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IN DEFENSE OF CORPORATE PERSONS*

*Kent Greenfield***

Corporate personhood is getting a bad name.

Following the Supreme Court's 2010 ruling in *Citizens United v. Federal Election Commission*[1] protecting the First Amendment rights of corporations to spend money in elections, the nation has seen two trends of interest. First, we are experiencing an explosion in the amount of outside spending in elections, with so-called "independent" expenditures in elections going up significantly—from less than $150 million in the 2008 election cycle to over $1 billion in 2012.[2] Even greater increases appear on the horizon.[3] Second, we have seen the development of a broad-gauged movement to overturn the decision by way of constitutional amendment. These proposals range from relatively limited and contained grants of Congressional authority to regulate campaign finance to broad attacks on what proponents call corporate "personhood."[4]

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1. 558 U.S. 310 (2010).

2. *Total Outside Spending by Election Cycle, Excluding Party Committees*, OPENSECRETS.ORG, https://www.opensecrets.org/outsidespending/cycle_tots.php (last visited Mar. 28, 2015).

3. Nicolas Confessore, *Koch Brothers' Budget of $889 Million for 2016 Is on Par With Both Parties' Spending*, N.Y. TIMES, Jan. 26, 2015, *available at* http://www.nytimes.com/2015/01/27/us/politics/kochs-plan-to-spend-900-million-on-2016-campaign.html; Matea Gold, *Koch-backed network aims to spend nearly $1 billion in run-up to 2016*, WASH. POST, Jan. 26, 2015, *available at* http://www.washingtonpost.com/politics/koch-backed-network-aims-to-spend-nearly-1-billion-on-2016-elections/2015/01/26/77a44654-a513-11e4-a06b-9df2002b86a0_story.html; Rich Lowry, *The Kochs Ride Again*, POLITICO (Jan. 28, 2015), http://www.politico.com/magazine/story/2015/01/koch-brothers-2016-114704.html#.VOwzNClN3zI; Kenneth P. Vogel, *The Kochs put a price of 2016: $889 million*, POLITICO (Jan. 26, 2015), http://www.politico.com/story/2015/01/koch-2016-spending-goal-114604.html.

4. For a chart outlining the range of different proposals in the 113th Congress, see http://freespeechforpeople.org/node/593. More recently, more than 100 Senators and

Electronic copy available at: http://ssrn.com/abstract=2639778

While there is honest disagreement about the causal relationship between the Court's decision in *Citizen United* and the increase in independent expenditures,[5] there is no dispute about the causal link between *Citizens United* and the increased political focus on corporate personhood. President Obama criticized the decision in his 2010 State of the Union address, with members of the Court looking on, and continued the critique during his 2012 reelection campaign. After Mitt Romney served up the issue by asserting on the stump that "Corporations are people, my friend," Obama responded by declaring "I don't care how many times you try to explain it, corporations aren't people. People are people." During the 2014 mid-terms, Sen. Elizabeth Warren kept the issue fresh as she barnstormed the country to rally the faithful. According to the Washington Post, her most dependable applause line in her stump speech was "Corporations are not people!"[6]

The opposition to corporate personhood has not just been the stuff of speeches. A number of advocacy groups have either sprung up to fight corporate personhood or rebranded themselves by newly taking aim at it. Most of these groups oppose the right of corporations to assert any First Amendment speech rights, and some have gone further, calling for disabusing all corporations or businesses of any constitutional right. Common Cause, for example, uses former Secretary of Labor Robert Reich to tout its support for "a constitutional amendment declaring that 'Only People are People' and that only people should have free speech

Representatives introduced a proposed 28th Amendment in the 114th Congress. This amendment, called the "Democracy for All Amendment," gives Congress and the States power to enact limits on the "raising and spending of money . . . to influence elections," and gives them power to "distinguish between natural persons and corporations" even as to "prohibit[] such entities from spending money to influence elections." *See* http://corporationsarenotpeople.com/2015/01/22/28th-amendment-introduced-in-congress-with-more-than-100-sponsors/.

5. ADAM WINKLER, WE THE CORPORATION (forthcoming 2016); Matt Bai, *How Did Political Money Get Lost?*, N.Y. TIMES MAG., July 22, 2012 at MM14, *available at* http://www.nytimes.com/2012/07/22/magazine/how-much-has-citizens-united-changed-the-political-game.html?pagewanted=all; Richard L. Hasen, *How 'The Next Citizens United' Could Bring More Corruption – but less gridlock,'* WASH. POST, Feb. 21, 2014, *available at* http://www.washingtonpost.com/opinions/how-the-next-citizens-united-could-bring-more-corruption--but-less-gridlock/2014/02/21/a190d1c6-95ab-11e3-afce-3e7c922 ef31e_story.html; Rick Hasen, *What Matt Bai's Missing in His Analysis of Whether Citizens United is Responsible for the Big Money Explosion*, ELECTION LAW BLOG (July 18, 2012, 10:41 am), http://electionlawblog.org/?p=37108 .

6. David A. Fahrenthold, *Sen. Elizabeth Warren, The Teacher, Reminds Democrats That 'Rally' Is A Verb*, WASH. POST, Oct. 28, 2014, *available at* http://www.washingtonpost.com/politics/sen-elizabeth-warren-has-become-a-master-of-the-stump-speech/2014/10/28/acfee026-5e0e-11e4-8b9e-2ccdac31a031_story.html.

Electronic copy available at: http://ssrn.com/abstract=2639778

rights protected by the Constitution."[7] Public Citizen, the liberal litigation group founded by Ralph Nader, argues that "rights protected by the Constitution were intended for natural people."[8] Free Speech for People, one of the groups most influential in the anti-personhood movement, is pushing a "People's Rights Amendment" (the "PRA") declaring that "the rights protected by this Constitution" are "the rights of natural persons."[9] Under the PRA, "corporate entities" would be "subject to regulations as the people . . . deem reasonable." Corporations, that is, would not be able to claim any constitutional right.[10] A version of the PRA was sponsored in the last Congress by Senator Jon Tester of Montana and Congressman Jim McGovern of Massachusetts. It would declare that "the rights protected by this Constitution" are "the rights of natural persons." By their count, sixteen states and nearly 600 localities have endorsed some kind of anti-personhood amendment.[11] Moreover, the movement against corporate personhood has benefitted from the intellectual heft offered by a number of prominent legal scholars, including several speaking at the conference that engendered this series of essays.[12] In a

7. COMMON CAUSE, http://www.commoncause.org/issues/money-in-politics/index.jsp?page=2 (last visited Mar. 28, 2015). The Reich video is at https://www.youtube.com/watch?v=eg3-yrZnxe0 (last visited Mar. 28, 2015).

8. *A Constitutional Amendment to Keep Corporate Money Out of Elections: Corporations Are Not People*, PUBLIC CITIZEN, http://www.citizen.org/documents/DIFP-Corporations-are-Not-People-Citizens-United-Fact-Sheet.pdf (last visited March 28, 2015).

9. *The People's Rights Amendment*, FREE SPEECH FOR PEOPLE, http://www.freespeechforpeople.org/node/527 (last visited Mar. 28, 2015). The text of the proposed amendment is as follows:

> Section 1. We the people who ordain and establish this Constitution intend the rights protected by this Constitution to be the rights of natural persons.
> Section 2. People, person, or persons as used in this Constitution does not include corporations, limited liability companies or other corporate entities established by the laws of any state, the United States, or any foreign state, and such corporate entities are subject to such regulations as the people, through their elected state and federal representatives, deem reasonable and are otherwise consistent with the powers of Congress and the States under this Constitution.
> Section 3. Nothing contained herein shall be construed to limit the people's rights of freedom of speech, freedom of the press, free exercise of religion, and such other rights of the people, which rights are inalienable.

10. More precisely, any claim of constitutional right by a corporation, would receive rational basis review, the lowest level of constitutional scrutiny. *See, e.g.*, Williamson v Lee Optical of Okla., 348 U.S. 483 (1955) ("The law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that he particular legislative measure was a rational way to correct it.").

11. *Elections Show Americans Ready to Amend the Constitution (Press Release),* MOVE TO AMEND (Nov. 5, 2014), *available at* https://movetoamend.org/press-release/election-shows-americans-ready-amend-constitution.

12. *Legal Advisory Committee*, FREE SPEECH FOR PEOPLE, http://freespeechforpeople.org/node/597 (last visited May 1, 2015).

moment when the progressive left seems listless, this movement has genuine energy.

This essay is a critique of this attack on corporate personhood. I will explain that the corporate separateness—corporate "personhood"—is an important legal principle as a matter of corporate law. What's more, as a matter of constitutional law, corporate "personhood" deserves a more nuanced analysis than has been typically offered in arguing in favor of an amendment to overturn *Citizens United*. Indeed, the concept of corporate "personhood" can in fact be marshaled in arguments *against* corporations being able to assert constitutional rights. In the nascent category of cases brought by corporations asserting rights of religious freedom, for example, corporations typically derivatively assert the religious claims of their shareholders. Attention to corporate "personhood" would lead courts to separate the claims of shareholders from those of the corporation itself, leading to a dismissal of corporate religious claims asserted on behalf of shareholders.

Finally, I will propose that the concerns motivating the movement against corporate personhood should be ameliorated with adjustments in corporate governance rather than constitutional law. In corporate law, what we need are changes in corporate governance to make corporations *more* like persons, not less. Unlike persons, corporations are expected to act if they have only one goal—the production of shareholder value. People must balance a range of obligations, both moral and legal. Requiring corporations to attend to a broader range of stakeholders would make corporations more like people, would make them better citizens, and would make their political participation less problematic.

I. THE IMPORTANCE OF SEPARATENESS

In 2014, the Court heard arguments in *Burwell v. Hobby Lobby*,[13] a case contesting the so-called "contraceptive mandate" in the Affordable Care Act. As enacted, the Affordable Care Act contained a provision requiring companies over a certain size to provide its employees with health insurance that includes all medically approved forms of contraceptive care.[14] Hobby Lobby sued, saying that the provision operated as a violation of the

13. 134 S. Ct. 2751 (2014).
14. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119.

Religious Freedom Restoration Act (RFRA),[15] which provides that the government "shall not substantially burden a person's exercise of religion" unless that burden is the least restrictive means to further a compelling governmental purpose.[16] Hobby Lobby argued that under traditional canons of statutory construction and under the Dictionary Act[17], it should be considered a "person" under RFRA.[18] While the case was limited to the statutory question, it presaged religious exercise cases certainly to be brought by corporations in the future.

An arts and crafts retailer, Hobby Lobby is a big company, with over 20,000 employees and more than 600 stores. But it's closerly held, with all its stock owned by members of one family—the Greens of Oklahoma City—who are devout Christians. The Greens believe that four of the methods covered by the contraceptive mandate of the ACA are "abortifacients," and argued that the mandate caused them to violate their genuinely-held belief that human life begins at conception. At first glance, the Greens' arguments appear to depend on corporate personhood. Indeed, they argued that Hobby Lobby deserved to be considered a person under RFRA.

Nevertheless, as a group of corporate law professors argued in an amicus brief, a crucial aspect of Hobby Lobby's argument turned on a *rejection* of corporate personhood. (I helped write the brief and was a signatory.[19]) The brief explained that "corporate personhood" simply expresses the idea that the corporation has a legal identity separate from its shareholders, employees, and other constituents. That separateness, the brief pointed out, is inherent in what it means to be a corporation. A "first principle" of corporate law is that "for-profit corporations are entities that possess legal interests and a legal identity of their own—one separate and distinct from their shareholders." The very purpose of the corporation as a legal form is to create an entity "distinct in

15. The Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb et seq.

16. 42 U.S.C. 2000bb-1(a) and (b).

17. 1. U.S.C. 1.

18. *Burwell*, 134 S. Ct. at 2768–70.

19. The brief was filed on behalf of a group of forty-four law professors. The lead author of the brief was Jayne Barnard, James Goold Cutler Professor of Law at William and Mary. *Amicus Curiae* Brief of Corporate and Criminal Law Professors in Support of Petitioners, Sebelius v. Hobby Lobby Stores, Inc., No. 13-354 (10th Cir. argued June 27, 2013), *available at* http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v3/13-354-13-356_amcu_cclp.authcheckdam.pdf.

its legal interests and existence from those who contribute capital to it."

This separateness means, among other things, that shareholders are not held liable for the debts of the corporation. That makes it possible for people to invest in corporate stock without overseeing the day-to-day activities of companies in which they invest and without risking every penny they own in case the corporation goes bankrupt. This separateness thus makes capital markets possible. And capital markets are essential for the development of a vibrant national economy. Separateness also means that corporations can exist long after the life of any individual that invests in, or works for, them. As Lynn Stout has pointed out, corporations in this way provide a mechanism for society to make long-term, intergenerational investments that are not linked to government or a specific family.[20] In this light, it is not an overstatement to say that corporate separateness has been one of the legal innovations most important to the development of national wealth.

The professors argued that separateness meant the Greens should not be able to attach their own religious beliefs to the corporation. The reason the Greens had chosen to form a corporation was to be able to operate the business without running the risk of losing their personal assets if the corporation went belly up. For purposes of liability, the Greens *wanted* separateness; they *wanted* "personhood" for the corporation. They should not then be able to stand in the shoes of the corporation for purposes of religion. The Greens' argument was cursed with an internal inconsistency: to be a religious "person" with religious beliefs cognizable under RFRA, the company had to borrow the religious beliefs of the Greens. That is, to disregard the company's personhood.

The Supreme Court did not notice the inconsistency. It held, 5–4, that the Greens could project their religious beliefs onto the corporation and refuse to provide their employees the required contraceptive-care benefits. Justice Samuel Alito's opinion is evidence of the Court's much-discussed pro-business tilt, to be sure.[21] But it is also evidence that the Court did not understand

20. Lynn A. Stout, *The Corporation As a Time Machine: Intergenerational Equity, Intergenerational Efficiency, and the Corporate Form*, 38 SEATTLE U. L. REV. 685 (2015).

21. ERWIN CHEMERINSKY, THE CASE AGAINST THE SUPREME COURT 172–84 (2014); Lee Epstein, William M. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431 (2013); Paul Barrett & Greg Stohr, *Supreme Court Shields Corporations From Liability Risks*, BLOOMBERG BUSINESS, June 27, 2013,

the basics of corporate law. Its mistake was not an embrace of corporate personhood but a rejection of it.

An additional aspect of corporate personhood is to create a mechanism in law to hold corporations accountable. Consider the Deepwater Horizon oil spill disaster. For three months in 2010, Americans woke to the news of another 50,000 barrels of crude oil spewing into the coastal waters of the Gulf of Mexico.[22] We were justifiably outraged. In a legal system without corporate personhood, the channel for that outrage would be limited to lawsuits and criminal inquiries against individual human beings responsible—managers, workers, and contractors. That is important, of course. In any legal jurisdiction worth its salt, the search for culpable individuals has to be part of the settling-up of any man-made disaster. But it should not be all. Few human beings would have enough money to compensate those harmed by a massive disaster like *Deepwater Horizon*. Because a corporate entity is also on the hook, there's a chance for something approaching real compensation or real responsibility. Corporate personhood is thus not only a mechanism for the creation of wealth (by encouraging investment), it is a mechanism for enforcing accountability (by providing a deep pocket to sue).

All this is to say that the political rhetoric of "corporations are not people" is just that, and should not be used to guide our legal analysis. Corporate separateness is a crucial analytical tool in corporate law, both in encouraging investment and providing accountability. A corporation may have "no soul to be damned and no body to be kicked,"[23] but corporate personhood is a valuable legal fiction that should not be jettisoned.

II. CORPORATE CONSTITUTIONAL RIGHTS: A NULL SET?

Not surprisingly, the leaders of the movement against "corporate personhood" do not spend much time talking about

http://www.bloomberg.com/news/articles/2013-06-27/supreme-court-shields-corporations-from-liability-risks; Adam Liptak, *Friend of the Corporation*, N.Y. TIMES, May 5, 2013, at BU1, *available at* http://www.nytimes.com/2013/05/05/business/pro-business-decisions-are-defining-this-supreme-court.html?pagewanted=all.

22. ON SCENE COORDINATOR REPORT, *DEEPWATER HORIZON* OIL SPILL 33 (2011), *available at* http://www.uscg.mil/foia/docs/dwh/fosc_dwh_report.pdf.

23. Attributed to Edward Thurlow, 1st Baron Thurlow, who was Lord Chancellor of Great Britain from 1778 to 1783. *See* John C. Coffee, Jr., *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386 (1981).

these corporate law aspects of the concept. Though their arguments with regard to constitutional standing are inconsistent with these longstanding corporate notions, they do not appear to advocate for an eradication of corporate personhood in the sense of having a capacity to sue and be sued, to hold property, or to borrow money or issue stock in its own name.

Instead, the cries of "corporations are not people" are usually meant as a placeholder for the assertion that corporations should not be able to claim the constitutional rights that human beings can. The question of corporate constitutional rights has been a matter of Supreme Court analysis for nearly 200 years, ever since the 1819 case of *Trustees of Dartmouth College v. Woodward*.[24] The question of which rights corporations should be able to claim does not have an easy answer.

But one piece of analysis is indeed easy: the argument that corporations should not have standing to assert *any* constitutional right is quite weak indeed.[25] Remember, the opposite of a constitutional right is a government power. If corporations have no rights, then governmental power in connection with corporations is at its maximum. That power can be abused, and corporate personhood is a necessary bulwark. A handful of examples illustrate the point.

In 1971, the government sought to stop the New York Times, a for-profit, publicly-traded media conglomerate, and the Washington Post, which had gone public as a corporation only a few weeks previously, from publishing the leaked Pentagon Papers. In one of the most important free speech rulings of the Twentieth Century, the Supreme Court correctly decided that the papers had a First Amendment right to publish.[26] At the time, no one seriously suggested that the correct answer to the constitutional question was that the Times and the Post, as corporations, had no standing to bring a constitutional claim at all.

In 1992, the Supreme Court reaffirmed Roe v Wade in a hard-fought case in which the right to choose was championed by plaintiff Planned Parenthood, a corporation.[27] No one seriously suggested the organization had no standing to object to limits on its ability to provide abortions because of its status as a corporate

24. 17 U.S. (4 Wheat.) 518 (1819).
25. For an excellent analysis, see Brandon Garrett, *The Constitutional Standing of Corporations*, 163 U. PA. L. REV. 95 (2014).
26. N. Y. Times Co. v. United States, 403 U.S. 713 (1971).
27. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

entity. Today, Google and other media companies are fighting government demands to disgorge the contents of their servers.[28] No one seriously suggests that the government's power should be unchecked because the media companies, as corporations, have no Fourth Amendment right to be free of unreasonable searches and seizures. If corporations were not able to claim the Fifth Amendment rights to be free of government takings, their assets and resources would always be at risk of expropriation. No one would invest in corporations, undermining the reason we have them in the first place.

In fact, some of the leading opponents of corporate "personhood" have begun to concede the weakness of the argument that corporations should never be able to assert any constitutional right. For example, a recent update to the website of Free Speech for People seeks to reassure supporters that its advocacy of the People's Rights Amendment would not affect the freedom of the press, even though its text purports to end all constitutional rights for corporations.[29] The update argues that press freedoms would still be held by the individual human beings engaging in press activities, even when those individuals operate in a corporate form. According to this update, "The freedom of press applies to press/media functions regardless of whether a corporation owns and operates those functions."[30]

This interpretation of the PRA by its own authors embodies what appears to be a striking concession that the corporate form is immaterial to the analysis of speech or press freedoms. What apparently counts is the *function* at issue, not the status of the claimant. If a law or government actor infringes on the function of the press, then it will be subject to constitutional scrutiny, "regardless of whether a corporation owns and operates those functions." In other words, corporate personhood is immaterial to

28. Brief of *Amici Curiae* Amazon.com, Inc. and Accenture PLC in support of Appellant, *Microsoft Co. v. U.S.,* No. 14-2985-CV (2d Cir. Dec. 15, 2014), *available at* https://www.eff.org/files/2014/12/15/amazon_microsoft_ireland_amicus_brief.pdf; Brief of Verizon Communications, Inc., Cisco Systems, Inc., Hewlett-Packard Co., Ebay Inc., Salesforce.com, Inc. and Infor, as *Amici Curiae* in support of Appellant, *Microsoft Co. v. U.S.,* No. 14-2985-CV (2d Cir. 2014), *available at* http://publicpolicy.verizon.com /assets/images/content/Amicus_Brief_in_Microsoft_Search_Warrant_Case.pdf; Kim Zetter, *Tech Giants Rally Around Microsoft to Protect Your Data Overseas*, WIRED, Dec. 15, 2014, *available at* http://www.wired.com/2014/12/microsoft-allies-fight-for-overseas-data-privacy/.

29. *See supra* at note 9.

30. *The People's Rights Amendment Protects Freedom of the Press*, FREE SPEECH FOR PEOPLE, http://freespeechforpeople.org/sites/default/files/FSFP%20on%20freedom %20of%20the%20press.pdf (last visited Mar. 30, 2015).

the constitutional question, and a corporation *can* assert the constitutional right of freedom of the press if it "owns and operates those functions." This reassurance is flatly inconsistent with the amendment's proposed language that "corporate entities are subject to such regulations as the people, through their elected state and federal representatives, deem reasonable." That language would allow a reasonable regulation of corporate-owned newspapers; the update backtracks significantly but does not adjust the language of the proposed amendment. Is it that the amendment's ban on corporate rights is not meant to apply when the corporation's assertion of rights is to the benefit of natural persons? If so, when is that *not* the case? Remember that in *Citizens United* itself, the non-profit corporate claimant was asserting a First Amendment right to speak on behalf of, and to, natural persons. If the Amendment includes an implicit exception when a corporation is acting on behalf of or for the benefit of natural persons, then the People's Rights Amendment would not change the outcome in the very case that motivated it.

The Amendment does include a provision that "Nothing contained herein shall be construed to limit the people's rights of freedom of speech, freedom of the press, free exercise of religion, and such other rights of the people, which rights are inalienable." But that provision focuses on rights of people. If it operates as a savings clause for *corporate* rights of speech, press, and religion, then the amendment is toothless indeed and would not overturn the result in *Citizens United* itself.

A second update purports to explain that the People's Rights Amendment is not open to the criticism that it subjects corporations to uncompensated takings, as I argue above.[31] The update explains that "While corporations are not among 'we the people' by and for whom the Constitution exists, corporations and other property are nonetheless secure from unconstitutional conduct by government." This explanation is hard to decipher, since it is a logical impossibility for an entity to not have rights but nevertheless be "secure from unconstitutional conduct by the government." Having a right is simply another way of saying that one is protected from unconstitutional acts; not having a right is merely another way of saying that there is no constitutional limit on government conduct toward you. So it cannot be the case that

31. *The People's Rights Amendment Protects Property Rights*, FREE SPEECH FOR PEOPLE, http://freespeechforpeople.org/sites/default/files/FSFP%20on%20property%20rights.pdf (last visited Mar. 30, 2015).

corporations do not have rights but are still able to claim the government has acted unconstitutionally toward them.

Perhaps this update should be taken to be saying something about the rights of shareholders, assumed to be those who "own" corporations (a highly contestable claim, by the way[32]). One way to understand the update is to see it as positing a right held by shareholders to assert a constitutional claim any time a corporation's property is taken. Let us call this "property standing." Or the update could mean that the corporation can derivatively assert the interests of its shareholders. Let us call this "derivative standing."

The update indeed seems to suggest that the PRA would allow both property and derivative standing. As for property standing, the update asserts that "human beings who have had their property taken . . . (including the shares held by people in the corporation) may invoke remedies under the 5th or 14th Amendment." As for derivative standing, the update asserts "The corporation may also have standing to bring those arguments on behalf of their shareholders."

As with the update on press freedoms, these arguments are inconsistent with the text of the proposed amendment and with the claim that corporations should have no constitutional rights. These exceptions are in fact so broad that they would swallow the rule. If, for example, shareholders can assert that limits on corporate activities causing financial harm to them give them an independent constitutional claim, then limits on corporate speech would often affect shareholder returns as clearly as limits on other aspects of corporate behavior. As a matter of "property standing" there is no conceptual difference between a limit on corporate speech that decreases shareholder value and a taking of corporate property that decreases shareholder value. One cannot explain the difference by saying that corporations have no speech rights and do have property rights, because under the PRA they would have neither. So under the update, shareholders could sue to contest constraints on corporations that cause shareholders financial harm, which could include limits on corporate speech. Under this reasoning, the only effect of the PRA would be that instead of corporations bringing First Amendment challenges it would be the shareholders of those corporations bringing the challenges. The years of effort fighting for a 28th Amendment

32. Kent Greenfield, *Are Shareholders Owners? Absolutely. And Absolutely Not*, 66 J. GOVERNANCE DIRECTIONS 479 (2014).

would result in the same claims being brought and argued, but on behalf of shareholders as plaintiffs instead of the corporation itself.

Another oddity created by the supposed work-around of "property standing" is that many corporations covered by the PRA do not have shareholders. Consider my home institution, Boston College. Organized as a corporation, it would not be able to claim any constitutional rights itself under the terms of the PRA, because as a corporate entity it would be subject to "such regulations as the people . . . deem reasonable." And shareholders cannot come to the rescue because Boston College has no shareholders. This is true of all non-profits—whether hospitals, charitable organizations, or political advocacy groups like Free Speech for People itself. Boston College is a legal person under Massachusetts law, but under the PRA it would have no constitutional rights and could be subject to uncompensated takings of its land, property, or other assets. And because it has no shareholders, there would be no human beings who could claim "property standing" to protect the corporation from governmental overreach. The irony of the "property standing" exception, then, would be that for-profit corporations would be protected from uncompensated takings because shareholders could raise the constitutional claims, but non-profit corporations would not be so protected. Chevron having more rights than Boston College surely cannot be the outcome intended by the PRA's advocates.

The notion of derivative standing is similarly problematic. Note that this is the same kind of exception to the "corporations have no rights" rule that the PRA advocates assert to save the freedom of the press. The corporation itself has no rights, they say, but the corporation can assert the rights of its constituents. There are multiple problems with this work-around, however. First, as mentioned above, many corporate entities do not have shareholders. And many corporations have only other corporations as shareholders. Subsidiaries, for example, are often entirely owned by a corporate parent. I presume that under the PRA, corporations would not "also have standing to bring [constitutional claims] on behalf of their shareholders" if those shareholders are also corporations. The resulting patchwork—corporations with human shareholders could assert constitutional rights but corporations with no shareholders or with only institutional shareholders could not—would be awkward at best.

Worse, the "derivative standing" argument would undermine corporate separateness where it is most important. Remember the *Hobby Lobby* case, where the Green family bristled at burdens on their religious freedoms but used the corporation as the vessel for their complaints. Hobby Lobby asserted, in effect, derivative standing to bring its shareholders' religious claims. If such derivative standing became the norm, we would see a drastic *increase* in the assertion of corporate constitutional claims for exemptions from regulations conflicting with their shareholders' freedoms of speech or religion, whether those regulations pertained to contraceptive mandates or anti-discrimination laws.[33] Surely an increase in corporate constitutional claims is not an intended outcome of the PRA. But the proposed exception allowing corporations to assert the rights of their shareholders could have that very effect.

The argument that corporations have no constitutional rights is simply unsustainable. Even the most adamant opponents of corporate constitutional rights cannot hold the line, offering up exceptions that recognize and even expand corporate rights. They, too, find themselves engaging in the very difficult analysis of which rights corporations may assert and which they do not. Their answers are problematic and inconsistent, but they recognize the necessity of the task.

III. CORPORATE CONSTITUTIONAL RIGHTS: SOME BUT NOT ALL

The question of which constitutional rights corporations can claim has bedeviled the Court and commentators for two centuries. Of course corporations are not genuine human beings and should not automatically receive all the constitutional rights that human beings claim. At the same time, as argued above, it is similarly obvious that corporations should be able to claim *some* constitutional rights. So which ones, and when?

At a high level of generality, the answer to that question turns on both the purpose of the corporate form and the nature of the right asserted. In fact, few general statements can improve on Chief Justice Marshall's in *Dartmouth College*: "Being the mere creature of law, [a corporation] possesses only those properties which the charter of its creation confers upon it either expressly

33. *See* Kent Greenfield, *Hobby Lobby and the Return of "The Negro Travelers' Green Book*," THE AMERICAN PROSPECT (Mar. 26, 2014), http://prospect.org/article/hobby-lobby-and-return-negro-travelers-green-book.

or as incidental to its very existence."[34] In effect, the proper analysis of corporate constitutional rights asks what rights are "incidental to its very existence." Then-Justice William Rehnquist, dissenting in *First National Bank v. Bellotti*, said it best. "Since it cannot be disputed that the mere creation of a corporation does not invest it with all the liberties enjoyed by natural persons, . . . our inquiry must seek to determine which constitutional protections are 'incidental to its very existence.'"[35]

This inquiry must thus necessarily begin with a discussion of what corporations are for, what purposes they serve. This in turn draws on a broad scholarly literature, in the corporate law field for the most part, about the purpose of the corporation. There is much disagreement about the question of—to borrow a phrase—for whom are corporate managers trustees,[36] that is, whether corporations should be managed primarily to serve shareholder interests or to serve a more robust set of stakeholder interests.[37] (More on that below.) But there is indeed broad consensus that for-profit corporations are economic entities, created for the purpose of benefiting society by creating wealth through the production of goods and services.[38] The constitutional analysis should begin, then, with the presumption that for-profit corporations should receive the rights necessarily incidental to serving that economic purpose, and should not receive those that are not germane to that purpose. This presumption may be overcome in specific contexts or to further other constitutional values, but that is the starting place for analysis.

The result will be a patchwork. Corporations cannot vote or serve on juries, for example; it does not make any sense to think of corporations asserting those rights, both because of the nature of the right and the nature of the corporate entity. Similarly, the

34. Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518, 636 (1819).

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

36. E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932). For recent forays into this area, see Leo E. Strine, *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, WAKE FOREST L. REV. (forthcoming); U of Penn, Inst. for Law & Econ Research Paper No. 15-08, *available at* http://ssrn.com/abstract=2576389; LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SJAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC (2012).

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

38. I discuss this foundational purpose of corporations in GREENFIELD, THE FAILURE OF CORPORATE LAW, *supra* note 37, at 125–42.

Court has held that corporations cannot assert the Fifth Amendment right to be free of self incrimination.[39] The exclusion makes sense, since corporations could otherwise evade all kinds of disclosure obligations necessary to make markets work. It is easy to imagine the havoc created if, for example, General Motors had a constitutional right not to disclose safety defects in their cars.

When the time comes, the Court should draw the same line with regard to the freedom to exercise religion. The right is to protect the freedom of conscience, and only actual human beings have a conscience. There should be allowances for genuine associations of religious people, such as churches. (In fact, the Catholic Church is organized as a corporation.[40]) But because of corporate separateness – that is, corporate personhood – it will be quite difficult for business companies to show that they are genuine associations of religious people. Moreover, when businesses win religious exemptions from regulation, the market is skewed in their favor and to the detriment of other market actors. That undermines society's economic purpose of having corporations in the first place.[41]

Should corporations be able to assert First Amendment free speech rights? The answer depends in part on whether the asserted right is inconsistent with corporations' economic purpose. Sometimes it makes little sense to protect the First Amendment rights of corporations. Securities laws, for example, routinely require corporations to disclose to the public their financial wellbeing. If human beings were required to reveal personal finances to the public, they would rightly object to the requirement as coerced speech, subject to strict scrutiny under the First Amendment. But corporations' arguments along those lines would fail, and they should. Disclosure is necessary for markets to work. A corporate right not to disclose would undermine the economic purpose of corporations themselves. In other words, a right not to disclose is not "incidental" to the "very existence" of corporations. The opposite is true. The Supreme Court agrees, in fact. In 2011, AT&T asked that information about its finances be excluded from Freedom of Information Act requests, because the

39. Hale v. Henkel, 201 U.S. 43 (1906).

40. WINKLER, *supra* note 5, at ch. 1; John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L. J. 655 (1926).

41. Kent Greenfield, Op-Ed, *Do Corporations Have Religious Liberty?*, BOS. GLOBE, Mar. 2, 2014, *available at* http://www.bostonglobe.com/opinion/2014/03/02/unfair-advantage-would-spur-abuse-exempt-status/jKhgXAMJyxaiC3vjb7qGxH/story.html.

statute has an exception for "personal privacy." The Court unanimously rejected this claim—and Chief Justice John Roberts ridiculed it in his opinion. That exception, he wrote, "does not extend to corporations. We trust that AT&T will not take it personally."[42]

On the other hand, the best understanding of corporate speech rights would include the ability of the corporation to speak publicly about matters germane to its economic role. That is, speech that is "incidental" to its very existence in the marketplace should receive protection. This includes commercial speech at least,[43] and presumptively even that political speech concerning economic matters germane to the business.[44]

But the question of germaneness is not likely to do all the work we need done in the free speech area. There are additional considerations at issue because of the nature of the right. Sometimes it is important to protect the speech rights of a corporation not because the communication is germane to the economic role of the business, but because of the rights of human listeners to hear what it has to say. The rights of listeners is what is actually at issue in many press cases, such as the Pentagon Papers case mentioned above. But it is not limited to press cases, and in fact has often been used by the Court to explain commercial speech cases. On occasion, what a corporation says is relevant to public debate,[45] or necessary to give customers the information required for them to make decisions in the marketplace.

It is worth pausing to recall that the idea that listeners have a right to hear the words of businesses began as a liberal idea. In the

42. FCC v. AT&T Inc., 131 S. Ct. 1177, 1185 (2011).

43. This statement is subject to the straightforward caveat that commercial speech should not receive protection that is so great so as to undermine the economic role of corporations. For example, fraud and misrepresentation—even if protected in other speech contexts—need not be protected in commercial speech. *See* United States v. Alvarez, 132 S. Ct. 2537 (2012). In other words, intermediate scrutiny—current doctrine—is about right for commercial speech. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Svc. Comm'n, 447 U.S. 557 (1980).

44. For purposes of comparison, germaneness is a matter of constitutional importance in construing the rights of unions and union members. Under *Abood v. Detroit Bd of Educ.*, 431 U.S. 209, 235–36 (1977), public employees have a First Amendment right not to have their union dues or fees used by the union for "the advancement of ideological causes not germane to its duties as collective bargaining representative."

45. The recent efforts on the part of corporations to block or limit "religious freedom" laws that could give businesses the right to discriminate against LGBTQ customers is an example. *See, e.g.*, Nick Gass, *Wal-Mart Slams Arkansas "Religious Freedom" Law*, POLITICO (Apr. 1, 2015), http://www.politico.com/story/2015/04/arkansas-hutchinson-rfra-walmart-116567.html.

1970s, Ralph Nader's group Public Citizen brought a First Amendment challenge to limits on the commercial advertising of pharmacies.[46] They argued these laws violated the public's right to know. As Adam Winkler argues, it is not unfair to say that Public Citizen's advocacy led directly to Justice Kennedy's reasoning in *Citizens United*, in which he rested his protection of corporate speech rights not on corporate "personhood" but on the right of the public to know corporations' views.[47] Public Citizen may now decry corporate constitutional rights, but its work forty years ago helped get us to where we are today.

For constitutional questions surrounding campaign finance, I agree with the personhood opponents that *Citizens United* wrongly expanded corporate rights to spend money on elections. I also agree that the Court's mistake traces its origins to the 1976 case *Buckley v. Valeo*, where the Court struck down limits on individual (human) campaign expenditures as violations of free speech. But the problem in *Citizens United* was not the Court's supposed holding that corporations are people, and the problem in Buckley was not a supposed ruling that "money is speech." Both are mischaracterizations, and the critical yelps they attract are poorly targeted in any event. The Court never said in *Citizens United* that corporations are people. Rather it said—incorrectly—that corporations are "associations of citizens" and that protecting corporate rights was necessary to protect natural persons in the association. This is, by the way, the same mistake the PRA advocates make in their discussion of press freedom discussed in the previous section. As for *Buckley*, the Court never said money is speech. The Court said instead that money is sometimes essential to make speech audible above the din. Giving it, too, can be an expressive act. Those notions are certainly correct. Imagine if Texas told its citizens they could not contribute to Planned Parenthood or had to pay dues to the National Rifle Association. It would be inane to argue that the First Amendment would not be implicated because money is not speech.

Nevertheless, there are myriad reasons why a commitment to free speech rights—even corporate free speech rights—should not bar reasonable limits on independent campaign expenditures

46. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc. 425 U.S. 748 (1976).

47. *Citizens United v. FEC*, 558 U.S. 310, 318–72 (2010) (stating that "[t]he purpose and effect of this law is to prevent corporations, including small and nonprofit corporations, from presenting both facts and opinions to the public"). *See* WINKLER, *supra* note 5.

from both corporations and the super rich. It is not hyperbole to say that without such limits, our democracy is at risk. The billions of dollars flooding the electoral process skews it toward the monied and well-heeled, and perverts the nature of public service. The current Court is so enamored with a simplistic, libertarian theory of free speech doctrine that it is blind to those risks. A sane Court could easily construct exceptions to otherwise applicable doctrine to protect the sanctity and fairness of our elections.[48] In fact, Canada's Supreme Court has done that very thing, saying, "If a few groups are able to flood the electoral discourse with their message, it is possible, indeed likely, that the voices of some will be drowned out."[49] They weighed the constitutional value of "equality in the political discourse . . . necessary for meaningful participation in the electoral process"[50] against the value of unfettered spending, and decided that reasonable limits on spending was consistent with freedom of speech.

But notice something. One can support campaign finance regulation, as the Canadian Supreme Court ruled, and still acknowledge corporate personhood and corporate constitutional rights as well.

The focus on corporate spending may also distract from the fact that most of the money flooding into the electoral process is not coming from corporations. It's coming from rich individuals like Sheldon Adelson and the Koch brothers. There is a lot of corporate money, to be sure. Chevron, the most politically active public corporation in 2012, spent $2.5 million in the 2012 cycle.[51] The Chamber of Commerce, the largest corporate bundler, funneled over $35 million into various 2012 races.[52] But both were dwarfed by the torrent of individual money. Adelson alone threw almost $93 million into various races during the same period, and

48. *See, e.g.*, Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341 (2009).

49. Harper v. Canada (Attorney General), [2004] 1 S.C.R. 827 (Can.).

50. *Id.*

51. Chevron's contributions to outside groups is listed as #23 on this chart: *2012 Top Donors to Outside Spending Groups*, OPENSECRETS, https://www.opensecrets.org/outsidespending/summ.php?cycle=2012&disp=D&type=O (last visited Mar. 30, 2015). The three companies listed above them all are privately held, one by the Kochs. You can also check the fact here: Ciara Torres-Spelliscy, *Safeguarding Markets from Pernicious Pay to Play: A Model Explaining Why the SEC Regulates Money in Politics*, 12(2) CONN. PUB. INT. L. J. 361, 402 (2012–2013).

52. Andrew Prokop, *40 charts that explain money in politics*, VOX (July 30, 2014), http://www.vox.com/2014/7/30/5949581/money-in-politics-charts-explain.

the Koch brothers ran a network of shady groups that spent over $400 million.[53]

The power of corporations, to be sure, is frequently misused, usually to the advantage of the financial and managerial elite. Employees, communities, consumers, the environment, and the public interest in general are often elbowed aside in corporate decisionmaking, unless the corporation can make money by taking them into account. Corporations are managed aggressively to maximize shareholder return. As a result, the risks they run—whether of oil spills in the Gulf or of financial crises erupting from Wall Street—are often unrecognized until too late. The executives who run American corporations do not generally think of themselves as having obligations to the public. The social contract of American corporations is thin.

But these defects of corporate power, fundamental as they are, are not problems of constitutional law or corporate personhood. They are problems of corporate law, and they could be fixed by corporate law.

IV. THE PROBLEM OF CORPORATE POWER: A CORPORATE LAW FIX

American courts forged sweeping protections for corporations during the Gilded Age, on both the constitutional and corporate fronts.[54] Though this legal fortress was slowly breached during the Progressive and New Deal eras, in many ways we are back where we started. The Supreme Court over the last decade or so has applied twisted ideas of free speech and due process to wall corporations off from accountability.[55] In corporate governance, after a mid-century pendulum swing toward more public-spiritedness, managers and investors are now once again fixated on maximizing shareholder value.

In the last few years, however, there has been a pushback against the shareholder primacy norm. An article in the Harvard Business Review declared:

> There's a growing body of evidence . . . that the companies that are most successful at maximizing shareholder value over time are those that aim toward goals other than maximizing

53. *Id.* at 6, 22.

54. See WINKLER, *supra* note 5; M. Todd Henderson, *The Story of* Dodge v. Ford Motor Company: *Everything Old Is New Again*, *in* CORP. L. STORIES 37 (J. Mark Ramseyer, ed., 2009).

55. See Chemerinsky, *supra* note 24, at 172–84.

> shareholder value. Employees and customers often know more about and have more of a long-term commitment to a company than shareholders do.[56]

New York Times columnist Joe Nocera wrote that "it feels as if we are at the dawn of a new movement—one aimed at overturning the hegemony of shareholder value."[57] An opinion piece in The Financial Times recently argued that "[c]ompanies need a bigger and better purpose than simply maximising shareholder value."[58] A 2011 Forbes article called shareholder primacy "the dumbest idea in the world."[59]

The case against shareholder primacy was argued best by Steven Pearlstein in The Washington Post. Maximizing shareholder value, he wrote, is a "pernicious" ideology that "has no foundation in history or in law."[60] He continued, "What began in the 1970s and '80s as a useful corrective to self-satisfied managerial mediocrity has become a corrupting, self-interested dogma peddled by finance professors, money managers and over-compensated corporate executives." In fact, he argued, "much of what Americans perceive to be wrong with the economy these days—the slow growth and rising inequality; the recurring scandals; the wild swings from boom to bust; the inadequate investment in R&D, worker training and public goods—has its roots in this ideology."

These skeptics are popularizing what a number of legal scholars and I have been saying for quite a while—that corporations should be seen as having robust social and public obligations that cannot be encapsulated in share prices.[61] Now, executives have legal obligations to take account of shareholder interests. Progressive corporate scholars argue these "fiduciary

56. Justin Fox & Jay W. Lorsch, *What Good Are Shareholders?*, HARV. BUS. REV., Jul.–Aug. 2012, at 48, 57, *available at* https://hbr.org/2012/07/what-good-are-shareholders.

57. Joe Nocera, *Down With Shareholder Value*, N.Y. TIMES, Aug. 11, 2010, at A.19, *available at* http://www.nytimes.com/2012/08/11/opinion/nocera-down-with-shareholder-value.html?_r=0.

58. Stefan Stern, Transcend Shareholder Value for All Our Sakes, FIN. TIMES, Oct. 23, 2014, *available at* http://www.ft.com/intl/cms/s/0/0a288288-583e-11e4-a31b-00144feab7de.html?siteedition=intl#axzz3Is1UZ900.

59. Steven Denning, *The Dumbest Idea in the World: Maximizing Shareholder Value*, FORBES Nov. 28, 2011, *available at* http://www.forbes.com/sites/stevedenning/2011/11/28/maximizing-shareholder-value-the-dumbest-idea-in-the-world/.

60. Steven Pearlstein, *How the cult of shareholder value wrecked American business*, WASH. POST, Sept. 9, 2013, *available at* http://www.washingtonpost.com/blogs/wonkblog/wp/2013/09/09/how-the-cult-of-shareholder-value-wrecked-american-business/.

61. *See* GREENFIELD, THE FAILURE OF CORPORATE LAW, *supra* note 37; STOUT, THE SHAREHOLDER VALUE MYTH, *supra* note 36.

duties" should be extended to employees and other corporate stakeholders.[62]

One way to make these obligations operational is to make the decisionmaking structure of the company itself more pluralistic. In a number of European countries, for example, companies have "codetermined" board structures that require representation of both shareholders and employees.[63] Even with these management structures, corporations continue their focus on building wealth—that is the core purpose of the corporate form—but not only for a narrow sliver of equity investors. And it works. Germany, where co-determination is strongest, is the economic powerhouse of Europe. The CEO of the German company Siemens argues that codetermination is a "comparative advantage" for Germany; the senior managing director of the U.S. investment firm Blackstone Group had said that codetermination was one of the factors that allowed Germany to avoid the worst of the financial crisis.[64]

Notice that these governance structures reforms make corporations more like persons, not less. Human beings routinely balance a multitude of interests—I am, for example, a parent, a spouse, a teacher, a writer. Only the rare oddball behaves as if accumulating money is the paramount and unitary good.[65] Humans have consciences; corporations do not. Left to themselves, they will behave as if profit is the only thing that matters. The best way to constrain corporations is to require them to sign onto a more robust social contract and to govern themselves more pluralistically—mechanisms designed to mimic the traits of human personhood within the corporate form.

62. Kent Greenfield, *Sticking the Landing: Making the Most of the "Stakeholder Moment,"* 2015 EUR. BUS. L. REV. 147; Kent Greenfield, *Defending Stakeholder Governance*, 58 CASE W. RES. L. REV. 1043 (2008); Marleen O'Connor, *Restructuring the Corporation's Nexus of Contracts: Recognizing a Fiduciary Duty to Protect Displaced Workers*, 69 N.C. L. REV. 1189 (1991).

63. ALINE CONCHON, BOARD-LEVEL EMPLOYEE REPRESENTATION RIGHTS IN EUROPE: FACTS AND TRENDS 7–8 (2011), *available at* http://www.etui.org/Publications2/Reports/Board-level-employee-representation-rights-in-Europe; *see also* MAP: Board-Level Representation in the European Economic Area, Worker-Participation.EU, http://www.worker-participation.eu/National-Industrial-Relations/Across-Europe/Board-level-Representation2/MAP-Board-level-representation-in-the-European-Economic-Area2.

64. CONCHON, *supra* note 63, at 8.

65. *See* Kent Greenfield & John E. Nilsson, *Gradgrind's Education: Using Dickens and Aristotle to Understand (and Replace?) the Business Judgment Rule*, 63 BROOK. L. REV. 799 (1997).

If corporations had these traits of personhood, I would worry less about corporate involvement in the political arena. American corporations have become a vehicle for the voices and interests of a small managerial and financial elite. The cure for this is more democracy within businesses—more participation in corporate governance by workers, communities, shareholders, and consumers. If corporations were more democratic, their participation in the nation's political debate would be of little concern.

Unfortunately, corporate personhood opponents are making these corporate governance reforms less likely. Personhood skeptics often characterize corporations as having a narrow social role; because of that narrow role, the argument goes, they owe it to shareholders to stay out of politics. The opponents of *Citizens United* are endorsing a narrow view of business as a way to explain why corporations should be exiled from the public square. To fight corporate personhood, they are bolstering shareholder primacy.

Take for instance Justice John Paul Stevens's dissent in *Citizens United* itself. He argued, among other things, that corporate speech should be limited in order to protect shareholders' investments. Shareholders are seen as owners, as "those who pay for an electioneering communication" and are assumed to have "invested in the business corporation for purely economic reasons."[66] Stevens argued that corporate political speech did not merit protection because:

> [T]he structure of a business corporation . . . draws a line between the corporation's economic interests and the political preferences of the individuals associated with the corporation; the corporation must engage the electoral process with the aim to enhance the profitability of the company, no matter how persuasive the arguments for a broader . . . set of priorities.[67]

Even more revealing, Stevens cites as support a set of corporate governance principles adopted by the prestigious American Law Institute. The Principles were the product of compromise, both asking corporations to look after shareholder interests and allowing them to act with an eye toward "ethical" and "humanitarian" purposes. But Stevens quoted only the language embodying shareholder primacy: "A corporation . . .

66. Citizens United v. FEC, 558 U.S. 310, 475–76 (2010) (Stevens, J., dissenting).
67. *Id. at* 469–70 (Stevens, J., dissenting) (internal citations omitted).

should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain."[68]

Opponents of corporate personhood are following Stevens into the shareholder rights trap. Common Cause now has a "featured campaign" for "strengthening shareholder rights."[69] The Brennan Center for Justice is supporting a "shareholder protection act" and calls shareholders "the actual owners" of corporations.[70] Professor Jamie Raskin of American University, one of the smartest and most energetic academic opponents of *Citizens United*, says that corporations should not be spending in elections because, "after all, it's [shareholders'] money."[71] This is all shareholder primacy language brought to bear in fighting Citizens United.

Wall Street loves talk of shareholder rights. To be sure, many Americans are shareholders through our retirement accounts and the like. But "widows and orphans"[72] are still the minority; most stock held in American businesses is owned by the very wealthy. (The richest 5% of Americans own over 2/3 of all stock assets. The bottom 40%—125 million working class people—essentially own nothing in terms of stock.[73]) So when opponents of *Citizens United* focus on shareholder rights, they are singing Wall Street's tune.

I wish this shareholder-protective rhetoric was just that, but it is not. Corporate personhood opponents urge, as an intermediate measure short of a constitutional amendment, that corporations be required to seek shareholder approval before spending corporate money on political campaigns. There might be

68. *Id.* at 470 (Stevens, J., dissenting) (quoting THE AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01(a), p. 55 (1992)). *See also* Melvin Aron Eisenberg, *An Overview of the Principles of Corporate Governance*, 48 BUS. LAW. 1271 (1993), *available at* http://scholarship.law.berkeley.edu/facpubs/2024.

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

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

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

72. *Widow-and-Orphan* Stock, INVESTOPEDIA, http://www.investopedia.com/terms/w/widowandorphanstock.asp (last visited May 18, 2015)

73. *Wealth groups' shares of assets, by asset type, 2010*, ECON. POL'Y INST. (Aug. 20, 2012), http://www.stateofworkingamerica.org/chart/swa-wealth-table-6-6-wealth-groups-shares/; *Wealth groups' shares of total household stock wealth, 1983-2010*, ECONOMIC POLICY INSTITUTE (Aug. 24, 2012), http://www.stateofworkingamerica.org/chart/swa-wealth-figure-6g-wealth-groups-shares/.

some benefit to such a rule, since it would help ensure executives do not spend corporate monies on issues and candidates opposing company interests. But that benefit is probably marginal, and would come at the risk of validating corporate involvement in the political process in furtherance of shareholder value and to the detriment of other stakeholders. Corporations could speak out in favor of Wall Street but not employees? That would be worse, not better.

The efforts of anti-personhood activists are not only in tension with stakeholder theory on the conceptual level. In the political arena, too, a tension exists because the energy for reform is a finite resource. I believe that, in this moment, there is an opening to question the very framework of how we view corporations and their social obligations. But we won't get anywhere on that front if the progressive left wastes its energy fighting for a constitutional amendment that is unlikely to succeed and would either be toothless or affirmatively harmful if it did.

V. CONCLUSION

There are numerous reasons to question the reasoning and outcome in *Citizens United*, [74] and a multitude of legitimate worries about its implications for our democracy.[75] But the significant efforts of activists, lawyers, and academics aimed at ending corporate personhood are being misspent. Corporate personhood did not drive the result in *Citizens United*, and it is unclear how ending corporate personhood would change the outcome. Indeed, an insistence on corporate personhood would avoid results in cases such as *Hobby Lobby*, which depend on courts' willingness to ignore the separation between corporations and their shareholders.

The worries that the deluge of independent expenditures will pervert our democracy are legitimate, but must come to terms with the fact that the source of the skewing at present is predominantly that of wealthy individuals, not corporations. A focus on corporate money in electoral politics is to fixate on what is a relatively minor problem at worst. The question of corporate

74. *See, e.g.*, Leo E. Strine, Jr. & Nicolas Walter, *Conservative Collision Course?: The Tension between Conservative Corporate Law Theory and* Citizens United, 100 CORNELL L. REV. 335 (2015).

75. *See, e.g.*, Paul Blumenthal & Ryan Grim, *The Inside Story of How Citizens United Has Changed Washington Lawmaking*, HUFFINGTON POST (Feb. 26, 2015, 5:00 AM), http://www.huffingtonpost.com/2015/02/26/citizens-united-congress_n_6723540.html?ncid=newsltushpmg00000003.

personhood is simply immaterial to broader remedy, whether by way of a doctrinal shift or even a constitutional amendment.

The legitimate worries about corporate power are not best dealt with by way of constitutional amendment. Corporate power is primarily a problem of corporate governance and regulation, not a problem of constitutional law. Here, too, corporate personhood should be embraced rather than shunned. Indeed, if corporations were structured so they behave more like people, we would have less reason to worry about their involvement in politics.