market return by indexing and limiting trading costs outperform actively managed funds that seek so-called alpha. *See, e.g.*, Eugene F. Fama & Kenneth R. French, *Luck Versus Skill in the Cross Section of Mutual Fund Returns*, 65 J. FIN. 1915 (2010); Michael C. Jensen, *The Performance of Mutual Funds in the Period 1945-1964*, 23 J. FIN. 389 (1968); Burton G. Malkiel, *Returns from Investing in Equity Mutual Funds 1971 to 1991*, 50 J. FIN. 2033 (1995).

¹⁴¹ As a distinguished professor observes, even if mutual funds could monitor corporate political spending, it would make little economic sense for them to do so. Actively managed funds prefer to free ride on other investors’ activism, and index funds are so cost-conscious that they tend not to spend money on corporate governance activism. Given these funds’ reluctance to spend time or money on issues more central to firm profits, it seems likely they would have little interest in monitoring firm political spending. BAINBRIDGE, *supra* note 100, at 245.

by management and the board, not by stockholders.¹⁴² If mutual funds feel poorly positioned to vote on specific social proposals,¹⁴³ about which their diverse investors likely disagree, they are even less likely to be able to decide how to represent their diverse views in constraining or channeling corporate political spending.¹⁴⁴ In fact, to the extent these funds will vote on social issues, they say they will do so based solely on a

¹⁴² Vanguard states that decisions on corporate and social policy matters “should be the province of company management unless they have a significant, tangible impact on the value of a fund’s investment and management is not responsive to the matter.” *Vanguard’s Proxy Voting Guidelines*, VANGUARD, <https://investor.vanguard.com/about/vanguards-proxy-voting-guidelines> (last visited Dec. 9, 2013). One of Fidelity’s major subadvisers, Geode, also abstains as to such proposals. *Corporate Governance and Proxy Guidelines*, FIDELITY, <http://personal.fidelity.com/myfidelity/InsideFidelity/InvestExpertise/governance.shtml> (last visited Dec. 9, 2013).

¹⁴³ For examples of the variety of social proposals proposed by stockholders, see *Corporate Social Responsibility: 2013 Shareholder Resolutions, AS YOU SOW*, http://www.asyousow.org/csr/2013_resolutions.shtml (last visited Dec. 9, 2013) (one corporate social responsibility advocacy organization’s list of stockholder resolutions in 2013); *Shareholder Resolutions*, CERES, <http://www.ceres.org/investor-network/resolutions> (last visited Dec. 9, 2013) (tracking stockholder resolutions on sustainability-related issues).

¹⁴⁴ For example, Blackrock, which manages a huge amount of 401(k) and pension funds, states that it “believe[s] that it is not the role of shareholders to suggest or approve corporate political activities.” See *Proxy Voting Guidelines for U.S. Securities*, BLACKROCK (Jan. 2013), at 12, <http://www.blackrock.com/corporate/en-us/literature/fact-sheet/blk-responsible-investment-guidelines-us.pdf>. Fidelity has thus far abstained from voting on all political spending resolutions. See *Fidelity Corporate Governance and Proxy Guidelines*, *supra* note 142; see also Jackie Cook, *Corporate Political Spending and the Mutual Fund Vote: 2012 Proxy Season Analysis*, CENTER FOR POLITICAL ACCOUNTABILITY (Dec. 2012), at *6, available at <http://politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/7380>.

Nor can mutual funds solve this problem by outsourcing voting decisions on political and social matters to proxy advisors such as Institutional Shareholder Services (ISS). The use of proxy advisors simply places another layer of agency between the human who is the ultimate beneficial owner of the stock and the exercise of the stock’s voting rights. See *supra* note 137. The central problem of legitimacy remains at all levels of agency. Like pension and mutual funds, proxy advisor firms have no principled manner in which to make political judgments on behalf of equity investors with widely divergent political beliefs. Nor do they have the institutional capacity to do so. See BAINBRIDGE, *supra* note 100, at 258 (in 2009, ISS “had to prepare voting recommendations with respect to more than 37,000 issuers around the world,” and was thereby forced to “automate decision making to the fullest possible extent”).

desire to increase the equity returns of the corporation, a monocular focus quite different from that of the actual human investors whose equity they control.¹⁴⁵

As a practical matter, Americans cannot avoid putting the bulk of their savings into 401(k) plans if they wish to save for retirement responsibly. The tax incentives for saving in this manner are powerful. But these incentives come with a downside. If a worker attempts to withdraw funds early from a 401(k) investment, the law imposes a severe penalty to ensure that such investments are not used as a tax dodge. Thus, if a withdrawal is made before the worker hits age 59½, the funds are subject to income taxes plus a 10 percent penalty tax on the amount withdrawn.¹⁴⁶ Therefore, as a practical matter, funds invested in 401(k) plans are entrusted to the market for decades, with the only choice for the worker being to move the funds among permissible mutual fund investments offered by the 401(k) plan.

¹⁴⁵ See, e.g., *Global Corporate Governance and Engagement Principles*, BLACKROCK, <http://www.blackrock.com/corporate/en-us/literature/fact-sheet/blk-responsible-investment-1engprinciples-global-122011.pdf> (“The trigger for engagement on a particular [social, ethical, or environmental] concern is our assessment that there is potential for material economic ramifications for shareholders”); *Proxy Voting Manual*, ALLIANCEBERNSTEIN, https://www.alliancebernstein.com/abcom/Our_Firm/Content/CGDocs/Proxy%20Voting%20Manual.pdf (“Maximizing long-term shareholder value is our overriding concern in considering [social, environmental, and governance] matters, so we consider the impact of these proposals on the future earnings of the company.”); *Proxy Voting Procedures and Principles*, AM. FUNDS, https://www.americanfunds.com/pdf/proxy_voting_guidelines.pdf (they will support proposals “where we feel the shareholder’s request is necessary for the success of the business or provides value to the company and its shareholders”); *Proxy Voting Policies and Procedures*, OPPENHEIMERFUNDS, <https://www.oppenheimerfunds.com/digitalAssets/Proxy-Voting-Policy-Summary-d67d7baa5d616110VgnVCM100000e82311ac.pdf> (they will only vote for proposals that “have a discernable positive impact on short-term or long-term share value.”).

¹⁴⁶ I.R.C. § 401(k) (2006); see also *401(k) Resource Guide*, INTERNAL REVENUE SERV., [http://www.irs.gov/Retirement-Plans/Plan-Participant,-Employee/401\(k\)-Resource-Guide---Plan-Participants---General-Distribution-Rules](http://www.irs.gov/Retirement-Plans/Plan-Participant,-Employee/401(k)-Resource-Guide---Plan-Participants---General-Distribution-Rules) (last visited Dec. 9, 2013).

Americans are also investing in mutual funds to meet the other major savings objective that families commonly face: funding their children's college education. Tax incentives similar to a 401(k) plan now exist in § 529 accounts that encourage Americans to put aside money to pay for their children's university and professional school tuition and costs.¹⁴⁷ As with 401(k) plans, investors are usually not permitted to buy stocks or bonds directly but only to put their funds into investment vehicles such as mutual funds controlled by others. For these reasons, the wealth of most Americans is increasingly beyond their direct access and control.

The reality that Americans have little choice but to give their wealth over to institutional investors for investment in the stock market creates a tension between the ruling in *Citizens United* and *Abood*. In this context, there is no ability for an employee to exit unless she wishes to quit her job and abandon her pension.¹⁴⁸ But even if she did, she would not escape the problem, because she would still need to contribute to a 401(k) plan or a § 529 account. Given the overwhelming prevalence of nonunion workplaces in the United States,¹⁴⁹ it is arguably easier for Americans to find a job in a nonunion

¹⁴⁷ I.R.C. § 529 (2006); *see also* *529 Plans: Questions and Answers*, INTERNAL REVENUE SERV., <http://www.irs.gov/uac/529-Plans:-Questions-and-Answers> (last visited Dec. 9, 2013).

¹⁴⁸ *See* Brudney, *supra* note 112, at 270 n.126 (“[E]xit may be difficult for pension fund or other fund beneficiaries”); Winkler, *supra* note 128, at 167 (1998) (“Take, for example, an employee whose money is invested in Corporation X through his pension fund. If Corporation X funds electoral speech with which the employee disagrees, the employee is incapable of selling his shares and disassociating himself from the speech. He exercises virtually no control whatsoever over his pension plan; he may be able to withdraw altogether from the plan, but there are often penalties for doing so. How is the pensioned employee who disagrees with the corporate speech to sell his shares? The simple answer is that he cannot — at least not without substantial injury.”).

¹⁴⁹ Only 11.3% of the U.S. workforce is unionized. *See Economic News Release: Union Members Summary*, BUREAU OF LABOR STATS. (Jan. 23, 2013), <http://www.bls.gov/news.release>

workplace than to avoid entrusting their funds to institutional investors to save for retirement and to pay for their children's education.¹⁵⁰

After *Citizens United*, these corporations can use treasury funds for political expression that these investors have no role in authorizing. The notion that Americans who save for such purposes are by that necessity authorizing either their mutual fund or the corporations in which those funds invest to “speak” to political matters on their behalf is one that conservative corporate theory would find implausible. And the reasoning of *Abood* would suggest that governmental policies, such as § 401(k) and § 529, that effectively coerce Americans into giving others the right to use their funds to advance “ideological activities” they do not endorse is itself constitutionally problematic.¹⁵¹ 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*, which is the same harm that conservative corporate theory views as occurring when corporate managers spend funds for social purposes.

/union2.nr0.htm; Steven Greenhouse, *Share of the Work Force in a Union Falls to a 97-Year Low, 11.3%*, N.Y. TIMES, Jan. 23, 2013, <http://www.nytimes.com/2013/01/24/business/union-membership-drops-despite-job-growth.html> (unionization rate is at “its lowest level in close to a century”). More than 92% of U.S. private sector workers are nonunion. Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rule of Union Organizing*, 123 HARV. L. REV. 655, 695 (2010).

¹⁵⁰ Sachs, *supra* note 112, at 839 (it would be difficult to save for retirement and college education using investment income from Treasury bills instead of stocks because this would “sacrifice a substantial percentage of . . . investment income”); Tucker, *supra* note 138 (discussing the practical effects of the separation of ownership from ownership on both the ability of ordinary human investors to constrain political speech they do not favor by corporations and their freedom to withdraw their capital from investments because corporations are engaging in political speech they do not favor).

¹⁵¹ 431 U.S. 209, 236 (1977).

Citizens United is also problematic for conservative corporate theorists on pragmatic, but important, grounds. In other words, the current reality of the separation of ownership from ownership makes even stronger the premise of conservative corporate theory that stockholders do not invest in for-profit corporations as an expression of their desire to have corporate managers pursue idiosyncratic social objectives. So too does it strengthen the premise that the tools available to those whose equity capital is ultimately at stake are not well designed to constrain management from pursuing ends those investors may not support.

Respected scholars have noted that it is problematic for public corporations to make political expenditures even if those expenditures are supported by a majority of stockholders, because that would associate the minority with political speech they might find inconsistent with their own consciences.¹⁵² Scholars, both before and after *Citizens United*, also recognized that investors in public corporations are in a position analogous to the nonunion worker in *Abood*.¹⁵³ To address this concern post-*Citizens United*, some of them have argued that substantive corporate law should be altered to require that any political expenditures be approved by a supermajority of stockholders or some other means to limit the potential that funds will be used contrary to the minority's will.¹⁵⁴ This argument recognizes that stockholders in for-profit corporations do not invest so

¹⁵² Bebchuk & Jackson, *supra* note 112, at 111-17.

¹⁵³ *Id.* at 113-14; *see also* Brudney, *supra* note 112, at 278-79; Fisk & Chemerinsky, *supra* note 8, at 1080-85; Sachs, *supra* note 112, at 868.

¹⁵⁴ Bebchuk & Jackson, *supra* note 112, at 116-17.

their capital might be deployed for political speech,¹⁵⁵ and that *Citizens United*, if it remains law, eliminates the ability to protect stockholders by a simple ban on certain political expenditures from corporate treasuries.¹⁵⁶ Notably, scholars also recognize that the pure option of “exit” is difficult for stockholders who must invest in the stock market to meet their family needs long-term.¹⁵⁷ This exacerbates the fact that most end-user investors have to invest through intermediaries, which strengthens the analogy to *Abood*. If the concept of exit is the answer to political spending stockholders do not favor, then it would require that ordinary Americans refrain from investing in the mutual funds most likely to provide the best risk-adjusted return: index funds. Index funds only use exit when an issuer’s shares are removed from the benchmark index for the fund.

Because *Citizens United* unleashes corporations to act directly on the election process and constitutionalizes the issue in a manner that disables many legislative policy options — and because many investors do not support the use of corporate funds for that purpose — *Citizens United* has stimulated a new cottage industry in suggesting corporate and securities law changes that will enable stockholders to directly constrain boards from engaging in political contributions.¹⁵⁸ By creating a need to protect stockholders from

¹⁵⁵ *Id.* at 115.

¹⁵⁶ *Id.* at 114-17.

¹⁵⁷ Greenwood, *supra* note 100, at 1025-29; *see also* Sachs, *supra* note 129, at 839; Elizabeth Pollman, *Citizens Not United: The Lack of Stockholder Voluntariness in Corporate Political Speech*, 119 YALE L.J. ONLINE 53 (2009), <http://www.yalelawjournal.org/images/pdfs/823.pdf>.

¹⁵⁸ *See, e.g.*, Lucian A. Bebchuk & Robert J. Jackson, Jr., *Shining Light on Corporate Political Spending*, 101 GEO. L.J. 923 (2013) (suggesting SEC disclosure rules on political spending); John C. Coates IV & Taylor Lincoln, *Fulfilling Kennedy’s Promise: Why the SEC Should Mandate Disclosure of Corporate Political Activity* (July 27, 2011), <http://ssrn.com/abstract=1923804> (corporations should have to disclose their spending); Joseph Kieran Leahy, *Are Corporate Super PAC Contributions Waste or Self-Dealing? A Closer Look*, 79 MO. L. REV.

having their entrusted capital used for political purposes they did not authorize, *Citizens United* creates an incentive for corporate governance workarounds that divert resources — including managerial time — from focusing on making the corporation more profitable by developing more attractive products and services. These suggestions for addressing *Citizens United* through substantive changes in corporate law collide with conservative corporate theory’s view of how for-profit corporations should be governed if they are to best increase social welfare. Reasonable minds have a basis to doubt that Milton Friedman would view stockholder exercises in corporate democracy to talk about whether their corporations should act on the political process in our republican democracy as being worth the cost, particularly when the stockholders would involve

(forthcoming 2014), <http://ssrn.com/abstract=2304852> (examining the use of litigation to constrain corporate political spending and concluding it is not a promising tool); Ciara Torres-Spelliscy, *Transparent Elections after Citizens United*, BRENNAN CTR. FOR JUSTICE (Mar. 1, 2011), available at <http://www.brennancenter.org/publication/transparent-elections-after-citizens-united> (state disclosure laws regarding corporate political expenditures should be adopted); Daniel Winik, Note, *Citizens Informed: Broader Disclosure and Disclaimer for Corporate Electoral Advocacy in the Wake of Citizens United*, 120 YALE L.J. 622, 626 (2010) (“[L]egislators [should] consider a more sweeping regime of disclosure and disclaimer for corporate-funded speech”); cf. Stephen A. Yoder, *Legislative Intervention in Corporate Governance Is Not a Necessary Response to Citizens United v. Federal Election Commission*, 29 J.L. & COM. 1, 14 (2010) (discussing state and federal legislative responses proposed by opponents of the decision).

Following *Citizens United*, there was a “significant uptick” in stockholder proposals aimed at curbing political contributions and lobbying by companies. See EQUILAR, 2013 VOTING ANALYTICS REPORT 25 (2013); James R. Copeland, *Shareholder Activism Focused on Political Spending and Lobbying*, HARV. L. SCH. FORUM ON CORP. GOVERNANCE & FIN. REG. (June 10, 2012) <http://blogs.law.harvard.edu/corpgov/2012/06/10/shareholder-activism-focused-on-political-spending-and-lobbying>. During the 2013 proxy season, stockholders submitted 80 proposals related to political contributions by corporations. See EQUILAR *supra*. These ranged from a proposal at Starbucks prohibiting the use of corporate funds for any political election to proposals at Merck and eBay requiring the disclosure of corporate political spending. Starbucks Corporation, Proxy Statement (Schedule 14A), at 57-58 (Jan. 25, 2013); eBay, Inc., Proxy Statement (Schedule 14A), at 24 (Mar. 18, 2013); Merck & Co., Inc., Proxy Statement (Schedule 14A), at 67-68 (Apr. 15, 2013).

index funds, emerging growth funds, pension funds, hedge funds, and other non-human persons.¹⁵⁹

V. *Citizens United* Weakens Conservative Corporate Theory's Answer To The Vulnerability Of Other Corporate Constituencies To Externality Risk

Conservative corporate theory has had to confront the contention that if corporate managers focus solely on stockholder welfare as the end of corporate governance, there

¹⁵⁹ We do not deal with every tension that *Citizens United* arguably creates with conservative thought, but two additional ones exist. First, the logic of *Citizens United* would seem to extend protection to foreign corporations, creating the potential for wealthy non-American entities to influence the outcome of our elections. Although corporations are chartered by a particular jurisdiction, it is increasingly difficult to identify the largest, multinational corporations with any national identity. These corporations not only often have large subsidiaries that operate abroad, but, as important, their stockholder bases are becoming more and more international. See, e.g., DEP'T OF TREASURY, FOREIGN PORTFOLIO HOLDINGS OF U.S. SECURITIES (Apr. 2013), at 3, <http://www.treasury.gov/resource-center/data-chart-center/tic/Documents/shla2012r.pdf> (foreign holdings of U.S. equities doubled in value between 2005 and 2012); DEP'T OF TREASURY, U.S. PORTFOLIO HOLDINGS OF FOREIGN SECURITIES (Dec. 2011), at 3, <http://www.treasury.gov/resource-center/data-chart-center/tic/Documents/shc2011r.pdf> (35% increase in value of U.S. holdings of foreign equities between 2005 and 2011). Given that members of the *Citizens United* majority find it problematic for decisions of foreign courts to be considered as persuasive precedent when deciding cases before the Supreme Court, see *Roper v. Simmons*, 543 U.S. 551, 622-29 (2005) (Scalia, J., dissenting), there is tension in ignoring the reality that corporations are not citizens of any nation in the same way as humans are, but could have an important influence on who gets elected to the political offices of our nation and states.

Second, state, county, and municipal pension funds control the voting rights of a large amount of stock in American public corporations. See Murphy, *supra* note 135, at 503-04 (“Pension funds now hold approximately 24 percent of the total U.S. equity market and 29 percent of the equity in the 1000 largest corporations. Roughly 40 percent of these equity investments are found in public pension funds for state, local and federal employees...”); Jeffrey R. Brown, Joshua Pollet & Scott J. Weisbenner, *The Investment Behavior of State Pension Plans*, NBER Working Paper (Sept. 2009), <http://www.nber.org/aging/rrc/papers/onb09-12.pdf> (“[S]tate and local pension fund assets amounted to over \$2.3 trillion in 2006” and “[a]s of the year 2002, these public pension plans accounted for approximately 1/6 of the ownership of the U.S. stock market”). Under *Citizens United*, these government-affiliated funds, which often have elected officials on their boards, could play a role in influencing how corporations spend money to influence who gets elected to political office. Conservative icons such as Hayek, Levitt, and Friedman might have found this prospect disquieting.

will be unfair risks and costs imposed on other corporate constituencies and interests affected by the corporation's conduct.¹⁶⁰ Conservative corporate theory has two answers.

The first is theoretical and depends on the proposition that stockholders can only benefit if the corporation first honors all of its obligations to legal claimants, such as creditors and employees owed wages, and to follow the law. Because equity holders can only get paid if there is surplus in excess of what is available to pay the corporation's legal debts, running corporations for the end of stockholder profit maximization must benefit all corporate constituents because growing the pie for stockholders will best ensure that other constituencies get their legally-owed share.¹⁶¹ Of course, this is an idealized theory that depends in a large way on ignoring the reality that stockholders can receive payouts at various times, in advance of the corporation paying off all its long-term debts, and that stockholder bases turn over frequently.¹⁶² Because stockholders are not required to remain stuck in and hold all the risks until some actual summing up, calling them "residual claimants" can be highly misleading unless done in a nuanced way for discrete and measured purposes.

The more convincing and predominant answer that conservative corporate theory has to externality risk is to acknowledge that the risk is real and that it is to be addressed, not by corporations themselves through voluntary decisions, but by compulsory societal

¹⁶⁰ See, e.g., Mitchell, *supra* note 32; Blair & Stout, *supra* note 31.

¹⁶¹ E.g., EASTERBROOK & FISCHER, *supra* note 18, at 38.

¹⁶² Jonathan R. Macey, *Fiduciary Duties as Residual Claims: Obligations to Nonshareholder Constituencies from a Theory of the Firm Perspective*, 84 CORNELL L. REV. 1266, 1273-74 (1999) (pointing out a variety of easy-to-conceive situations where other constituencies that have made non-diversifiable, firm-specific investments — such as employees — can be harmed by decisions of managers taken to advance stockholder welfare).

regulation.¹⁶³ Conservative corporate theory therefore accepts the fundamental economic reality that rational economic actors have an incentive to keep as much of the profits of their activity for themselves as they can while seeking to shift the costs of their economic activity to others if possible. The “tragedy of the commons”¹⁶⁴ is the academic label often used to illustrate this phenomenon, and the real world tragedy of pervasive environmental wreckage caused by capitalist behavior in the nineteenth and twentieth centuries is evidence of this reality.¹⁶⁵

Conservative corporate theory does not deny this or similar risks. But its answer is that the most responsible, legitimate, and effective solution is not to permit corporate managers to govern toward the end of a better environment, safer products, or a stable financial sector for the good of society as a whole. Rather, it is to have the legitimate instruments of the people’s will, reflective of their desire, set the boundaries for corporate

¹⁶³ See ARROW, *supra* note 17, at 135-37, 142; BAINBRIDGE, *supra* note 23, at 425; Friedman, *Social Responsibility*, *supra* note 16, at 4; Romano, *supra* note 100, at 944, 961, n.107 (associating conservative corporate law theorists with pluralist political philosophy, and noting that “[p]luralism supports regulating corporations when there are externalities, in order to affect the profit maximization calculus”); see also Engel, *supra* note 61, at 4 (social welfare is best served by having for-profit corporations focus on profit maximization and leaving it to government to address externality risk to society and other corporate constituencies).

¹⁶⁴ Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243 (1968).

¹⁶⁵ See, e.g., John M. Broder, *U.S. Acts To Fine BP and Top Contractors for Gulf Oil Spill*, *N.Y. TIMES*, Oct. 13, 2011, at A18. Other examples of externality risks include: (1) Use of contractors who run sweatshops to make products for large multinationals, see, e.g., Robert Kuttner, *Sweat and Tears*, *AM. PROSPECT*, July-Aug. 2013, at 61; Schumpeter, *Battle of the Brands*, *ECONOMIST*, May 16, 2013, <http://ww3.economist.com/blogs/schumpeter/2013/05/factory-safety>; and (2) The wreckage of the international financial system, see, e.g., William W. Bratton & Michael L. Wachter, *The Case Against Shareholder Empowerment*, 158 *U. PA. L. REV.* 653, 716-24 (2010); John Armour & Jeffrey N. Gordon, *Systemic Harms and Shareholder Value* 4, ECGI Law Working Paper No. 222 (Aug. 2013), available at <http://ssrn.com/abstract=2307959> (“It is tolerably clear that the difficulties banks found themselves in by the fall of 2008 were the consequence of the pursuit of high-risk, high-return strategies by bank executives. Such strategies earn good returns for shareholders, but by raising the volatility of the firm’s cashflows, also increase the risk of its failure. . . .”).

conduct by regulating externality risk in the public interest.¹⁶⁶ Conservative corporate theory developed this concept based on the understanding that the corporation's ability to act on the political process was subject, as it historically had been, to the legislative process, the very process that gave corporations life.¹⁶⁷

¹⁶⁶ *E.g.*, Engel, *supra* note 61, at 34-35 (“[P]ursuit of maximum profits would be the corporation’s well directed contribution to society’s search for Pareto optimality — one social goal whose pursuit by corporations presumably has consensus support if anything does. . . . Insofar as the profit maximization proxy fails at any time to direct corporate energies down routes supported by social consensus, the legislature has the power, at least in theory, to modify the profit consequences of any given corporate action, so as to nudge corporate behavior in the direction society prefers. . . . Whatever the source of the perceived shortcomings in the profit-maximization proxy, the legislature can enact liability rules, regulatory provisions backed by criminal sanctions, or other measures, to correct the shortcomings.” (citations omitted)).

¹⁶⁷ Among the forms of regulation that emerged early in the period when corporations formed under general corporation laws and began to get larger in size was regulation of corporate involvement in the political process. See Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577, 616 nn.199-200 (1990) (citing the enactment of federal and state regulation of corporate political activity in the late nineteenth and early twentieth centuries); Robert Post, *Citizens Divided: A Constitutional Theory of Campaign Finance Reform*, The Tanner Lectures on Human Values, 49-53 (unpublished manuscript) (on file with authors) (discussing how, when confronted with the increasing pursuit by corporations of favorable regulatory policies in the nineteenth and twentieth centuries, such as tolerance of child labor and immunity from taxation, the response by progressives like Theodore Roosevelt and even conservatives like Elihu Root was to “sever ties between corporations and politics, [by] enacting statutes that were the direct ancestors of the legislation found unconstitutional a century later in *Citizens United*”). The iconic statement of the early understanding of the corporation’s subordinate role to the society that gave it life was issued by Chief Justice Marshall in 1819. See *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819) (“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. These are such as are supposed best calculated to effect the object for which it was created.”). That statement continued resonated for over a century and is cited to this day.

In 1916, brewers challenged the constitutionality of the Tillman Act on First Amendment grounds. In rejecting that challenge to the first federal act to restrict the influence of corporate money in elections, the district court judge echoed the sentiments in Chief Justice Marshall’s *Dartmouth* decision. *United States v. U.S. Brewers’ Ass’n*, 239 F. 163, 168 (W.D. Pa. 1916) (“In the exercise of its prerogatives and to secure greater economy and efficiency, the government has thought best that certain artificial bodies should be created with certain fixed and definite powers, and acting within certain prescribed limitations. These artificial creatures are not citizens of the United States, and, so far as the franchise is concerned, must at all times be held

subservient and subordinate to the government and the citizenship of which it is composed.”). Much of the Supreme Court’s First Amendment jurisprudence was not articulated until the 1920s and after. JON GOULD, *SPEAK NO EVIL: THE RISE AND TRIUMPH OF HATE SPEECH REGULATION* 45 (2005) (“First Amendment jurisprudence is still a relatively new doctrine, having emerged from the courts’ cocoon in the early 1900s”); Eugene Gressman, *Bicentennializing Freedom of Expression*, 20 SETON HALL L. REV. 378, 380 (1990) (“Not until after the end of World War I did the nation or the Court begin to give serious heed to what was written [in the First Amendment] in 1789.”); Post, *supra*, at 71-78 (judicial protection for First Amendment rights developed in the years after World War I); David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1303 (1983) (same).

And, as the Supreme Court itself noted in *McConnell v. FEC*, the Court had upheld statutory restrictions on for-profit corporations’ ability to engage in certain political activity. See 540 U.S. 93, 203-09 (2003); Brandon L. Garrett, *The Constitutional Standing of Corporations* 23 (Univ. of Va. Sch. of Law, Pub. Law & Legal Theory Research Paper Series 2013-33), available at <http://ssrn.com/abstract=2330972> (“The very provisions challenged in *Citizens United* had been upheld in 2003, in *McConnell v. Federal Election Comm’n*, which noted how the Court had repeatedly upheld such restrictions on corporate spending. *Citizens United* marked a break from those earlier decisions.”). Chief Justice Marshall’s reasoning in *Dartmouth* was cited in 1977 by conservative Justice Rehnquist in support of his dissent in *Bellotti*, arguing that there was no constitutional right for corporations to engage in political speech:

There can be little doubt that when a State creates a corporation with the power to acquire and utilize property, it necessarily and implicitly guarantees that the corporation will not be deprived of that property absent due process of law. Likewise, when a State charters a corporation for the purpose of publishing a newspaper, it necessarily assumes that the corporation is entitled to the liberty of the press essential to the conduct of its business. . . . Until recently, it was not thought that any persons, natural or artificial, had any protected right to engage in commercial speech. Although the Court has never explicitly recognized a corporation’s right of commercial speech, such a right might be considered necessarily incidental to the business of a commercial corporation.

It cannot be so readily concluded that the right of political expression is equally necessary to carry out the functions of a corporation organized for commercial purposes. A State grants to a business corporation the blessings of potentially perpetual life and limited liability to enhance its efficiency as an economic entity. It might reasonably be concluded that those properties, so beneficial in the economic sphere, pose special dangers in the political sphere. Furthermore, it might be argued that liberties of political expression are not at all necessary to effectuate the purposes for which States permit commercial corporations to exist. So long as the Judicial Branches of the State and Federal Governments remain open to protect the corporation’s interest in its property, it has no need, though it may have the desire, to petition the political branches for similar protection. Indeed, the States might reasonably fear that the corporation would use its economic power to obtain further benefits beyond those already bestowed. I would think that any particular form of organization upon which the State confers special privileges or immunities different from those of natural

Citizens United undermines conservative corporate theory's reliance upon the regulatory process as a safeguard against externality. Because *Citizens United* permits the corporation to act directly to influence who is elected to office by using the huge resources in corporate treasuries, it is likely as a general matter to make candidates of all persuasions more beholden to corporate desires. Under conservative corporate theory, the only legitimate reason for a for-profit corporation to make political expenditures will be to elect or defeat candidates based on their support for policies that the corporation believes will produce the most profits. Almost by definition, this will increase the danger of externality risk, because corporate expenditures will be made with the singular objective of stockholder profit in mind, and therefore will be likely to favor policies that leave the corporation with the profits from their operations, while shifting the costs of those operations (including of excessive risk taking or safety short cuts) to others.

Precisely because the for-profit corporation has been so successful as a means to generate wealth, the means at its disposal will be huge. Even before McCain-Feingold

persons would be subject to like regulation, whether the organization is a labor union, a partnership, a trade association, or a corporation.
First Nat'l. Bank v. Bellotti, 435 U.S. 765, 824-27 (1977) (Rehnquist, J., dissenting) (internal citations omitted).

Even as recently as 1986, Justice Rehnquist would write:

Extension of the individual freedom of conscience decisions to business corporations strains the rationale of those cases beyond the breaking point. To ascribe to such artificial entities an "intellect" or "mind" for freedom of conscience purposes is to confuse metaphor with reality.

Pac. Gas & Elec. Co. v. Public Utilities Comm'n, 475 U.S. 1, 33 (1986) (Rehnquist, J., dissenting).

was struck down by *Citizens United*, corporate political spending far exceeded that of labor or other interest groups.¹⁶⁸ After *Citizens United*, that imbalance grew.¹⁶⁹

Under conservative corporate theory, corporations are fundamentally different from human beings in terms of their range of concern. Corporations cannot give equal weight to a concern for the environment, for the moral obligations owed to others, or for the best interests of workers or consumers. Corporations, under conservative corporate theory, cannot even give equal weight to patriotism, in terms of loyalty to the nation on whose public stock markets the corporation's shares trade and under the laws of a particular state it is chartered. Unlike human beings, corporations must have only one end that motivates their political spending: what will produce the most profit for them in the purely monetary sense.¹⁷⁰

For that reason, if conservative corporate theory holds, the only reason why a corporation would choose to make a corporate political expenditure would be to support a

¹⁶⁸ See *Business-Labor-Ideology Split in PAC & Individual Donations to Candidates and Parties*, CTR. FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/bigpicture/blio.php?cycle=2008> (last visited Dec. 9, 2013). Business PACs gave over \$300 million to candidates in the 2007-08 business cycle, compared to just under \$75 million by unions. Public corporations also provided indirect funding to political causes through intermediaries, like the Chamber of Commerce. See Bebachuk & Jackson, *supra* note 112, at 93-94. These intermediaries “do not have to disclose either the identity of the corporations that make these contributions or the amounts they contribute” but are able to spend “considerable sums” on lobbying and politics. See Bebachuk & Jackson, *supra* note 158, at 930-32 (estimating that eight active intermediaries spent more than \$1.5 billion on politics in the six-year period between 2005 and 2010).

¹⁶⁹ In 2012 — the first presidential election year after *Citizens United* — business PACs gave \$365 million to candidates, parties, and super PACs, whereas labor unions gave \$65 million. *Business-Labor-Ideology Split in PAC & Individual Donations to Candidates, Parties Super PACs and Outside Spending Groups*, CTR. FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/bigpicture/blio.php?cycle=2012> (last visited Dec. 9, 2013).

¹⁷⁰ Tucker, *supra* note 138, at 527 (“[W]hen corporations speak, it is speech of an economic — not a political — nature, due to corporations’ singular fidelity to profit maximization.”).

candidate that would help the corporation make money for the benefit of its stockholders. Thus, corporations will only make expenditures in favor of candidates who will help the corporation make money. These candidates will be candidates who favor the corporations' regulatory agenda, i.e., candidates that favor rules whereby the corporation is more likely to externalize the negative costs of its activities on to society.¹⁷¹ For example, the corporation's preferred candidate may be hostile to a Pigouvian tax whereby the corporation must pay for the social costs of its activities.¹⁷² Likewise, corporations will have an inclination to relax laws that are designed to protect the corporation's employees or consumers.¹⁷³ Under the conservative theory that a corporation must spend

¹⁷¹ Armour & Gordon, *supra* note 165 (“[T]he shareholder value norm creates incentives for firms systematically to undermine the efficacy of regulatory internalization. The easiest way to maximize shareholder returns may be not to innovate processes so as to reduce the social costs of one’s activities in accordance with regulatory strictures, but to exercise political influence to achieve a lower rate of regulatory ‘tax’. The upshot is that whatever the extent of the work that may be done by regulation, the shareholder value norm will tend systematically to undermine it.”); David G. Yosifon, *The Public Choice Problem in Corporate Law: Corporate Social Responsibility After Citizens United*, 89 N.C. L. REV. 1197, 1203 (2011) (“Because regulation threatens to diminish profits, and because directors are given the fiduciary obligation to pursue profits, combating the development and implementation of regulations becomes an important aspect of the firm’s work.”).

¹⁷² See ARTHUR CECIL PIGOU, *THE ECONOMICS OF WELFARE* 192-93 (4th ed. 1952); see also Armour & Gordon, *supra* note 171, at 17 (“In the presence of appropriately-priced Pigouvian taxes, then the firm has incentives either to reduce the level of the activity in question, or to take precautions against harm up to the extent to which they are socially cost-justified. . . . Because social costs have been factored into the firm’s bottom line, then the share price will reflect residual returns *after* social costs are taken into account. Shareholder value maximization therefore focuses managers’ attention on ways of reducing the social cost of the activities in question. More precisely, shareholder value maximization focuses managers’ attention on ways of reducing the regulatory tax that the firm incurs on its activities, much like the firm would seek to minimize any other tax.”).

¹⁷³ In a review of how corporations have attempted to use the Bill of Rights and the Fourteenth Amendment to advance their interests, Professor Mayer links the rise of externality regulation of the increasingly powerful corporations that arose after the move to general corporation laws to corporate interest in using the Constitution to restrict regulation of their activities. See Mayer, *supra* note 167, at 579-93. As Mayer notes, when corporations were specifically chartered by

its wealth to maximize stockholders' own wealth, this is the logical result of the corporation's ability to spend money in the political process.

But, as pointed out, the actual ultimate providers of equity capital are human and are not only indirect stockholders (and often creditors through investments in bond funds) of for-profit corporations, but often more importantly direct employees of and consumers of the products of such corporations. They also breathe the air, drink the water, and live on the land affected by the corporation's operations. As taxpayers, they may be called upon to subsidize corporations that have failed and cannot meet their obligations to pensioners or others, or that are deemed too big to fail. As human beings with diverse moral beliefs and concerns, American investors speak about and vote on political matters for many reasons other than personal profit. Even as diversified investors, it is not clear that ordinary Americans are advantaged if corporate managers can influence the political process to reduce externality regulations, because such externalities can affect the overall growth of the economy and investor returns.¹⁷⁴

government, their activities were directly restricted in their charters, minimizing the need for more general prudential regulation. After specific chartering gave way to more enabling general corporation statutes, substantive legislation regulating externality risks created by corporate activity became more common, and corporations used constitutional litigation to attempt to invalidate or limit regulation. *Id.* at 588-93.

¹⁷⁴ Scholars recognize that if the externality costs generated to create corporate profits are too high, even the stockholders of those corporations may be worse off, because if they are diversified, the externality costs from the harm to society may exceed any gain to them as firm-specific stockholders. As John Armour and Jeff Gordon write:

[T]he shareholder value norm creates incentives for firms systematically to undermine the efficacy of regulatory internalization. [And], where the harms are systemic, even the firm's diversified shareholders, its majoritarian owners, would rather that the managers did not impose externalities. Risks of systemic harms — that is, affecting the economy at large — increase the undiversifiable portion of investors' risk. In relation to projects with such potential consequences,

Citizens United, however, ignores the reality that inhuman corporations are fundamentally distinct from their ultimate human investors, in strong contradiction to the hard-headed realism of conservative corporate theory. It also ignores the reality that these human investors cannot, for the reasons indicated, truly use the wealth they have entrusted to the stock market to counterbalance corporate speech. That personal wealth is impounded in their 401(k) plans, which are invested in those corporations.

Because the corporate form has worked as intended, corporate wealth dwarfs that of even the richest Americans. The ten richest people in the United States have a net worth of about \$370 billion.¹⁷⁵ The ten wealthiest corporations have equity of \$1.6 trillion, over four times as much.¹⁷⁶ Flesh-and-blood humans do not have the wallet to compete with corporations. Furthermore, corporate financial firepower dwarfs that of

diversified investors should not want managers to single-mindedly maximize share prices. As a result, a system in which ‘shareholder value’ is interpreted as share price maximization is paradoxically not aligning managers’ interests with those of dispersed shareholders, at least as regards systemic risks.

Armour & Gordon, *supra* note 171, at 45. The separation of ownership from ownership exacerbates this concern:

[D]iversified shareholders typically hold their shares through institutional investor intermediaries, whose governance activism will be constrained by what one of us has referred to as the ‘agency costs of agency capitalism.’ This refers to self-interested behavior by institutional actors who are typically evaluated in [relative] performance terms, not absolute performance. Thus even though such intermediaries may hold diversified portfolios, in service to the diversification desires of their beneficiaries, their incentives do not focus their attention on systemic risk issues, for these would similarly affect their investment management competitors. Rather, like a blockholder, for the portfolio companies in which they are ‘overweight,’ they are likely to promote management strategies that advance share price maximization, because that is how they would show superior performance against their competitors in most circumstances.

Id. at 39-40.

¹⁷⁵ *The World’s Billionaires*, FORBES, Mar. 25, 2013, <http://www.forbes.com/billionaires/list>.

¹⁷⁶ *Fortune 500 2013*, CNN MONEY, http://money.cnn.com/magazines/fortune/fortune500/2013/full_list/index.html?iid=F500_sp_full (last visited Dec. 9, 2013).

labor unions, because among other reasons, if labor were as rich as capital, it would be capital and not labor.¹⁷⁷

After *Citizens United*, corporate and labor donations to PACs increased.¹⁷⁸

Although there are no precise data on contributions to political campaigns, the Center for Responsive Politics, found that in the 2008 election cycle, i.e., the last general election before *Citizens United*, donations from business interests to political candidates totaled \$2 billion, while donations from trade unions were only \$75 million.¹⁷⁹ In the 2012 election cycle — that is, after *Citizens United* — the donations of corporate interests increased to over \$2.3 billion, while union donations were up to \$125 million.¹⁸⁰

VI. McCain-Feingold's Design Was Consistent With Conservative Corporate Theory And Left For-Profit Corporations With Substantial Expressive Clout

As we have shown, *Citizens United* embraces an understanding of corporate governance that is in tension with conservative corporate theory. Statutory and constitutional law before McCain-Feingold put far less pressure on conservative corporate theory's foundations. Before *Citizens United*, corporations were free to lobby elected officials for regulatory policies they thought desirable. By all measures, there

¹⁷⁷ Between 2000 and 2008, business interests outspent labor interests by a four-to-one margin. Tilman Klumpp et al., *The Business of American Democracy: Citizens United, Independent Spending, and Elections* 11 (Sept. 2013), <http://www.ualberta.ca/~klumpp/docs/cu.pdf>. Labor unions also face more onerous disclosure requirements. See Bebachuk & Jackson, *supra* note 158, at 960-61 (2013).

¹⁷⁸ See Coates, *supra* note 95, at *25.

¹⁷⁹ *Business-Labor-Ideology Split in PAC & Individual Donations to Candidates and Parties*, CTR. FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/bigpicture/blio.php?cycle=2008> (last visited Dec. 9, 2013).

¹⁸⁰ *Business-Labor-Ideology Split in PAC & Individual Donations to Candidates and Parties*, CTR. FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/bigpicture/blio.php?cycle=2012> (last visited Dec. 9, 2013).

appears to be no plausible argument that corporations were outgunned in this domain, as corporate lobbying expenditures greatly exceeded that of other interests.¹⁸¹

Similarly, corporations could act as aggregators for those of their stockholders and employees who voluntarily chose to contribute to corporate-sponsored PACs, which could then engage in independent expenditures and, within the limits of campaign laws, even direct contributions to candidates.¹⁸² By this means, the law addressed conservative corporate theory's concern that corporate managers had no legitimacy to spend corporate spending for purposes other than profit maximization because that is not why stockholders invest and because stockholders have diverse political views. By enabling corporations to seek voluntary contributions from stockholders and employees, McCain-Feingold and prior law facilitated corporate speech from those corporate constituencies who desired that end. Again, the resulting reality was not that corporations were outgunned. Corporate PACs were potent sources of political spending.¹⁸³

¹⁸¹ Heidi Welsh & Robin Young, *Corporate Governance of Political Expenditures: 2011 Benchmark Report on S&P 500 Companies*, SUSTAINABLE INVESTMENTS INST. (Nov. 2011), at *2, *47, http://www.irrcinstitute.org/pdf/Political_Spending_Report_Nov_10_2011.pdf (“S&P companies allocated \$979.3 million (87 percent) of the \$1.1 billion they gave in 2010 to [federal] lobbying. They spent a further \$112 million (10 percent) on state level candidates, parties and ballot initiatives and \$31 million (3 percent) on federally registered political committees.”).

¹⁸² See 11 C.F.R. § 110.2 (2013) (\$5,000 per candidate limit on PAC contributions); 11 C.F.R. § 114.5 (2013) (regarding separate segregated funds).

¹⁸³ On a similar practical level, pre-*Citizens United* statutory and decisional law reflected an ability on the part of legislators and of the Supreme Court to ensure that restrictions on corporate activity designed to address for-profit corporations did not chill the ability of individuals to come together using a corporate vehicle specifically for genuinely expressive purposes. See *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 263-64 (1986) (Section 441(b) of the Federal Election Campaign Act, which prohibited corporations from making expenditures out of their treasuries “in connection with” a federal election, was unconstitutional as applied to a non-business corporation organized for advocacy purposes, which had no stockholders, and did not accept contributions from business corporations or labor unions); *FEC v. Wisc. Right to Life, Inc.*, 551

The one limit that pre-*Citizens United* law did impose was on the ability to use corporate funds directly to influence the election process, particularly in terms of using corporate funds to expressly advocate the election or defeat of candidates.¹⁸⁴ This limit was consistent with premises of conservative corporate theory because it buttressed the notion that externality risk could be effectively addressed by the political process. By giving candidates some buffer against having massive corporate treasury funds unleashed against them directly if they did not support regulatory policies corporations advocate, this limit supported conservative corporate theory's argument that society and other corporate constituencies are protected because corporations have to play by the rules of the game, and those rules are not set by the corporations themselves, but by government officials elected by human beings, not corporations.

VII. *Citizens United* Strengthens The Argument That Conservative Corporate Theory Is Socially Counterproductive And Legally Erroneous

After *Citizens United*, the rival to conservative corporate theory has been arguably strengthened. The logical result of *Citizens United*, when combined with the conservative corporate theory view that corporations should only spend money on increasing stockholders' wealth, is that corporations will pour money into the electoral process to increase the returns to their stockholders. Because corporate wealth far

U.S. 449 (2007) (Section 203(b) of the McCain-Feingold Act, which prohibits a corporation from broadcasting shortly before an election a communication naming a candidate and targeted to the electorate, was unconstitutional as applied to a nonprofit, nonstock corporation organized for advocacy purposes).

¹⁸⁴ See 2 U.S.C. § 441b (2006) (banning corporate and union treasury expenditures "for any . . . electioneering communication"); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986) (construing § 441b to cover only "express advocacy").

exceeds that held directly by human beings, if corporations are able to act directly to influence who is elected to office, the laws and regulations in our society will increasingly tend to tolerate the imposition of greater externalities, because they will be enacted by politicians who have been elected in an expensive process in which money matters, and in which securing the support of non-human corporate money with a monocular focus on profit will be important to electoral competitiveness.

Anyone who has ever seriously discussed *Citizens United* with a range of fellow Americans has doubtless heard the argument that the reelection of President Obama refutes the notion that *Citizens United* has any important policy effect.¹⁸⁵ Aside from the fact that *Citizens United* was only decided in 2010 and that it already had a documented effect on campaign behavior in 2012, the mere election of a Democratic President does not mean that *Citizens United* had no effect on actual human citizens.¹⁸⁶ Rather, the question is whether *Citizens United* will make candidates of both parties who wish to be competitive far more dependent on corporate funds and therefore constrict the range of policy options available to address corporate externalities. A recent empirical study concludes that *Citizens United* had the effect in 2012 of increasing the probabilities that Republican candidates for state legislative races would get elected, but predicts that over time the bigger effect *Citizens United* will have is to shift power within the political marketplace to for-profit corporations and therefore to make both political parties more

¹⁸⁵ See, e.g., Dan Eggen & T.W. Farnam, *Spending by Independent Groups Had Little Election Impact, Analysis Finds*, WASH. POST, Nov. 7, 2011, http://www.washingtonpost.com/politics/decision2012/spending-by-independent-groups-had-little-election-impact-analysis-finds/2012/11/07/15fd30ea-276c-11e2-b2a0-ae18d6159439_story.html.

¹⁸⁶ See *supra* note 177.

likely to embrace their policy preferences.¹⁸⁷ Another study has found that corporate political activity since *Citizens United* has increased generally.¹⁸⁸ This suggests that, post-*Citizens United*, companies in regulated industries will be more able to “capture” regulators so as to bend the rules of the game in their own favor.

As a result, the rival argument that corporations should have to consider the best interests of all corporate constituencies and societies as a whole when making decisions is strengthened.¹⁸⁹ Otherwise, one form of non-human citizen that as a matter of reality controls much of the wealth of actual humans will have the ability to imbalance public policy, in a manner that is inconsistent with social welfare. Put plainly, if corporations are regarded as having equal rights with human beings, without regard to the real world

¹⁸⁷ Klumpp et al., *supra* note 177, at 25-26 (indicating why *Citizens United* is likely to increase the already large spending margin corporations enjoyed before the decision issued).

¹⁸⁸ Coates, *supra* note 95, at *27-28. Coates doubts whether corporate political spending is good for stockholders solely as stockholders of particular firms, because his results indicate that increased political spending was negatively correlated with firm profitability in all sectors except one: industries that are heavily subject to government regulation. This finding suggests that these firms’ political spending was intended to tilt the regulatory playing field in their direction, and thus tends to confirm the problem this paper identifies for conservative corporate theory.

¹⁸⁹ See, e.g., Lynn A. Stout, *The Toxic Side Effects of Shareholder Primacy*, 161 U. PA. L. REV. 2003, n.6 (2013) (citing *Citizens United* as recognition that “corporations are independent legal entities that own themselves” in support of her argument that stockholder wealth maximization is bad law and policy); Yosifon, *supra* note 171, at 1237 (“Multi-stakeholder governance will help to solve the public choice problem inherent in the shareholder primacy system, a problem that will only be exacerbated after *Citizens United*. . . . My argument is that shareholder primacy is not viable unless one is prepared to restrict corporate political activity.”); David G. Yosifon, *The Law of Corporate Purpose* (Santa Clara Univ. Legal Studies Research Paper No. 14-12, May 2013), <http://ssrn.com/abstract=2154031> (“As long as *Citizens United* is good constitutional law, shareholder primacy is bad corporate theory. . . . Instead, we must have fundamental reform of corporate governance law which requires directors to actively attend to the interests of multiple stakeholders at the level of firm governance, openly, honestly, and in good faith.”); Susanna Kim Ripkin, *Citizens United, Corporate Personhood, and Corporate Power: The Tension Between Constitutional Law and Constitutional Power* (Chapman Univ. Law Research Paper No. 12-10 Aug. 22, 2012), <http://ssrn.com/abstract=2134465> (arguing that *Citizens United* is not the cause of excess corporate power and influence in society, but a symptom, and that addressing concerns about corporate influence will require changes within corporate law itself).

differences between for-profit corporations and human beings recognized by and built into the design of conservative corporate theory, their managers must have the legal right to act with conscience and a regard for the full range of concerns that animate flesh and blood citizens of the United States. If the for-profit corporation really is a citizen like any other, and a distinct one from that of any of its constituencies including its stockholders, then its board must be entitled to have it act as a patriotic, moral citizen imbued with a conscience. If the notion of a corporation — a nexus of contracts — acting with a conscience is strange to conservative corporate theorists, their intellectual rivals would argue that *Citizens United* has made that strange notion a necessity because their conservative colleagues on the Supreme Court have equated the for-profit corporation with flesh-and-blood Americans entitled to cast a vote.