Michigan Business & Entrepreneurial Law Review

Volume 8 | Issue 2

2019

Crafting a Corporate Analogue to Criminal Disenfranchisement

B. Graves Lee Jr.
University of Michigan Law School

CRAFTING A CORPORATE ANALOGUE TO CRIMINAL DISENFRANCHISEMENT

B. Graves Lee, Jr.[*]

ABSTRACT

The Supreme Court's 2010 decision in Citizens United v. FEC represented a sea change in the world of corporate citizenship. Although the decision dealt with campaign finance law, it has sparked significant discussion of the concept of corporate personhood more broadly. Corporations have increasingly taken advantage of legal rights previously reserved for individuals. This Note argues that where corporations reap the benefits of constitutional entitlements intended for individuals, they should suffer consequences for malfeasance similar to those imposed on individuals who engage in criminal conduct. Specifically, this Note advocates for limitations on corporate electioneering as a collateral consequence of a corporation's criminal conviction, just as individuals may forfeit the right to vote following a felony conviction. Such a reform would address common criticisms regarding corporate criminal prosecutions' lack of deterrent effect. It would also send an important expressive message that corporations do not enjoy more favorable treatment than individuals when facing criminal prosecutions.

TABLE OF CONTENTS

* J.D. Candidate, May 2019, University of Michigan Law School. I am grateful to Professors Vic Khanna, David Uhlmann, and Ellen Katz for their insights and suggestions. Thanks also to Johannah Walker and Allison Lasher for excellent feedback on earlier drafts, and to the staff of the *Michigan Business & Entrepreneurial Law Review* for their help through the publication process.

INTRODUCTION

"Corporations are people, my friend," responded former Republican presidential nominee Mitt Romney to a protestor's shouts at a 2011 campaign event.[1] In a way, this was an uncontroversial statement. After all, corporations have long enjoyed the legal status of personhood. However, the twenty-first century has seen the notion of the corporation as a person aggressively advanced in new directions.

Perhaps no single instance has done more to ingrain corporate personhood in the popular conscience than the Supreme Court's decision in *Citizens United v. FEC*.[2] The Court struck down statutory limits on corporate electioneering contributions on First Amendment grounds. In doing so, the Court sparked significant outcry and attracted criticism for facilitating the ability of corporations to assert rights traditionally thought to be reserved for individuals. Since *Citizens United*, there have been numerous instances of corporations claiming rights ostensibly meant for individuals in other contexts as well.[3]

However, if corporations may reap the benefits of constitutional protections for individuals, should they not also be subject to analogous consequences? This Note proposes that, in the context of corporate crime, the answer is yes. Specifically, the Note will argue that corporations convicted of a crime should face limitations on political activity akin to individual felony disenfranchisement. The proposed reform would also force corporations to disclose electioneering information that would otherwise be discretionary to disclose. Corporate criminal disenfranchisement would shore up the deterrent effect of corporate prosecutions, addressing a common critique of such prosecutions. It would also serve an expressive function, indicating that corporations may not opt into a different set of rules than individuals are subject to when facing criminal prosecution. Corporate criminal disenfranchisement may also be constructed in a way that is consonant with the Supreme Court's First Amendment jurisprudence post-*Citizens United*.

Part I of this Note first examines the underpinnings of corporate crime to describe why society prosecutes corporations directly, as well as prominent criticisms of corporate criminal prosecutions. Part I also describes the historical and constitutional status of collateral consequences of criminal convictions, both for corporations and individuals. Part II discusses regulations of corporate campaign finance before and after *Citizens United* before moving into a broader

1. Ashley Parker, *'Corporations Are People,' Romney Tells Iowa Hecklers Angry Over His Tax Policy*, N.Y. TIMES (Aug. 11, 2011), https://www.nytimes.com/2011/08/12/us/politics/12romney.html.

2. 558 U.S. 310 (2010).

3. *See* discussion *infra* Part II.C.

discussion of the notion of corporate personhood. Part III lays out the proposed reform—restrictions on electioneering flowing from a corporation's criminal conviction—before addressing counterarguments.

I. WHY AND HOW WE PROSECUTE CORPORATIONS: HISTORY, JUSTIFICATIONS, AND CRITICISM

A. *Theories of Corporate Criminal Prosecutions*

The ability to bring criminal charges against a corporation directly, as opposed to the individuals making up the corporation, is a well-established tool available to prosecutors in the United States.[4] Prosecutors have used this tool for over a century, and the United States Supreme Court held the practice constitutional in 1909.[5] The doctrine arose as the corporate form became common in American society.[6] Although prosecutors' use of criminal corporate prosecutions has waxed and waned over time,[7] it remains a valid tactic for addressing corporate wrongdoing.

A corporation may be criminally liable for acts of its employees or agents committed within the scope of their employment or agency for the benefit of the corporation.[8] When deciding whether the corporation had the requisite mental state to incur criminal liability, the court will look to the mental state of the corporate employees or agents involved and impute that state to the corporation itself.[9] Even when no individual employee or agent possesses the requisite mental state, the court may consider employees' or agents' collective knowledge to satisfy the *mens rea* requirement.[10] This criminal liability arises separately from the corporation's civil liability for the same act or acts and does not preclude civil or administrative enforcement actions for the same acts.[11]

As in the individual criminal context, the prosecution of corporations advances several societal goals. First, prosecutions deter. Ideally, they dissuade other corporations from engaging in similar wrongdoing in the future.[12] Mone-

4. *See, e.g.*, Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319 (1996) (providing an overview of the doctrine surrounding corporate crime).

5. N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 494–95 (1909) (rejecting the argument that a corporation cannot be held criminally liable).

6. *See* V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1482 (1996).

7. *See, e.g.*, David M. Uhlmann, *The Pendulum Swings: Reconsidering Corporate Criminal Prosecution*, 49 U.C. DAVIS L. REV. 1235 (2016) [hereinafter Uhlmann, *The Pendulum Swings*] (discussing the shift from corporate criminal prosecutions to deferred prosecution and non-prosecution agreements during the George W. Bush and Barack Obama administrations).

8. N.Y. Cent. & Hudson River R.R. Co., 212 U.S. at 494.

9. *See* United States v. Bank of New England, 821 F.2d 844, 856 (1st Cir. 1987).

10. *Id.*

11. *See* Fischel & Sykes, *supra* note 4, at 321.

12. *See* Khanna, *supra* note 6, at 1495.

tary penalties may steer prospective corporate wrongdoers away from the temptation to break the law. Courts may also require structural reforms within a corporation following a criminal conviction.[13] This too can add deterrent bite.[14]

Although the same financial and structural consequences can flow from civil or administrative enforcement actions,[15] some argue that the badge of a criminal conviction provides a deterrent effect that those procedures lack.[16] The label of criminality brings with it a public stigma for management that mere civil or administrative liability does not.[17] This stigma may nudge corporations away from courses of conduct that could bring corporate liability.[18] This expressive mechanism of societal disapproval is similar to that of individual criminal prosecution, placing moral blame upon the bad actor.[19]

This stigma also serves a retributive purpose, punishing the corporation for wrongdoing.[20] However, many scholars are skeptical of the retributive justifications of corporate criminal prosecutions. Retributive theories of criminal justice presuppose a level of moral culpability as a justification for imposing punishment.[21] But because corporations are typically a collective body, pinpointing the "mind" of a corporation in an effort to identify *mens rea* presents challenges that do not arise in the prosecution of individuals.[22]

Others point to decision-making mechanisms within the corporate structure to argue that retributive goals are coherent with corporate punishment.[23] Because corporate decision making is the result of intentional choices that carry a moral element, a mental state for any given decision can be imputed to a corporation.[24] The moral, ethical, and social guidelines to which corporations adhere

---

13. *See* Uhlmann, *The Pendulum Swings*, *supra* note 7, at 1240–41.

14. *Id. But see* Khanna, *supra* note 6, at 1534 (expressing doubt about such deterrent value).

15. *See* Uhlmann, *The Pendulum Swings*, *supra* note 7, at 1240–41.

16. *Id.* at 1242 ("[T]here is additional deterrent value associated with criminal charges against corporations. Companies do not want to be labeled corporate criminals and therefore may have more incentives to avoid criminal sanctions than otherwise comparable civil or administrative sanctions." (footnote omitted)).

17. *See* Khanna, *supra* note 6, at 1509 ("[T]here is no [reputational] rub-off effect if the corporation is found liable in civil court because civil cases are such common occurrences.").

18. *See* Uhlmann, *The Pendulum Swings*, *supra* note 7, at 1242.

19. *See* Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 500–03 (2006).

20. Lawrence Friedman, *In Defense of Corporate Criminal Liability*, 23 HARV. J.L. & PUB. POL'Y 833, 852–53 (2000).

21. *See* John T. Byam, Comment, *The Economic Inefficiency of Corporate Criminal Liability*, 73 J. CRIM. L. & CRIMINOLOGY 582, 583 (1982).

22. *See* Fischel & Sykes, *supra* note 4, at 320 ("Corporations are legal fictions, and legal fictions cannot commit criminal acts. Nor can they possess mens rea . . . ."); Howard M. Friedman, *Some Reflections on the Corporation as Criminal Defendant*, 55 NOTRE DAME L. REV. 173, 180 (1979).

23. *See, e.g.*, Uhlmann, *The Pendulum Swings*, *supra* note 7, at 1248–50.

24. *See, e.g.*, Denis G. Arnold, *Corporate Moral Agency*, 30 MIDWEST STUD. PHIL. 279, 281–82 (2006).

in making a given decision can all provide evidence for the level of moral culpability in that decision.[25]

Certain collateral consequences can flow from a corporation's criminal conviction that are not available sanctions in the realm of civil liability. Perhaps the most consequential[26] is debarment of government contractors from future contracting with the federal government.[27] Corporations may also be subject to loss of license to engage in certain activities.[28] This loss of license, foreign to the civil and administrative sphere, suggests that novel collateral consequences may add further deterrent value.

Still, some commentators question how much deterrence corporate criminal prosecution really affords.[29] Crucially, a corporation cannot be put in jail, unlike individuals.[30] The possibility of incarceration is one of the biggest reasons not to engage in criminal activity. Yet this threat is entirely absent from the corporation's decision-making processes. In short, the argument goes, corporations simply do not care about criminal prosecutions in the same way that individuals do because of the impossibility of incarceration of the corporation itself.

Scholarship is divided on this point. On the one hand, the impact of reputational sanctions is speculative, and the impact of these sanctions lacks uniformity.[31] However, evidence indicates that reputational harms flowing from corporate criminal convictions can give rise to consequences heightened in or unique to the criminal context.[32] These include disruption in customer relationships, managerial and employee turnover, and cost outlays to prevent further commissions of similar crimes.[33]

---

25. *See* Uhlmann, *The Pendulum Swings*, *supra* note 7, at 1249.

26. *See* David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295, 1335 (2013) [hereinafter Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements*].

27. *See* 33 U.S.C. § 1368(a) (2018) (instituting debarment as a sanction for criminal conviction under the Clean Water Act); *see also* RICHARD S. GRUNER, CORPORATE CRIME AND SENTENCING § 1.9.2(c) (1994) (estimating that debarments and license suspensions were imposed as a collateral consequence in twenty-five percent of government procurement cases and twenty percent of government program fraud cases).

28. *See* Khanna, *supra* note 6, at 1497–99.

29. *See, e.g.*, Albert W. Alschuler, *Two Ways to Think about the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359 (2009) (discussing the improper deterrent effect falling upon shareholders who do not engage in the decision-making that could give rise to criminal liability); Fischel & Sykes, *supra* note 4, at 324 (arguing through an economic framework that corporate criminal liability may create problems both of under- and over-deterrence); Khanna, *supra* note 6, at 1493–96.

30. *See* Fischel & Sykes, *supra* note 4, at 322 ("Of course, corporations may . . . lack the resources to pay monetary penalties against them, but the alternative of incarceration is not available for them.").

31. *See* Khanna, *supra* note 6, at 1504–05 ("The use of reputation is nonetheless problematic, because reputational sanctions are inaccurate and affect only firms with good reputations.").

32. *See, e.g.*, Cindy R. Alexander, *On the Nature of the Reputational Penalty for Corporate Crime: Evidence*, 42 J.L. & ECON. 489, 523 (1999).

33. *Id.*

Finally, corporate criminal prosecutions can serve the purpose of promoting the perception of fairness throughout the criminal justice system. In high-profile instances of corporate misconduct, public outcry has emerged when the state declines to prosecute.[34] Uniform treatment of corporate and individual criminal defendants bolsters the public's perception of fairness within the criminal justice system.[35]

This Note addresses the perceived shortcomings of criminal corporate prosecutions by adding a new collateral consequence to convictions: restrictions on the corporate defendant's ability to engage in electioneering. This policy reform would enhance the deterrent effect of corporate criminal prosecutions. Likewise, it would engender feelings of fairness by creating a step towards similar treatment of individual and corporate defendants in the criminal sphere.

B. *Collateral Consequences for Criminal Convictions*

For individuals, the criminal justice system has deterrent features beyond the possibility of incarceration. Individuals routinely suffer collateral consequences even after they serve their sentences. For example, people convicted of a crime[36] may face deportation post-conviction.[37] They may be forbidden from owning a firearm.[38] They may be subject to no-contact orders.[39] They may lose eligibility to receive government benefits.[40]

---

34. *See, e.g.*, Daniel C. Richman, *Corporate Headhunting*, 8 HARV. L. & POL'Y REV. 265 (2014) (discussing anger at the lack of prosecutions following the 2008 financial collapse); Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. BOOKS (Jan. 9, 2014), http://www.nybooks.com/articles/2014/01/09/financial-crisis-why-no-executive-prosecutions/.

35. Uhlmann, *The Pendulum Swings*, *supra* note 7, at 1268 ("We expect corporations to meet their legal obligations, just as we expect individuals to do so; we must sanction corporate criminality just as we must sanction individual criminality.").

36. Although the historical tendency has been to refer to such individuals with terms such as "convict," "felon," or "offender," this Note will eschew such terminology in an effort to keep to the contemporary practice avoiding branding these individuals with a stigmatic badge. *See generally* Karol Mason, *Justice Dept. Agency to Alter its Terminology for Released Convicts, to Ease Reentry*, WASH. POST (May 4, 2016), https://www.washingtonpost.com/news/true-crime/wp/2016/05/04/guest-post-justice-dept-to-alter-its-terminology-for-released-convicts-to-ease-reentry (describing a Department of Justice policy shift in this direction).

37. 8 U.S.C. § 1227(a)(2) (2018) (rendering deportable any alien convicted of certain crimes).

38. 18 U.S.C. § 922(g) (2018) (criminalizing the possession of firearms and ammunition for individuals "convicted in any court of, a crime punishable by imprisonment for a term exceeding one year").

39. *See*, *e.g.*, Jones v. Alabama, No. 14-0059-WS-C, 2015 U.S. Dist. LEXIS 88245 (S.D. Ala. June 30, 2015); State v. Latham, Nos. A11-1930 and A11-1931, 2014 Minn. App. Unpub. LEXIS 1204 (Nov. 24, 2014); Thatcher v. Thatcher, No. 22493-7-III, 2004 Wash. App. LEXIS 2361 (Oct. 19, 2004).

40. *See* Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253, 259 (2002).

Perhaps the most severe collateral consequence for individuals who have been convicted of a crime is the loss of voting rights. An overwhelming majority of states disenfranchise those convicted of a felony.[41] Prior felony convictions bar millions of Americans from voting—a 2016 study estimated the number to be about one in every forty adults in America, with the rate for African Americans of voting age over four times higher.[42] Although criminal justice reformers have fueled a movement to open avenues to restoration of voting rights for convicted felons in many states,[43] the forfeiture of voting rights upon conviction of a felony remains the norm for individuals all over in the United States.[44]

The legal justification for collateral consequences stems from the common law.[45] In the English tradition, people suffered profound consequences following a criminal conviction. A conviction could trigger the forfeiture of rights that are now thought to be fundamental, including the right to contract, marry, and bring suit.[46] Post-conviction punishment was so harsh that it came to be known as a "civil death."[47] Although the American criminal justice system has taken a step back from these severe common law traditions, it nonetheless im-

41. *See* Jean Chung, *Felony Disenfranchisement: A Primer*, SENTENCING PROJECT (July 17, 2018), https://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/. Note that that these numbers were compiled before the recent passage of Amendment 4, a ballot measure in Florida that could restore voting rights for over one million people with felony convictions. Nadege Green, *Florida Passes Amendment 4, Will Automatically Restore Right to Vote for Felons*, WLRN (Nov. 6, 2018), http://www.wlrn.org/post/florida-passes-amendment-4-will-automatically-restore-right-vote-felons. Currently, however, the number of people who will reobtain their voting rights under Amendment 4 is unclear. *See* Karen Zraick, *Florida Republicans Push to Make Ex-Felons Pay Fees Before They Can Vote*, N.Y. TIMES (Mar. 20, 2019), https://www.nytimes.com/2019/03/20/us/florida-felon-voting-rights.html (describing the political fight over a Republican-sponsored bill in the Florida legislature that would curtail the impact of Amendment 4).

42. CHRISTOPHER UGGEN ET AL., SENTENCING PROJECT, 6 MILLION LOST VOTERS: STATE-LEVEL ESTIMATES OF FELONY DISENFRANCHISEMENT, 2016 (2016), http://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016/. These numbers were also compiled before the passage of Amendment 4 in Florida. *See* Green, *supra* note 41.

43. *Restoring the Right to Vote by State*, BRENNAN CTR. FOR JUSTICE (Oct. 19, 2015), https://www.brennancenter.org/analysis/restoring-right-vote-state ("Since 1997, twenty-three states have made legislative or policy changes restoring the vote to at least some people with criminal convictions or liberalizing the state's clemency procedures."). This was published prior to the passage of Amendment 4 in Florida, which represented a monumental development in the political movement against felony disenfranchisement. *See* Green, *supra* note 41. However, the practice is still commonplace elsewhere in the United States.

44. Chung, *supra* note 41, at 2 fig.A.

45. Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 478 (2010).

46. *See id.*; Alec C. Ewald, *Civil Death: The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1049 n.13.

47. Pinard, *supra* note 45, at 478.

poses a number of collateral consequences that are arguably more punitive than incarceration.[48]

Collateral consequences from felony disenfranchisement to risk of deportation to loss of access to public benefits have all attracted considerable reasoned critiques from commentators.[49] This Note does not endorse imposing these consequences on individuals convicted of crimes. Nor does it take umbrage with the moral, racial, sociological, and philosophical objections within these critiques to the extent that they impact individuals differently than they do corporations. Instead, this Note argues that where a stringent system of collateral consequences exists for individuals, it should be applied equitably to corporations convicted of criminal misconduct.

Following the Supreme Court's decision in *Citizens United v. FEC*,[50] the notion of corporate personhood entered the popular conscience. Drawing upon this idea, this Note argues that limits on corporate political activity following a criminal conviction in the same way we restrict the political activity of those convicted of a felony could address some of the shortfalls in election law that critics of *Citizens United* have focused upon. These limits would better tailor punishments towards deterrent goals and would combat popular perceptions that corporations are subject to a different system of justice than are individuals.

II. ELECTIONEERING LIMITS AND CORPORATE PERSONHOOD

A. *The Road to* Citizens United *and Money as Speech*

Modern limits to electioneering find their genesis in the Supreme Court's opinion in *Buckley v. Valeo*.[51] *Buckley* presented a broad challenge to the 1971 Federal Election Campaign Act (FECA), which included provisions capping individual donations to campaigns[52] and banning corporate and union contributions outright.[53] Those challenging the law argued that regulating electioneering activity amounted to a regulation of political speech. Therefore, the law

48. *See* Chin, *supra* note 40, at 253 ("[C]ollateral consequences may be the most significant penalties resulting from a criminal conviction."); Colleen F. Shanahan, *Significant Entanglements: A Framework for the Civil Consequences of Criminal Convictions*, 49 AM. CRIM. L. REV. 1387, 1394 (2012).

49. *See generally* Chin, *supra* note 40 (investigating the "covert" nature of these consequences' impact); Pinard, *supra* note 45 (discussing the disproportionate racial impact of collateral consequences on individuals convicted of a crime).

50. 558 U.S. 310 (2010).

51. 424 U.S. 1 (1976) (per curiam).

52. Federal Election Campaign Act of 1971, 86 Stat. 3, as amended by the Federal Election Campaign Act Amendments of 1974, 88 Stat. 1263, *partially invalidated by* Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam).

53. FECA § 610, *invalidated by* Buckley v. Valeo, 424 U.S. 1, 143 (1976) (per curiam).

needed to meet the exacting standards of strict scrutiny[54] to avoid violation of the First Amendment.[55]

The Court, in a 170-page per curiam opinion, upheld some parts of the law and struck down others.[56] Perhaps most crucial, however, was the Court's acceptance of the challengers' argument that regulation of campaign contributions implicated the First Amendment.[57] Because the Court found that political contributions facilitated political speech, contribution limits restricted political speech itself.[58] *Buckley* opened the door for future challenges to campaign finance laws on First Amendment grounds. Dissenting in part, Justice White made explicit the paradigm shift that the majority left unsaid: "money is speech."[59]

Twenty-six years later, Congress passed the Bipartisan Campaign Reform Act, commonly referred to as McCain-Feingold, enacting new restrictions on campaign contributions.[60] In a five-to-four victory before the Supreme Court, most of McCain-Feingold survived a 2003 facial challenge.[61] The justice who provided the swing vote, Justice O'Connor, retired three years later.[62] Soon after, her replacement, Justice Alito, swung the Court's majority view on campaign finance. In 2007, one of McCain-Feingold's key provisions lost in an as-applied challenge before the Supreme Court.[63] The Court, however, could not muster up a majority to declare the provision facially unconstitutional, so they stopped short of overturning the 2003 decision.[64]

---

54. *See* Police Dep't v. Mosley, 408 U.S. 92, 101 (1972) ("The Equal Protection Clause requires that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives.").

55. Buckley, 424 U.S. at 11 ("In appellants' view, limiting the use of money for political purposes constitutes a restriction on communication violative of the First Amendment, since virtually all meaningful political communications in the modern setting involve the expenditure of money.").

56. *Id.* at 143.

57. Stuart McPhail, *Remembering Buckley's Mistakes*, CITIZENS FOR RESP. AND ETHICS IN WASHINGTON (Jan. 30, 2018), https://www.citizensforethics.org/remembering-buckleys-mistakes/.

58. *See* Eugene Volokh, *Money and Speech*, VOLOKH CONSPIRACY (Jan. 24, 2010), http://volokh.com/2010/01/24/money-and-speech-2/.

59. Buckley, 424 U.S. at 262 (White, J., concurring in part and dissenting in part).

60. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 166 Stat. 81.

61. McConnell v. FEC, 540 U.S. 93 (2003). One provision of McCain-Feingold that the Court upheld banned corporations from use of general treasury accounts to fund television and radio ads during election season that urged viewers to vote for or oppose a candidate. The Court relied on its ruling in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), in which it upheld the constitutionality of a state law prohibition against corporations' use of general treasury funds for donations to campaigns for elected state office.

62. *See Sandra Day O'Connor, First Woman on the Supreme Court*, SUP. CT. U.S., https://www.supremecourt.gov/visiting/SandraDayOConnor.aspx (last visited Dec. 10, 2018).

63. FEC v. Wis. Right to Life, Inc., 551 U.S. 449 (2007).

64. *Id.* at 482 ("*McConnell* held that express advocacy of a candidate or his opponent by a corporation shortly before an election may be prohibited, along with the functional equivalent of such express advocacy. We have no occasion to revisit that determination today.").

B. *The* Citizens United *Decision*

When the Supreme Court first heard oral argument in *Citizens United* in 2009, the case presented an issue of campaign finance law that seemed unlikely to have profound constitutional repercussions.[65] Counsel for the petitioners argued that Section 203 of McCain-Feingold, which prohibited corporations from spending money from their general treasuries on electioneering, did not apply to the commission of a politically-charged documentary. They pushed the Court to resolve the case on purely statutory grounds, obviating the need to consider the broader constitutionality of the law.[66] However, after an unexpected turn at argument, the conservative wing of the Court signaled its openness to a constitutional attack on the law.[67] The Court set the case for rehearing, requesting supplemental briefing on whether the Court's prior decision regarding the constitutionality of corporate contribution limits should be overruled.[68]

The Court agreed that corporations enjoy full First Amendment protections in the realm of political speech.[69] Justice Kennedy's majority opinion leaned on First Amendment precedent indicating that the government cannot determine what speech is protected based on the identity of the speaker[70] to hold that the very same protection applies to corporations.[71] The opinion echoed worries voiced by Justices Kennedy, Alito, and Roberts in the first round of oral argument that allowing regulation of political speech could lead to an endpoint where the government has an ability to censor the press, print media, and other commonplace forms of communication.[72] The Court invalidated Section 203 of McCain-Feingold outright, invalidated 2 U.S.C. § 441b's ban on the use of corporate treasury funds for express advocacy, and overturned *McConnell v. FEC*—the case that had upheld Section 203's constitutionality just seven years before.[73]

---

65. *See* Jeffrey Toobin, *Money Unlimited: How Chief Justice John Roberts Orchestrated the Citizens United Decision*, NEW YORKER: ANNALS OF LAW (May 21, 2012), https://www.newyorker.com/magazine/2012/05/21/money-unlimited.

66. *Id.* ("[Citizens United's counsel Theodore] Olson's argument indicated that there was no need for the Court to declare any part of the law unconstitutional, or even to address the First Amendment implications of the case.").

67. *See id.*

68. Lyle Denniston, *Briefing Set on* Citizens United *Rehearing*, SCOTUSBLOG (June 29, 2009, 2:00 PM), http://www.scotusblog.com/2009/06/briefing-set-on-citizens-united-rehear/.

69. *See* Citizens United v. FEC, 558 U.S. 310, 342 (2010).

70. *See, e.g.*, Pac. Gas & Elec. Co. v. Pub. Util. Comm'n, 475 U.S. 1, 8 (1986); First Nat'l Bank v. Bellotti, 435 U.S. 765, 778 n.14 (1978).

71. *See* Citizens United, 558 U.S. at 342.

72. *See id.* at 337.

73. *Id.* at 365–66 ("*Austin* is overruled . . . . The *McConnell* court relied on the antidistortion interest recognized in *Austin* to uphold a greater restriction on speech than the restriction upheld in *Austin* . . . . This part of *McConnell* is now overruled.") (internal citations omitted).

On the other hand, Section 311 of McCain-Feingold survived *Citizens United*.[74] This provision contained the statute's disclosure requirements for corporate political spending. It mandated that any non-candidate entity who funds a televised electioneering communication must include a disclaimer identifying the source of the funding.[75] The Court explained that disclosure requirements do not prevent speech itself, and that the government had an interest in aiding citizens in making informed choices in elections.[76] The Court also upheld McCain-Feingold Section 201, which requires that large-money donors file a disclosure statement with the FEC,[77] on similar grounds as McCain-Feingold Section 311.[78]

Some criticism of the *Citizens United* decision has focused on its treatment of disclosure law. On the one hand, the decision ostensibly left undisturbed the state of disclosure law by leaving the pertinent provisions of McCain-Feingold intact.[79] However, the majority failed to address the FEC's continued narrowing of what types of transactions are subject to disclosure.[80] As a result, only those contributions specifically earmarked for election spending trigger disclosure requirements.[81] When *Citizens United* removed the shackles from the activities of SuperPACs, it opened the door to largescale donations to these groups. Disclosure of these donations was not required by law unless given with a specific directive to spend on an election.[82] Some commentators have posited that many of the decision's ill effects could be ameliorated through heightening of the FEC's interpretations of disclosure requirements.[83] However, partisan polarization among the six politically appointed Commissioners seems to have sapped the political will necessary to create this change at the FEC.[84]

---

74. *See id.* at 367.

75. 52 U.S.C. § 30120(d)(2) (2018) (formerly 2 U.S.C. § 441d(d)(2)).

76. Citizens United, 558 U.S. at 366–67.

77. 52 U.S.C. § 30104(f)(1) (2018) (formerly 2 U.S.C. § 434(f)(1)).

78. Citizens United, 558 U.S. at 366–67.

79. *Id.*

80. *See, e.g.*, Symposium, *The Disclosure Debates: The Regulatory Power of an Informed Public*, 38 VT. L. REV. 933, 937 (2013) [hereinafter Malloy] (statement by Tara Malloy, Senior Counsel, Campaign Legal Center, criticizing this aspect of the *Citizens United* opinion).

81. *See id.*

82. *See id.* ("For example, if I were to give $100,000 to [a SuperPAC], and not earmark the funds for anything, I [sic] would not have to be disclosed . . . as long as I was not foolish or honest enough to say, 'Please use my millions of dollars for an election ad that falls into the two legal categories.' ").

83. *See, e.g.*, *Citizens United*, RADIOLAB PRESENTS MORE PERFECT (Nov. 2, 2017), https://www.wnycstudios.org/story/citizens-united/ (pertinent discussion from 53:56–56:33).

84. *See id.* (pertinent discussion from 56:34–1:00:24).

C. *Fallout of* Citizens United *and Emerging Conceptions of Corporate Personhood*

The *Citizens United* decision's apparent treatment of the corporate form as a legal person sparked widespread outcry.[85] The majority opinion carefully stopped short of explicitly equating corporations and persons, often echoing Section 441b's language of "persons or group."[86] Still, the Court placed individuals and corporations on equal footing when engaging in political speech.[87] This prompted populist pushback. Taken alongside Republican presidential nominee Mitt Romney's infamous assertion that "corporations are people, my friend," the case drew major attention during the 2012 presidential election cycle.[88] Scrutiny of the decision continues today.[89]

Significant cracks in the armor of legal restrictions on corporate giving have emerged as a consequence of *Citizens United*. The D.C. Circuit relied on *Citizens United* to invalidate caps on corporations' donations to SuperPACs.[90] The decision had major impacts on the 2012 presidential election, where large donors played key roles in bolstering candidates' war chests.[91] The Supreme Court has also invalidated attempts to use public funding to offset the advantage of candidates who enjoy major financial support from large private donors.[92]

Citizens United also left open questions about how far the comparison between the corporate entity and human persons might go. The majority opinion

---

85. *See, e.g.*, Amanda D. Johnson, *Originalism and Citizens United: The Struggle of Corporate Personhood*, 7 RUTGERS BUS. L.J. 187, 187 (2010); Jim Hightower, *Fighting the Subversion of Our People's Sovereignty*, TRUTHOUT (Feb. 26, 2010), http://truth-out.org/archive/component/k2/item/88240:fighting-the-subversion-of-our-peoples-sovereignty.

86. Citizens United v. FEC, 558 U.S. 310, 339, 366, 368 (2010). The dissenting justices explicitly use the term "personhood" in describing the majority's conception of a corporation's ability to exercise free speech rights. *Id.* at 466 (Stevens, J., dissenting).

87. *See id.* at 343 ("Corporations and other associations, like individuals, contribute to the discussion, debate, and the dissemination of information and ideas that the First Amendment seeks to foster. The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment.") (majority opinion) (internal citations omitted).

88. *See, e.g.*, Justin Elliott, *Why Mitt Romney Was Right about Corporations*, SALON (Aug. 13, 2011, 6:01 PM), https://www.salon.com/2011/08/13/corporate_personhood/; John Light, *Where do the Candidates Stand on* Citizens United*?*, MOYERS & COMPANY (Oct. 19, 2012), http://billmoyers.com/2012/10/19/where-do-the-candidates-stand-on-citizens-united/.

89. *See, e.g.*, Kent Greenfield, *If Corporations Are People, They Should Act Like It*, ATLANTIC (Feb. 1, 2015), https://www.theatlantic.com/politics/archive/2015/02/if-corporations-are-people-they-should-act-like-it/385034/; Nina Totenberg, *When Did Companies Become People? Excavating the Legal Evolution*, NPR (July 28, 2014), https://www.npr.org/2014/07/28/335288388/when-did-companies-become-people-excavating-the-legal-evolution.

90. SpeechNow.org v. FEC, 599 F.3d 686 (D.C. Cir. 2010).

91. Toobin, *supra* note 65 ("Sheldon Adelson, the gambling entrepreneur, gave about fifteen million dollars to support Newt Gingrich, and Foster Friess, a Wyoming financier, donated almost two million dollars to Rick Santorum's Super PAC. Karl Rove organized a Super PAC that has raised about thirty million dollars in the past several months for use in support of Republicans.").

92. Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 727–28 (2011).

gave little guidance as to what rights corporations might enjoy under a personhood theory outside of the context of campaign contributions.[93] In its aftermath, some worried that the case might provide ammunition for overruling the ban on direct corporate donations to political candidates (as opposed to funding electioneering communications, which was at issue in *Citizens United*).[94] To date, this has not occurred—at least one district court has explicitly declined to extend the rule of *Citizens United* to invalidate the ban on direct corporate electoral donations,[95] and another district court that relied on *Citizens United* to invalidate the ban was reversed on appeal.[96] Furthermore, the Supreme Court has recognized that *Citizens United* does not alter the propriety of limiting corporate electioneering when the purpose behind such regulation is to prevent corruption or the appearance thereof.[97]

What's more, *Citizens United* could lay the foundation for corporations to assert new rights divorced from the campaign finance context. Commentary on this possibility has ensued since the ruling in *Citizens United*.[98] And in 2014, the Supreme Court seemed to recognize the possibility in *Burwell v. Hobby Lobby Stores, Inc*. There, the Court held that the Affordable Care Act could not require Hobby Lobby to provide health plans that covered contraception because it impermissibly burdened the corporation's religious freedom.[99]

This attempt to expand corporate personhood likewise reaches the criminal context.[100] In 2015, the Third Circuit rejected a claim that a corporation was

---

93. *See, e.g.*, KENT GREENFIELD, CORPORATIONS ARE PEOPLE TOO (AND THEY SHOULD ACT LIKE IT) 60 (Yale Univ. Press 2018) ("The *Citizens United* opinion . . . does not reveal deep thought about when corporations should have rights.").

94. *See, e.g.*, Amy J. Sepinwall, Citizens United *and the Ineluctable Question of Corporate Citizenship*, 44 CONN. L. REV. 575, 577–78 n.3 (2012) ("*Citizens United* may well prompt recognition of even broader corporate political rights.").

95. Minn. Citizens Concerned for Life, Inc. v. Swanson, 741 F. Supp. 2d 1115, 1133 (D. Minn. 2010), *rev'd on other grounds*, 692 F.3d 864 (8th Cir. 2012).

96. United States v. Danielczyk, 788 F. Supp. 2d 472, 493–94 (E.D. Va. 2011) (relying on *Citizens United* to invalidate Section 441b(a) of FECA), *rev'd*, 683 F.3d 611 (4th Cir. 2012).

97. McCutcheon v. FEC, 572 U.S. 185, 187 (2014) ("This Court has identified only one legitimate governmental interest for restricting campaign finances: preventing corruption or the appearance of corruption."). In this analysis the Court leans heavily on the analysis in *Davis v. FEC*, 554 U.S. 724 (2008).

98. *See, e.g.*, Sepinwall, *supra* note 94, at 577–78 n.3; Elizabeth R. Sheyn, *The Humanization of the Corporate Entity: Changing Views of Corporate Criminal Liability in the Wake of* Citizens United, 65 U. MIAMI L. REV. 1, 40 (2010).

99. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 682 (2014). Although the *Hobby Lobby* majority did not directly cite *Citizens United*, each case deals with the ability of a corporation to assert constitutional rights in novel ways. Numerous commentators have compared the two in significant detail. *See generally, e.g.*, Brandon L. Garrett, *The Constitutional Standing of Corporations*, 163 U. PA. L. REV. 95, 96–104 (2014); David Rosenberg, *The Corporate Paradox of* Citizens United *and* Hobby Lobby, 11 N.Y.U. J.L. & LIBERTY 308 (2016); Ryan Azad, Comment, *Can a Tailor Mend the Analytical Hole? A Framework for Understanding Corporate Constitutional Rights*, 64 UCLA L. REV. 452, 452–67 (2017).

100. The phenomenon of corporations asserting constitutional rights meant to constrain the activities of law enforcement is not entirely new. For instance, the Supreme Court held nearly a cen-

entitled to a Fifth Amendment privilege against self-incrimination before a grand jury subpoena.[101] This attempt found its grounding partially in the expanded corporate rights granted by the *Citizens United* and *Hobby Lobby* decisions.[102] A number of circuits ruled prior to *Citizens United* that a corporation may have a Sixth Amendment right to jury trial in criminal contempt proceedings, but the Supreme Court has not addressed this issue.[103]

Other commentators have suggested that the relationship between the First Amendment and the Fourth Amendment might give rise to another extension of corporate rights. One conception of the Fourth Amendment is protection against intrusions on activities associated with freedom of thought.[104] Coupled with the language in *Citizens United* about the right of corporations to engage in the "marketplace of ideas,"[105] the possibility of increased corporate Fourth Amendment protections may be viable.[106] Remarkably, one scholar has asserted that the case law granting corporations constitutional rights like those of individuals would not be inconsistent with a corporation asserting a Second Amendment right to take up arms.[107]

Beyond the effects that *Citizens United* has had on the constitutional rights of corporations outside of the context of election law, there may be subtle effects in doctrine that alter the course of corporate criminal prosecutions. In the

---

tury ago that corporations enjoy at least some protections against unreasonable searches and seizures under the Fourth Amendment. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) ("[T]he rights of a corporation against unlawful search and seizure are to be protected . . . ."). Still, assertions of novel conceptions of corporate rights may be accelerating in the wake of *Citizens United*, as this discussion details. And, scholars and commentators have looked to corporate personhood jurisprudence following *Citizens United* in imagining how those rights may change going forward. *See, e.g.*, GREENFIELD, *supra* note 93, at 74–81 (discussing the history and trajectory of corporate criminal procedure rights).

101. In re Grand Jury Empaneled on May 9, 2014, 786 F.3d 255 (3d Cir. 2015) [hereinafter *Grand Jury Case*]. The Supreme Court has recognized an individual's Fifth Amendment right to avoid compulsion to testify before a grand jury. Kastigar v. United States, 406 U.S. 441, 443–44 (1972). However, this prohibition is not absolute. *See, e.g.*, Hiibel v. Sixth Judicial Dist. Court, 542 U.S. 177, 189–90 (2004) ("The Fifth Amendment prohibits only compelled testimony that is incriminating . . . . Suspects who have been granted immunity from prosecution may, therefore, be compelled to answer . . . .").

102. Grand Jury Case, 786 F.3d at 261 n.1.

103. *See, e.g.*, United States v. Twentieth Century Fox Film Corp., 882 F.2d 656, 663 (2d Cir. 1989); United States v. Troxler Hosiery Co., 681 F.2d 934, 935 n.1 (4th Cir. 1982); United States v. R.L. Polk & Co., 438 F.2d 377, 379 (6th Cir. 1971); *see also* Khanna, *supra* note 6, at 1518 ("[T]he Sixth Amendment right to a jury trial may, arguably, be available to corporate defendants.").

104. *See* Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387, 412–17 (2008).

105. Citizens United v. FEC, 558 U.S. 310, 474 (2010).

106. *See, e.g.*, Christopher Slobogin, Citizens United *& Corporate & Human Crime*, 14 GREEN BAG 2D 77, 82–84 (2010).

107. Daniel J.H. Greenwood, *Telling Stories of Shareholder Supremacy*, 2009 MICH. ST. L. REV. 1049, 1075. *But see* GREENFIELD, *supra* note 93, at 67 ("The Second Amendment's right to bear arms is described as a 'right of the *people*,' . . . [but the] First Amendment, for example, says that 'Congress shall make no law . . . abridging the freedom of speech' without limitation of such right to persons.").

realm of deferred prosecution and non-prosecution agreements, the humanization of corporations implied in *Citizens United* may necessitate greater judicial review to meet the fairness standards that courts operate under for human defendants.[108] *Citizens United*'s blending of the corporate form and personhood may strengthen the rationale for prosecuting a corporation directly when in the past it would have made more sense to prosecute individuals responsible for the misconduct.[109]

Citizens United represents a major step in the slow jurisprudential march towards corporations claiming rights previously reserved for individuals. But it raises the question: if corporations can reap the benefits of constitutional entitlements for individuals, should they not too face the consequences for misconduct that individuals experience? Legislators have ample room for creativity in crafting proactive policy measures to constrain and deter corporate malfeasance in the face of these growing rights.

A corporate analogue to individual felony disenfranchisement is an active step that legislators could take against the growing trend allowing corporations "to take advantage of the significant benefits of the corporate form . . . without having to shoulder attendant fundamental responsibilities."[110] The implementation of limits on electioneering as a collateral consequence of a corporation's criminal conviction would add deterrent teeth to corporate prosecutions that do not exist today. Because the Court has consistently recognized that corporate political speech can still be limited to prevent corruption,[111] this tool could permissibly exist against a post-*Citizens United* backdrop.

III. CRAFTING A CORPORATE ANALOGUE TO INDIVIDUAL CRIMINAL DISENFRANCHISEMENT

A. *Substance and Mechanics of Corporate Disenfranchisement*

This Note proposes that corporations convicted of criminal conduct should suffer collateral consequences analogous to individual criminal disenfranchisement. Just as individual disenfranchisement strips the right to vote from an individual convicted of a felony,[112] this reform would constrain the ability of a corporation to effect change in the electoral process following a criminal conviction. The reform would therefore constitute a step towards similar treatment of individuals and corporations in the world of criminal prosecutions.

---

108. *See* Sheyn, *supra* note 98, at 39–41.

109. *See* Slobogin, *supra* note 106, at 78.

110. Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1437 (2018) (Sotomayor, J., dissenting) (citing Citizens United; Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014)).

111. *See* McCutcheon v. FEC, 572 U.S. 185, 187 (2014); Davis v. FEC, 554 U.S. 724, 737 (2008).

112. *See* discussion *supra* Part I.B.

The core of the proposed reform would impose contribution limits on corporations that have been convicted of a crime. For this subset of corporations, the reform would effectively reinstate the more generally applicable provision of McCain-Feingold that the Supreme Court invalidated in *Citizens United*.[113]

Another component of the reform would heighten the disclosure requirements imposed on contributions to SuperPACs by convicted corporations. Relying on Justice Louis Brandeis's famous exhortation that sunlight provides the best disinfectant,[114] these disclosure requirements would expose the concealed links between criminally convicted corporations and organizations purposed with influencing the electoral process. Such disclosure requirements would provide a step towards making up for the gap in FEC-imposed disclosure requirements that have exacerbated the influx of obfuscated corporate money into elections following the decision in *Citizens United*.[115]

Corporate criminal disenfranchisement would attach upon conviction at trial or upon the entry of a guilty plea. It would last for a prescribed length of time as a condition of probation. The policy could also come as a term of a corporation's deferred prosecution or non-prosecution agreement. The reform would be permissive, not mandatory, in nature, so as to target those corporate criminal defendants whom the policy would deter.[116]

Corporate disenfranchisement would also be limited to a subset of prosecutions for criminal acts that engender corruption within the electoral system. The Supreme Court has consistently recognized that corporate electoral speech can be limited in furtherance of anticorruption.[117] Therefore, limiting the policy to corporate crimes of this sort ensures that this punishment appropriately fits its crime—that is, the policy represents a refined tool, not a blunt hammer.

B. *Benefits of Corporate Criminal Disenfranchisement*

Corporate criminal disenfranchisement would advance several goals of the criminal justice system. First, the proposed reform would impose new collateral consequences for a subset of corporate crimes, thereby responding to critiques of corporate criminal prosecutions as lacking in real deterrence. Corporations would care about the potential effects of disenfranchisement and would change

113. *See* Citizens United v. FEC, 558 U.S. 310, 355–56 (2010).

114. Louis Brandeis, *What Publicity Can Do*, HARPER'S WKLY., Dec. 20, 1913 at 10.

115. *See, e.g.*, Malloy, *supra* note 80, at 936–37.

116. A significant share of corporate criminal prosecutions targets small businesses. *See* Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements*, *supra* note 26, at 1326 n.193. Therefore, to the degree that small businesses are less likely to engage in electioneering than large corporations, this could limit the proper application of the proposed reform to a relatively modest number of cases. Nonetheless, the reform is a worthwhile pursuit both because of the deterrent message sent to all corporations, along with its effect of bolstering the popular perception of fairness in criminal corporate prosecutions.

117. *See, e.g.*, McCutcheon v. FEC, 572 U.S. 185, 187 (2014); Davis v. FEC, 554 U.S. 724, 737 (2008).

their behavior as a result. Second, corporate disenfranchisement would strike a tone of fairness throughout the broader criminal justice system. As corporations have claimed more and more rights previously reserved for individuals, corporate disenfranchisement levels the playing field at least somewhat by imposing upon corporations a collateral consequence analogous to restrictions that society places upon convicted criminals' ability to vote.

Commentators have called into question the true deterrent force of corporate prosecutions.[118] Corporations cannot be jailed. Likewise, the stigmatic harm of a criminal conviction may be less for corporations than for individuals because their focus is on their financial bottom line. Some argue that, as a result, corporations care far more about the fines that flow from a criminal conviction than about the conviction itself.[119]

Introducing a novel collateral consequence to a corporation's criminal conviction would change this calculus. Corporations that regularly engage in electioneering would experience greater deterrence from corporate disenfranchisement than they do under the current criminal justice regime. For instance, one of the largest monetary penalties ever included in a corporate plea agreement involved the Koch Petroleum Group.[120] The company is a subsidiary of Koch Industries, which has a longstanding reputation as one of the most active corporate electioneering donors in the United States.[121] Corporate criminal disenfranchisement following its conviction could have dampened Koch's subsequent electoral influence.

One might question whether corporate disenfranchisement would appreciably alter corporations' behavior. After all, the limitations do not fall on the individuals that make up the corporation. In theory, members of the corporation could circumvent the reach of the proposed reform by simply forming a new entity and carrying on unaffected. However, such an endeavor would take time, resources, and effort. Corporate disenfranchisement does not need to be entirely airtight and inescapable to drive behavior. If the reach of the policy can be avoided, but only through inconvenient or costly means, it nonetheless has the power to shift behavior.

---

118. *See* discussion *supra* Part I.A.

119. *See* Khanna, *supra* note 6, at 1500 (noting that some corporations may be unbothered by reputational harms of criminal liability). A helpful illustration comes from the Securities and Exchange Commission rules informally known as the "Bad Boy" provisions. 17 C.F.R. § 230.506(d) (2013). These provisions disqualify those convicted of a criminal securities violation from use of certain capital accumulation safe harbors. Presumably, this adds deterrent effect to criminal liability beyond mere stigmatic harm: corporations are better incentivized to avoid criminal violations of securities laws when it could impact their future ability to raise capital.

120. *Koch Pleads Guilty to Covering Up Environmental Violations at Texas Oil Refinery*, U.S. DEP'T OF JUSTICE, ENV'T AND NAT. RES. DIV. (Apr. 9, 2001), https://www.justice.gov/archive/opa/pr/2001/April/153enrd.htm.

121. *See* Nicholas Confessore, *Koch Brothers' Budget of $889 Million for 2016 Is on Par With Both Parties' Spending*, N.Y. TIMES (Jan. 26, 2015), https://www.nytimes.com/2015/01/27/us/politics/kochs-plan-to-spend-900-million-on-2016-campaign.html.

Although one might anticipate strong corporate opposition to this reform, there is reason to believe that some corporations would, in fact, support it. The notion of corporate "hands-tying" rests on the idea that some corporations privately prefer not to engage in certain activities, yet nonetheless feel compelled to participate.[122] Several rationales explain this desire to assimilate (e.g., gaining political capital, maintaining client relations, or building a specific public image)—rationales that are just as compelling in the context of corporate electioneering. But if corporations could point to law eliminating or limiting their discretion to do so, it provides cover for the corporation to pursue the course of conduct it would have preferred in the first place.[123]

Corporate criminal disenfranchisement would also send an important message about the criminal justice system that corporations must play by the same rules as individuals. The outrage aimed at the lack of criminal prosecutions in the wake of the 2008 financial crisis illustrated a popular perception that corporations operate with a degree of legal impunity unavailable to individuals.[124] Corporations' increasing zeal for claiming rights traditionally reserved for individuals strikes a similar tone of unfairness.[125] Corporate disenfranchisement would send a clear message in response—if corporations want to lay claim to the benefits of personhood, they must accept this drawback of personhood in the criminal context.

C. *Anticipating Constitutional Objections to Corporate Disenfranchisement*

The First Amendment's protection of the freedom of speech is a foundational principle of American civil society.[126] Accordingly, limits on speech must survive serious review. And because this reform regulates political speech, it must adhere to the requirements of *Buckley* and *Citizens United*.[127] The reform will have to advance both a compelling interest and be narrowly tailored toward that goal.[128] This is attainable. Properly tailored, corporate criminal disenfranchisement fits within the parameters of permissible regulations of political speech that the Supreme Court has set forth.

---

122. *See, e.g.*, Christine Jolls, *Hands-Tying and the Age Discrimination in Employment Act*, 74 TEX. L. REV. 1813 (1996) (discussing this phenomenon).

123. *See id.*; Henry Hansmann & Reinier Kraakman, *Hands-Tying Contracts: Book Publishing, Venture Capital Financing, and Secured Debt*, 8 J.L. ECON. & ORG. 628 (1992).

124. *See, e.g.*, Rakoff, *supra* note 34.

125. *See generally* discussion *supra* Part II.B.

126. *See, e.g.*, Benjamin Franklin, *On Freedom of Speech and the Press*, PA. GAZETTE, Nov. 1737, at 9 ("Freedom of speech is a principal pillar of a free government: when this support is taken away, the Constitution is dissolved and tyranny is erected on its ruins.").

127. *See* McPhail, *supra* note 57.

128. *See* Police Dep't v. Mosley, 408 U.S. 92, 101 (1972).

Collateral consequences are a longstanding facet of our criminal justice system.[129] Individuals and corporations alike experience profound limitations on various rights and freedoms stemming from criminal convictions.[130] Corporations in particular regularly face debarment when they have engaged in corrupt behavior.[131] The right to contract, which debarment threatens to circumscribe, is certainly fundamental, but it is not unlimited.[132]

Collateral consequences of criminal convictions already entail a similar circumscription of constitutional rights. For example, individuals convicted of a felony yield their Second Amendment right to possess firearms.[133] Those convicted of a domestic violence offense are subject to some limitations on their First Amendment right to free speech in the form of no-contact court orders.[134]

Specifically in the arena of corporate expenditures for the purpose of funding electioneering efforts, the Supreme Court has long recognized that limitations on corporate speech may survive searching First Amendment review where a governmental interest in reducing corruption drives those limitations.[135] Stifling political speech as a means of preventing corruption or the appearance thereof remains constitutionally permissible even post-*Citizens United*.[136] Criminal laws prohibiting graft, bribery, and the like do precisely this.[137]

---

129. *See* discussion *supra* Part I.B.

130. *See* discussion *supra* Part I.B. And, note that courts routinely view some constitutional rights as more protective of the interests of individuals than of corporations. *See* GREENFIELD, *supra* note 93, at 21 (pointing to courts' treatment of forced corporate disclosure in securities law and in the law surrounding Freedom of Information Act requests, and arguing that laws demanding the same disclosures from individuals would violate the First Amendment); *cf. id.* at 135 ("Requirements that corporations disclose financial and other information material to those who engage with them, for example, should be unassailable even if such requirements might be constitutionally problematic if applied to natural persons."). Since individual disenfranchisement is constitutionally permissible, perhaps courts would have little reason to frown upon analogous treatment of corporations.

131. *See supra* notes 26–27 and accompanying text.

132. *See* Chicago, Burlington & Quincy R.R. Co. v. McGuire, 219 U.S. 549, 567 (1911) ("[F]reedom of contract is a qualified and not an absolute right.").

133. 18 U.S.C. § 922(g) (2018) (criminalizing the possession of firearms and ammunition for individuals "convicted in any court of, a crime punishable by imprisonment for a term exceeding one year"); *see also* District of Columbia v. Heller, 554 U.S. 570, 626 (2008) (invalidating a District of Columbia statute banning handgun possession, but noting that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons.").

134. *See*, *e.g.*, Jones v. Alabama, No. 14-0059-WS-C, 2015 U.S. Dist. LEXIS 88245 (S.D. Ala. June 30, 2015); State v. Latham, Nos. A11-1930 and A11-1931, 2014 Minn. App. Unpub. LEXIS 1204 (Nov. 24, 2014); Thatcher v. Thatcher, No. 22493-7-III, 2004 Wash. App. LEXIS 2361 (Oct. 19, 2004).

135. *See* FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 496–97 (1985) ("[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.").

136. *See* McCutcheon v. FEC, 572 U.S. 185, 187 (2014).

137. *See id.* at 206–08 (discussing the types of *quid pro quo* corruption where prevention of which may be a permissible basis for limiting speech); *see also* Dave Denison, *Zephyr Teachout: We're Mired in Corruption*, BAFFLER (Jan. 27, 2017), https://thebaffler.com/latest/zephyr-teachout-

Therefore, imposing corporate disenfranchisement upon a company that has broken these types of laws falls squarely within the permissible regulation of speech that the Court has long allowed.

In one key passage of its opinion, the *Citizens United* Court is quick to equate "citizens" and "associations of citizens" for the purpose of First Amendment analysis.[138] The court leans on this logic to equate protection of the rights of individual speech with protection of the rights of corporate speech.[139] Implicit in this analogue is the function of the corporate governance structure as a mechanism of translation for individual speech: when corporations speak, they are simply manifesting the speech of their individual members. However, in the context of corporate crime, this logic breaks down. If the corporation's system of governance has allowed for or facilitated the commission of a crime, perhaps that structure has crucial flaws. If that is the case, then equating a corporation's speech to an amalgamation or translation of its members' speech is illogical, and the need for robust First Amendment protections is less apparent.

Even if the forcible imposition of corporate disenfranchisement upon conviction were to run afoul of the First Amendment, the same result could perhaps permissibly emerge through plea bargains, deferred-prosecution agreements, and non-prosecution agreements. The consensual nature of these agreements could avoid some constitutional hurdles. However, given the significant criticism of deferred- and non-prosecution agreements, this technique is not ideal.[140] Concerns of coercion that exist around these agreements would be even greater when First Amendment protections are implicated.[141]

CONCLUSION

Citizens United changed the face of corporate citizenship. Conceptions of corporate personhood following the decision have extended well beyond the realm of political speech and election law. The possibility that this extension may soon reach the world of corporate criminal prosecutions cannot be ignored. Accordingly, if corporations continue the trend of claiming individual rights,

---

corruption-denison ("[T]he way in which [the framers of the Constitution] would use the word bribe is somewhat different than you might use the word bribe now. Bribery did not typically in their conversation refer to a particular criminal law statute. . . . What they meant was taking money for influence.").

138. Citizens United v. FEC, 558 U.S. 310, 349 (2010) ("If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech.").

139. *Id.*

140. For examples of such criticism, see generally Uhlmann, *The Pendulum Swings*, *supra* note 7; Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements*, *supra* note 26.

141. *See, e.g.*, Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements*, *supra* note 26, at 1342.

they should also be subject to the drawbacks individuals face in claiming those rights.

The decision seems to be here to stay. Still, policymakers can take *Citizens United* as an opportunity to devise creative new incentives for corporate behavior, rather than treat it as the tombstone of all corporate regulation. Corporate disenfranchisement presents such a policy measure that alleviates election law shortfalls in the wake of *Citizens United*, bolsters fairness in the criminal justice system, and steers corporate behavior in a positive direction.