

The Question Raised by America's Design

THE PRESENT MOMENT HAS ACQUIRED A RARE CONSTITUTIONAL quality, as though the essence of the country has become unstable and is on the verge of being redefined. Some say this is eternally the case—that citizens in a democracy can always exercise their political rights to bring about the changes they desire, and that a degree of instability is in the nature of a system of elected lawmakers. This view fails to admit that these fundamental ingredients—“citizens,” “political rights,” and “political representation”—are vulnerable to radical shifts, their meanings dependent upon the ideologies of those in power. Democracy is heading towards new meanings whose contours run deep in the waters ahead.

Sensational threats to democracy spring up to the surface and clamor for attention, but a different focus is now required. This is not the time to marvel at the faces of the FBI agents who found \$90,000 in Congressman William Jefferson's freezer.¹ Nor is it the time to compare Jack Abramoff's boyish, admiring grin as he shook hands with President Reagan with his disdainful scowl years later as he strode into federal court, prepared to plead guilty to the corruption of public officials.² It would be useless to inspect the private wine lockers at the Capitol Hill Club where an engraved plaque once read, “Brent Wilkes”—Wilkes, the defense contractor who contributed to the more than \$2.4 million in bribes that Representative Randy Cunningham accepted.³ Focusing on bribery and other obvious forms of corruption—the rule breakers—recalls the bromide “rearranging the deck chairs on the *Titanic*.”

The gravity of the moment is a function of what is legal, not what is illegal. In order to perceive democracy's vulnerability, we must leave the criminals aside, as colorful as they are, and train our eyes on the nation's present course. What sorts of citizens are becoming most influential and how do they exercise their political rights? Just one couple, the Adelsons, single-handedly prolonged Newt Gingrich's 2012 presidential primary

run through \$20 million in donations to a pro-Gingrich superPAC.⁴ The Adelsons went on to donate an additional \$130 million to other political organizations,⁵ roughly the same amount that each presidential campaign spent in the 2000 election. One hundred and fifty-nine other individuals, corporations, and interest groups have followed the Adelson playbook, giving \$1 million or more.⁶ Other, more creative spenders, such as the Koch brothers, have propelled their preferred causes and candidates to prominence through funneling hundreds of millions of dollars into a variety of organizations and candidates. Meanwhile, one nonprofit association, ALEC, has succeeded in having thousands of bills based on its model legislation introduced in state legislatures.⁷ Noting that approximately 17 percent of its bills get passed, ALEC bragged to its members that their donations were “a good investment,” adding that “nowhere else can you get a return that high.”⁸ In 2010, AT&T, Pfizer, and Reynolds American agreed, contributing between \$130,000 and \$398,000 each to ALEC’s treasury.⁹

And what about the course that lawmakers are setting for political representation? During the 2009 debate on health care legislation in the House of Representatives, more than a dozen officeholders gave speeches ghostwritten by lobbyists who bundle contributions for their reelection campaigns.¹⁰ In a time of tornados, record-setting heat, and melting icccaps, lawmakers postpone emissions regulations and weaken environmental protections at the behest of entrenched companies.¹¹ As with natural disasters, so too with financial ones. On the same day they voted on the financial overhaul bill, legislators collected campaign money from the financial firms with the strongest interest in the outcome.¹² The same pattern occurs in other policy areas, as members of important congressional committees tend to take in 10 percent to 30 percent more donations during their tenure, “rais[ing] money from many of the same industries affected by their work.”¹³

All of this is perfectly normal, predictable even. Everyone is doing exactly what the system encourages them to do, propelled forward by its momentum and incentives. Because political parties, campaigns, and political speech are almost exclusively privately financed, politicians and parties compete for funds, and the private sources contributing those funds exploit the situation in order to press their interests. As of the 2012 elections, it costs approximately \$1 billion to become president,¹⁴ \$10 million to become a

senator, and \$1 million to become a member of the House.¹⁵ Candidates and officeholders depend on friendly donations and outside spending; and to the same severe extent, they fear unfriendly donations and spending. So long as such dependency and fear are operative, the political power of wealthy donors and spenders, corporations, superPACs, lobbyists, and special-interest groups is secure.

Beyond casting donors and spenders in the role of political master, however, candidates and officeholders' tremendous demand for political funds casts donors and spenders in the role of slave. A growing body of evidence shows that limits on donations and expenditures are, in essence, limits on the amount of money that politicians will extort from citizens and businesses.¹⁶ Even former senators have confessed that "donors . . . feel shaken down" and that some dynamics behind money in politics are "more like extortion than . . . bribery."¹⁷ The discovery that donors and spenders are both political predators and political victims strengthens the cause of campaign finance reform.

Whether they are spending money to pressure officeholders to enact favorable policies or spending money to appease officeholders who might otherwise punish them with unfavorable policies, donors and spenders feel tremendously insecure. What is to stop their competitors from outspending them? How do they know when they have employed sufficient funds to successfully press or protect their interests? Candidates face similar insecurity. How can they be sure that their cash reserves and campaign spending are sufficient to beat out their opponents? Because there is no limit to the total amount of money that campaigns or outside groups can raise and spend, an arms race ensues.

Spending on U.S. congressional and presidential campaigns topped \$6 billion in 2012, up from \$5.3 billion in 2008, and \$4.2 billion in 2004.¹⁸ While each presidential campaign raised over \$1 billion in 2012, Obama and McCain raised little more than \$1 billion together in 2008. And yet that amount set a record in its time, outstripping the \$646.7 million raised by Bush and Kerry in 2004, and more than tripling the \$325 million raised by Bush and Gore in 2000.¹⁹ A similar dynamic attends congressional elections. The \$448 million spent in House and Senate races in 1988, for example, was six times greater than the amount spent in 1976. And

still, this number had tripled by 2006 and quadrupled by 2012, reaching \$1.8 billion.²⁰ For candidates, these trends signal a rising financial bar for obtaining elected office. Interested individuals and groups, on the other hand, face a rising financial bar for obtaining political influence.

The price tags attached to political power have never been so daunting. For the first time ever, both presidential candidates rejected the public financing system passed in the wake of Watergate. Neither candidate was willing to limit himself to public funds in the final stage of the election and risk being surpassed by the other candidate's private funds. When all is said and done, campaigning seems better defined by private fundraisers than public rallies. Consider that President Obama appeared at 221 fundraisers in 24 states in the 2012 election season, a financial regimen that dwarfed his civic regimen of 101 rallies in 10 states during that same period.²¹ Romney's fundraising routine was similarly rigorous and notably more informative than his public appearances. Audiences of donors, who commonly paid \$30,000–\$40,000 each, enjoyed detailed policy descriptions and long question-and-answer sessions. Public audiences, in contrast, were generally privy to nothing more than vague twenty-minute speeches with little or no time for questions.²²

Various types of financial competition fuel the fundraising imperative. It has long been the case that political actors have to guard against being outspent by opponents within their same grouping—candidates versus candidates, parties versus parties, lobbyists versus lobbyists, and spending groups versus other spending groups. Lately, however, another dynamic has begun to fuel the money race as well: candidates and their parties scramble to avoid being outgunned by superPACs and dark money groups. This risk revealed itself to be formidable in the 2012 election as outside spending reached \$1.3 billion,²³ a number equal to or greater than what both presidential candidates had raised in any prior election. Although each candidate aided the formation of one or more friendly superPACs to do battle against his superPAC foes, this only exacerbated the larger trend of candidates and parties being marginalized by unaccountable, private organizations.

By the end of the 2012 election, superPACs and dark money groups had raised more than the national party committees themselves. While the size of individual donations to candidates and parties is limited by law, the major-

ity of superPAC funds came in the form of seven-figure checks.²⁴ And while parties, candidates, and even superPACs must disclose the identities of their donors, dark money groups, such as Karl Rove's Crossroads GPS, do not have to do so. As one dark money group told potential donors, "[N]o politician, no bureaucrat, and no radical environmentalist will ever know you helped . . . the only thing we plan on reporting is our success to contributors like you."²⁵ As a result of this strategy, the people and interests behind \$400 million in 2012 election spending will never be known.²⁶ This even holds true for spending by the U.S. Chamber of Commerce, a nonprofit that serves as a political front for unlimited corporate cash.²⁷ In recent years, for example, Prudential Financial donated \$2 million to the Chamber as part of its efforts against stricter financial regulations, and Dow Chemical donated \$1.7 million to oppose the push for greater security at chemical facilities.²⁸

The need to raise private funds did not end with the general election. Bruised and battered by the money race, President Obama solicited unlimited corporate and individual donations to fund his 2013 inauguration.²⁹ The invitation sent to campaign donors spelled out categories of donations between \$10,000 and \$1 million. As the amount increases, so do the perks, which include varying degrees of access to exclusive receptions and meetings, and varying numbers of tickets to the inaugural ball.³⁰ While the administration expected some donors to keep on giving after the election, other donors lined up to demand a reward—most notably, bundlers of significant campaign funds who now stand at the front of the line for diplomatic appointments as ambassadors to choice foreign nations.³¹ The same occurred after the 2008 election when "[n]early 80 percent of those who collected more than \$500,000 for Obama took 'key administration posts,' as defined by the White House."³²

I. WARNINGS HEEDED IN VAIN

Power, exclusiveness, and distortion are among the themes common to these diverse examples of money in politics. In terms of power, nobody goes so far as to claim that money alone is *sufficient* for political success. Many well-funded candidates lose elections, and many wealthy spenders and interest groups have failed to get their way in elections and lawmaking.³³ Money is *necessary* for political success, however, and in increasingly high

sums at that. Officeholders spend roughly half their time raising funds for their reelection campaigns, and the feasibility of candidacies, meanwhile, is judged by fundraising ability.³⁴ No candidate or politician can afford to alienate his or her donor base. Moreover, money has extraordinary power in certain contexts, such as lifting unpopular candidates to prominence, prolonging campaigns, influencing the legislative agenda, and saturating media markets with whatever political messages are favored by wealthy spenders—or even by just one wealthy spender.³⁵

After power comes exclusiveness. Even in the context of donations to political campaigns and parties, where legal limits on money in politics are strongest, only one-third of one percent of citizens contributes over \$200.³⁶ And yet those donations constitute the vast majority of all the money raised by candidates and parties in federal elections.³⁷ In the case of superPACs and dark money groups, where limits are weakest, 200 millionaires and billionaires (0.000063 percent of the population) stand behind roughly 80 percent of all the money spent.³⁸ In the end, 0.37 percent of the population supplies approximately 70 percent of all the money in politics.³⁹ It is little wonder that most Americans feel disenfranchised. Political freedoms appear trivial unless buoyed by significant cash; and when raised up in this way, political freedoms become a means of dominating those who lack financial resources.

Exclusion and domination at the individual level give way to distortion at the level of the system itself. The experience of self-governance and the outputs of the policymaking process cannot help being colored by the money race. Although they contain many shades of gray and do not always fall neatly within the lines, the hues and the basic forms they compose are evident. Candidates who are successful at fundraising go further; outside spending groups shape the debate; interest groups with deep pockets enjoy greater access, if not sway; organizations with a larger lobbying budget receive more attention than their competitors; congressional activity reflects the priorities of donors and spenders . . . and so on. When systematized and repeated in countless contexts, the conversion of financial power into political power distorts self-governance. What does democratic integrity mean in the system as we know it today? How do popular sovereignty and political accountability work in such a system? What is the present-day status of political equality?

To begin to answer such questions is to realize that American democracy is charting a precarious course, its regard for ordinary citizens dubious, its values open to question, its purposes uncertain, its nature shifting, and, ultimately, its legitimacy jeopardized. The problem is much less a function of individual instances of acute corruption than it is a widespread system of corruption, broadly understood. The question is not who cheats democracy, but who lawfully owns it. After all, the \$90,000 in a particular officeholder's freezer matters less than the billions of dollars invested in officeholders' campaigns and their associated superPACs. The few lobbyists who con their clients are less significant than the thousands who bring their clients excellent returns on their political investments. Could the occasional legislative provision produced in conjunction with a bribe possibly matter more than the hundreds of thousands of provisions produced through an opaque interest-group process? Attention should be focused on the market for political power, the privileged position of the wealthy and corporations therein, and the laws produced thereby.

That focus matured quickly on American soil. Seventy-five years prior to the Declaration of Independence, the New World's first popular legislative body outlawed the bribing of voters.⁴⁰ And in the way of foreshadowing the problem in the United States proper, George Washington himself came under scrutiny for "treating" voters to refreshments, spending an amount worth more than the average voter's real assets.⁴¹ Concerns over bribery and candidate spending soon gave way to our broader focus, spurred on by the words of democracy's and capitalism's icons. For example, note the fear expressed by the author of the Declaration of Independence. "I wish," Thomas Jefferson wrote, "never to see all offices transferred to Washington, where, further withdrawn from the eyes of the people, they may more secretly be bought and sold as a market."⁴² On another occasion, he put it even more bluntly:

This country is headed toward a single and splendid government of an aristocracy founded on banking institutions and moneyed incorporations and if this tendency continues it will be the end of freedom and democracy, the few will be ruling and riding over the plundered plowman and the beggar.⁴³

He suggested that his countrymen “take warning [from the case of England] and crush in its birth the aristocracy of our monied corporations which dare already to challenge our government to a trial of strength and bid defiance to the laws of our country.”⁴⁴

Decades later, Abraham Lincoln voiced a similar concern. Referencing the rise of corporate power during the Civil War, Lincoln predicted that “an era of corruption in high places will follow, and the money power of the country will endeavor to prolong its reign by working upon the prejudices of the people until all wealth is aggregated in a few hands and the Republic is destroyed.”⁴⁵ Though he was witnessing the dismemberment of the United States, he assessed the danger of concentrated wealth in these terms: “I feel at this moment more anxious for the safety of my country than ever before, even in the midst of war.”⁴⁶

How did the father of capitalism feel about these concerns? In his revolutionary book, *The Wealth of Nations*, Adam Smith wrote that “[o]ur merchants and master-manufacturers complain much of the bad effects of high wages . . . [but t]hey are silent with regard to the pernicious effects of their own gains.”⁴⁷ He described those who “employ the largest capitals” and “dealers in any particular branch of trade or manufacturers” as “an order of men whose interest is never exactly the same with that of the public, who have generally an interest to deceive and even to oppress the public, and who accordingly have, upon many occasions, both deceived and oppressed it.”⁴⁸ Considering that these classes use their wealth to “draw[] to themselves the greatest share of public attention” and that they desire restraints upon competition and an increase in profits at the public’s expense, Smith recommended that proposed laws be “long and carefully examined, not only with the most scrupulous, but with the most suspicious attention.”⁴⁹

It is as though Smith had traveled in time to read the latest exposés on ALEC. It would seem that Jefferson and Lincoln had joined him and made it their first priority to examine the cost of today’s campaigns, the power of lobbyists in the legislative process, and the billions of dollars in corporate funds spent on political advertising. Their ancient warnings echo today: if economic power translates into political power, then democracy is threatened—its core values of political equality and popular sovereignty cannot survive.

Over and over again, citizens and their representatives have agreed, proclaiming that money unduly influences politics, that it is unfair for wealthy individuals and corporations to freely employ their economic power for political gain, that this displaces the role of the ordinary citizen, skews debate, corrupts the law-making process, and undermines the political accountability of lawmakers. Various packages of campaign finance reform have been enacted in the states and at the federal level, and numerous laws limiting the power of corporations in the political process have been passed. Those who catalog such reforms at the federal level alone cite 1883, 1907, 1910, 1911, 1925, 1940, 1946, several years in the 1970s, and 2001 as dates that Congress took action.⁵⁰ Reforms enacted at the state level are even more numerous.⁵¹ All included, these political finance reforms have addressed many topics, including campaign contributions, campaign expenditures, political party funding, public financing for political campaigns, disclosure and transparency, individual expenditures, political action committee spending, and corporate political spending. Our moment in history becomes increasingly suspenseful as these laws are erased, one by one, from the books.⁵²

II. THOSE WHO INSIST, "FULL SPEED AHEAD"

For anyone wondering why reforms are being eliminated and why the problem is being allowed to spiral out of control, it is a waste of time to pay much attention to the Congress, the president, state governments, or the public. Forget that the role of money in politics has long been contested in legislatures, state and lower federal courts, specialized agencies, boardrooms, political campaigns, the media, university classrooms, and even the street. Attention must be directed instead to those who have had the final say. The power of judicial review continues, time after time, to bring campaign finance reform efforts within the reach of the Supreme Court.

The pattern is clear: state and federal lawmakers restrict the role of money in politics, lawsuits are filed, and the Supreme Court ultimately declares some portion of the legislation unconstitutional. Comprehensive reforms are rendered ineffective, and meaningful future reforms are not attempted because their fate is a foregone conclusion. In short, we can count on the Court to riddle campaign finance laws with holes, if not to

strike them down entirely, and we can count on resourceful lawyers and lobbyists to find their way through those tattered parchments. Taking in its considerable power, the Court once remarked, “[m]oney, like water, will always find an outlet.”⁵³ Perhaps so. But this inevitability does not explain why the Court has created so many of these outlets itself. Indeed, the historical dynamic of Supreme Court reversals amounts to outlets of considerable width opened on purpose. Here lies the mysterious heart of the problem.

Limitations on political finance constrain freedom, economic freedom: citizens cannot bestow their wealth (or as much of it as they might like) upon political candidates and political parties. Corporations encounter additional limits—they are not treated as equal citizens in democracy. When lawmakers restrain political spending, they separate economic power from political power, and move away from economic conceptions of core values. They announce that speech, freedom, equality, and citizenship mean one thing in democracy and another thing in capitalism. This course decouples speech from money, equality from non-discrimination in political spending, and citizenship from incorporation. Those harmed by political finance reform, by these distinctions between the political system and the economy, have asked the Court to define speech as financial donations and expenditures competing for market share, freedom as freedom to spend, equality as no more than a formal condition in which nobody’s money is turned down, citizenship as inclusive of corporations, and democracy as a free market. The Court has acquiesced to each request.

After striking down limits on how much candidates and campaigns could spend, a core component of the nation’s first comprehensive law on political finance, the Court proceeded to free corporations to spend unlimited sums to influence state ballot questions. It accomplished this much between 1976 and 1978. Even Chief Justice Rehnquist’s long and more critical leadership of the Court did not reverse these nation-defining holdings. The additions of Chief Justice Roberts and Justice Alito have moved the Court even further to the side of financial power. Joined by Justices Scalia, Thomas, and Kennedy, these fledgling Justices wasted no time in striking down many election laws, including the strictest campaign finance rules at the state level, the most promising form of public financing

for elections, and long-standing federal restrictions on corporate political activity. *Citizens United*, handed down in 2010, is the most infamous of these cases, granting corporations a First Amendment right to unlimited political expenditures.⁵⁴

It is only natural for private interests to seek political influence. But instead of permitting the states and the federal government to moderate that natural tendency and provide for a principled democratic framework, the Court has liberated big spenders and corporations. This would not be such a bad thing if officeholders and parties were in a position to critically evaluate the claims of the private parties and interest groups that clamor for their attention. By striking down Arizona's public financing system, one of the most effective nationwide, the Court has helped to ensure that officeholders will not obtain such a position.⁵⁵ This precedent has frustrated state and national efforts to prevent candidates from becoming dependent upon (and ultimately indebted to) a narrow class of donors and spenders.

After issuing passionate dissenting opinions in *Citizens United* and other related cases, Justices Stevens and Souter retired. Justices Kagan and Sotomayor have taken up their predecessors' cause, but it is of little use. Once Rehnquist and O'Connor were replaced by Roberts and Alito, concern over money in politics became a minority position. Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito constitute a majority of the Court. These five men can rule however they like, a power they have steadily directed against campaign finance reform since 2006. Their rulings stand behind today's ever-increasing heights of money in politics.

III. PROPOSED SOLUTIONS

Responses to the problem vary more than one might expect. Some reforms would eliminate all existing limits on money in politics so that candidates and parties could better compete against superPACs and dark money groups. Others would leave money in politics alone and focus instead on changing corporations so that corporate political activity would seek more progressive ends. And still others would strengthen limits on money in politics, through either new legislation or a constitutional amendment. Citizens face a choice between conflicting solutions, each promising to lead democracy in a better direction.

It is too soon to choose, however, although not for the reasons one might think. True, the ink has barely dried on the Supreme Court's latest opinion on money in politics. And yes, new facts and figures on political spending will continue to arise, election after election. Still, the problem in choosing between reforms is not that there are new things we do not yet know; it is, rather, that there are old things we have not yet understood.

All reforms are crafted with reference, whether explicit or implicit, to Supreme Court rulings. Often enough, such proposals put forth a view of democracy that the Court has already contradicted. Other times, they build on the Court's view, but seek to extend it further than the Court intended. How can such proposals be evaluated if the Court's rulings have not been fully understood? How can we decide where democracy *should* go if we have yet to understand the reasons for its present course? Upon discovering those reasons, one can make an informed choice between reforms. The types of proposals on the table today initially demand attention, not judgment. In return, they offer to serve as a guide, focusing and grounding the inquiry into the Supreme Court's design for democracy.

A. *Anti-Reform*

To opponents of campaign finance reform, the rising tide of money in politics represents a movement towards a better democracy, a democracy with fewer limits on financial power. A popular initiative among Republican politicians and ultra-conservative policy groups is to relax or eliminate the limits on contributions directly to candidates and parties.⁵⁶

The Supreme Court heard arguments along these lines on October 8, 2013, in *McCutcheon v. FEC*. A Republican activist and the Republican National Committee brought the case in order to challenge the aggregate limits on political contributions enacted shortly after the Watergate scandal. If the Court rules for the plaintiffs, the biennial contribution limits of \$74,600 to non-candidate committees and \$48,600 to candidate organizations will be struck down, ushering in a new era of multi-million dollar contributors.⁵⁷ Donors would still have to respect limits on contributions to each individual candidate and committee,⁵⁸ but without an aggregate limit, donors could spend up to \$3.5 million each,⁵⁹ thus becoming a vastly more powerful force in federal campaigns and political parties. The next

logical step (and subsequent item on the anti-reform agenda) is to abolish those individual contribution limits, enabling wealthy financiers to donate unlimited amounts to particular candidates and committees.

One notable libertarian organization, the Center for Competitive Politics, would abolish other rules as well, including the ban on corporate contributions directly to political campaigns and parties, and the disclosure rules that require the identification of individual and corporate donors and spenders.⁶⁰ The center describes campaign finance reform as “an assault on the First Amendment” and positions its agenda within its overall mission “to promote and defend citizens’ First Amendment political rights of speech, assembly, and petition.”⁶¹

James Bopp, a lawyer who has persuaded the Court to adopt this line of thought in several cases, believes that we have reached “the tipping point.” Noting the ability of superPACs to rival candidate spending so rapidly after their creation, Bopp predicts that “they’ll [soon] exceed candidate spending by 50 percent [and] [o]nce the Democrats realize there ain’t any going back on this, then their contributors will start realizing the only thing they can do is participate.” Bopp’s prediction for superPAC spending in 2016? “[I]t’ll be three times candidate spending.”⁶² Aside from its own importance as a major achievement of the anti-reform agenda, unlimited outside spending is a catalyst for the elimination of contribution limits. Illinois recently proved the point, suspending contribution limits once outside groups spend over \$250,000 in a statewide race.⁶³ The new law seeks to allow candidates and parties to more effectively compete with superPACs. Commenting on the law, Bopp proudly announced, “We’re in the endgame.”⁶⁴

Even if the Court were to defy Bopp and end its streak of holdings striking down campaign finance laws, the surviving laws would not necessarily be on safe footing. Although the Court long ago upheld the constitutionality of limits on individual contributions to parties and candidates, and bans on direct corporate contributions, it has not deemed such measures constitutionally required.⁶⁵ Nobody doubts that the Court would allow the Congress and the states to weaken or even repeal them.⁶⁶ The same goes for a bill, passed by the House of Representatives, to eliminate the limited presidential public financing system, another measure that the Court long ago upheld as constitutional.⁶⁷

Anti-reformers pursue such legislative means, but they also go further, urging the Court itself to strike down the last remaining campaign finance laws. This end run around the Congress and state legislatures alike is entirely predictable. The Court's view of the First Amendment presently drifts towards "unlimited campaign freedom." Given this judicial mood, many cases are being primed and finessed with a view to finishing, once and for all, the messy judicial execution of campaign finance reform.

In order to explain why anti-reform is a plausible agenda despite the present extremes of money in politics, and in order to evaluate the terms of that agenda, we too must look to the Court. Why does the Constitution (as interpreted by the Court) protect the free flow of political funds? What aspects of the Court's vision of democracy demand further violence to campaign finance reform? Can this vision be justified or must it be corrected?

B. Corporate Reform

An influential group of scholars suggests that the best way to save democracy is to reform corporations, not campaign finance. Larry Ribstein summarized the new trend: "*Citizens United* shifted the debate over corporate speech from corporations' power to distort political debate to the corporate governance processes that authorize this speech."⁶⁸ Anne Tucker explains that this shift "from government legislation to the private sector . . . plac[es] the burden on the corporations and the shareholders . . . that have the resources to monitor corporate political contributions and the sway to influence corporate policies."⁶⁹ Unlike the anti-reformers discussed above, corporate reformers believe that money in politics, especially corporate money, is a cause for concern.⁷⁰ But rather than addressing campaign finance law, they would change corporate law in order to ensure that corporate political power be exercised in different ways and possibly for different ends.

For example, Kent Greenfield urges us "to focus on changing corporations themselves so that overturning *Citizens United* would be unnecessary."⁷¹ Consider his assessment:

The reason why corporate political speech is so corrosive to democracy is that the benefits and prerogatives of the corporate form are marshaled to bolster the

speech of a tiny sliver of the financial and managerial elite. The fact that corporations speak is not itself a problem; whom they speak for is.⁷²

Adam Winkler confirms that “[m]anagement, not shareholders, makes the determination of what to say, where to say it, and how much to spend,” concluding that “corporate speech is really corporate management’s speech.”⁷³ This could change, however. As Lisa Fairfax notes, “shareholders have launched an aggressive campaign to increase their voting power with the corporation[,] seeking to make the corporation more ‘democratic.’”⁷⁴

Part of the push for increased shareholder rights addresses political spending directly. The proposed Shareholder Protection Act “gives shareholders of public companies the right to vote on the company’s annual budget for political expenditures.”⁷⁵ Others would take corporate law in the same direction, providing “shareholders with a veto over the overall amount of corporate resources spent on political speech” and permitting them “to adopt binding resolutions concerning corporate political spending.”⁷⁶ Shareholders across the country have increasingly demanded similar measures, and a popular petition urges the Securities and Exchange Commission to “force publicly traded corporations to reveal their political giving to shareholders.”⁷⁷ Whether championed by Congress, law professors, shareholders, or the SEC, such reforms would respond to an age-old concern. Corporate speech was long seen as “amount[ing] to a misuse of ‘other people’s money’: company executives were opportunistically misappropriating the company owners’ money to purchase legislation benefitting the executives themselves.”⁷⁸ Justice Stevens recently called it “coerced speech,” noting that “shareholders who disagree with the corporation’s electoral message may find their financial investments being used to undermine their political convictions.”⁷⁹

Greenfield and other corporate reformers have something more inclusive in mind than shareholder rights, however. They would make corporations accountable to corporate *stakeholders*, a group broad enough to include “employees, consumers, communities, and bondholders.”⁸⁰ If the fiduciary duties of corporate managers and the composition of corporate boards of directors were altered to include stakeholders, corporate political power might be leveraged by and for a larger set of interests. Inspired by the possibility of robust corporate democracy, Greenfield offers a curious

thought: “There is nothing inherently undemocratic in corporate speech, unless corporations themselves are undemocratic.”⁸¹

Michael Siebecker helps to explain the realization that underlies Greenfield’s remark.

[T]o the extent corporations increasingly dominate the political sphere itself, a new blend of political and business theory seems necessary to ensure the basic legitimacy of decisionmaking within the corporate setting . . . As decisions traditionally left to . . . standard political processes now get made—or controlled—by corporations, giving shareholders some of the traditional rights of citizens within a polity does not seem all that radical. In many respects, the corporation has become the new public forum in which political decisions get made.⁸²

The tremendous power of corporations over the people they employ, the goods and services we all rely upon, the global flow of capital, and the health of any given economy is significant enough (and still growing); but, as corporate reformers recognize, corporations also exercise significant power over political advertising, the legislative agenda, and the information that informs decisions on that agenda.⁸³ Reformers’ focus on how corporations make decisions must be understood in light of corporate dominance of the economy *and* the political sphere. If we concede that corporate power is and will remain so all-encompassing, then perhaps the best progressive strategy is to promote deliberative and more broadly accountable decision making within corporations. And so Siebecker imports political theory into the context of corporate governance, advocating “rules and incentives [in corporate law] to promote autonomous expression of ideas, fair and equal participation in the deliberative process, respectful consideration of expressed viewpoints, and the ability to alter previously accepted positions through continued discourse.”⁸⁴

If corporate spending is democratized to the point of shareholder accountability or even further to the point of stakeholder accountability, and if corporate decision making takes on more participatory and deliberative forms, the implication is clear: corporate governance is being converted into an acceptable form of political governance. Perhaps an inclusive, deliberative form of corporate governance would make the ever-expanding role of corporations in society a more benevolent and legitimate force.