

CORPORATE SOCIAL RESPONSIBILITY
IN THE NIGHT-WATCHMAN STATE*Stephen M. Bainbridge**

When any Chief Justice of the Delaware Supreme Court speaks on a corporate law topic, lawyers and academics who toil in that doctrinal vineyard listen.¹ When that Chief Justice is Leo Strine, they listen especially closely. The “well-respected”² Chief Justice after all is the “[w]underkind of U.S. corporate law”³ and has been “recognized among academics, practitioners, and other judges” as an “intellectual leader” of the Delaware judiciary.⁴ Yet, even mighty Homer nods occasionally.

In a recent article,⁵ Strine and his coauthor Nicholas Walter argue that the U.S. Supreme Court’s controversial *Citizens United v. FEC*⁶ decision poses a significant challenge for “conservative corporate law theory.”⁷ They argue that conservative corporate law theory supports

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1. Readers of a certain age will recognize the cultural reference to the E. F. Hutton television commercial tag line, “When E. F. Hutton talks, people listen” (which usually involved a young professional remarking at a dinner party that his broker was E. F. Hutton, which caused the moderately loud party to stop all conversation to listen to him).” E. F. Hutton & Co., Wikipedia, http://en.wikipedia.org/wiki/E._F._Hutton_%26_Co. (on file with the *Columbia Law Review*) (last visited Feb. 13, 2015).

2. See, e.g., Steven M. Davidoff & Christina M. Sautter, Lock-Up Creep, 38 J. Corp. L. 681, 703 (2013) (discussing opinion by “well-respected, then-Vice Chancellor Strine”); Andrew J. Morris, Clarifying the Authority of Litigation Trusts: Why Post-Confirmation Trustees Cannot Assert Creditors’ Claims Against Third Parties, 20 Am. Bankr. Inst. L. Rev. 589, 592 (2012) (“The opinion’s author was the well-respected Vice Chancellor Leo Strine.”).

3. John Gapper, Capitalist Punishment, *Fin. Times* (Jan. 28, 2005, 5:53 PM), <http://www.ft.com/intl/cms/s/0/8561245e-7032-11d9-b572-00000e2511c8.html> (on file with the *Columbia Law Review*).

4. David Millstone & Guhan Subramanian, *Oracle v. Peoplesoft*: A Case Study, 12 Harv. Negot. L. Rev. 1, 24 (2007).

5. Leo E. Strine, Jr. & Nicholas Walter, Conservative Collision Course?: The Tension Between Conservative Corporate Law Theory and *Citizens United*, 100 Cornell L. Rev. 335 (2015).

6. 558 U.S. 310 (2010).

7. See Strine & Walter, *supra* note 5, at 340 (“[C]ertain assumptions of *Citizens United* about corporations and their investors are inconsistent with conservative corporate theory.”).

shareholder primacy⁸ on grounds that government regulation is a more superior constraint on the externalities caused by corporate conduct than social-responsibility norms.⁹ Because *Citizens United* purportedly has unleashed a torrent of corporate political campaign contributions intended to undermine regulations, they argue that the decision undermines the viability of conservative corporate law theory.¹⁰ As a result, they contend, *Citizens United* “logically supports the proposition that a corporation’s governing board must be free to think like any other citizen and put a value on things like the quality of the environment, the elimination of poverty, the alleviation of suffering among the ill, and other values that animate actual human beings.”¹¹

This Essay argues that Strine and Walter’s analysis is flawed in three major respects. Part I contends that “conservative corporate law theory” is a misnomer. Strine and Walter apply the term to such a wide range of thinkers as to make it virtually meaningless. More importantly, scholars who range across the political spectrum embrace shareholder primacy. Part II summarizes and critiques the key factual claims that underlie Strine and Walter’s principal normative claim. In particular, Part II argues that Strine and Walter likely overstate the extent to which *Citizens United* will result in significant erosion of the regulatory environment that constrains corporate conduct. Finally, the role of government regulation in controlling corporate conduct is just one of many arguments in favor of shareholder primacy. Many of those arguments would be valid even in a night-watchman state in which corporate conduct is subject only to the constraints of property rights, contracts, and tort law. As such, even if Strine and Walter were right about the effect of *Citizens*

8. In earlier work, I have argued that shareholder primacy should be understood as making two distinct claims: “(1) that shareholders are the principals on whose behalf corporate governance is organized and (2) that shareholders do (and should) exercise ultimate control of the corporate enterprise.” Stephen M. Bainbridge, *Director Primacy in Corporate Takeovers: Preliminary Reflections*, 55 *Stan. L. Rev.* 791, 794 (2002). Many other commentators limit the definition of shareholder primacy to the first of these claims, however. See, e.g., Melvin A. Eisenberg, *The Conception that the Corporation Is a Nexus of Contracts, and the Dual Nature of the Firm*, 24 *J. Corp. L.* 819, 832 (1999) (“Most (although by no means all) corporate scholars subscribe to the norm of shareholder primacy, under which the objective of the corporation’s management should be to increase shareholder wealth”); Jonathan D. Springer, *Corporate Constituency Statutes: Hollow Hopes and False Fears*, 1999 *Ann. Surv. Am. L.* 85, 104 (“Adherents to the shareholder primacy norm generally contend that the role of a corporation is to generate wealth”). In this Essay, I adopt that more conventional meaning of the phrase.

9. See, e.g., Strine & Walter, *supra* note 5, at 339 (“[C]onservative corporate theorists note that other constituencies affected by corporate behavior—workers, neighbors, customers, communities, and those affected by the corporation’s impact on the environment—are protected by societal regulation.”).

10. See *id.* at 342 (“*Citizens United* . . . undermines conservative corporate theory’s reliance upon the regulatory process as an adequate safeguard against corporate overreaching for non-stockholder constituencies and society generally.”).

11. *Id.* at 345.

United on the regulatory state, conservative corporate law theory would continue to favor shareholder primacy over corporate social responsibility.

To be clear, this Essay does not seek to defend shareholder primacy. Instead, it argues that Strine and Walter err in claiming that conservative corporate law theorists' case for shareholder primacy relies "upon the regulatory process as an adequate safeguard against corporate overreaching for non-stockholder constituencies and society generally."¹² While that argument is part of the case for shareholder primacy, it is only part of the case.

I. CRITIQUING STRINE AND WALTER'S CHOICE OF FOIL

Strine and Walter define conservative corporate law theory as embracing the principle that "for-profit corporations should be governed with one end in mind, the generation of the most profit for their stockholders."¹³ They label this principle "conservative" on grounds that "conservative icons like Friedrich Hayek, Milton Friedman, and Frank Easterbrook" embrace it¹⁴ and that it "is most associated with legal and economic thinkers who are typically labeled as conservatives."¹⁵

There are several problems with Strine and Walter's application of the conservative label to the principle of shareholder primacy. First, many conservatives would question whether Hayek, Friedman, and Easterbrook count as conservatives at all.¹⁶ Indeed, Hayek for one went so far as to write an essay entitled "Why I Am Not a Conservative."¹⁷ Strine and Walter attempt to slide past that problem by adopting a big-tent definition of conservatism,¹⁸ but that move is insufficient. If one sets out to argue that a certain development is problematic for a particular school of thought, one needs a parsimonious definition of that school. This is so because the broader the school of thought that one seeks to critique, the greater the diversity of thought likely to exist within that school and, ac-

12. *Id.* at 342.

13. *Id.* at 338.

14. *Id.*

15. *Id.* at 337–38.

16. See, e.g., Thomas Sowell, *The Vision of the Anointed: Self-Congratulation as a Basis for Social Policy* 208 (1996) ("Friedman has . . . repudiated the 'conservative' label . . ."); George Anastaplo, *Legal Education, Economics, and Law School Governance: Explorations*, 46 *S.D. L. Rev.* 102, 151 (2001) ("Also essential, if one is to understand Mr. Hayek's doctrines, is the fact that he definitely does not consider himself a 'conservative.'"); Kelly A. MacGrady & John W. Van Doren, *AALS Constitutional Law Panel on Brown, Another Council of Nicaea?*, 35 *Akron L. Rev.* 371, 403 (2002) (describing Easterbrook as "libertarian economist and judge").

17. Friedrich A. Hayek, *The Constitution of Liberty* 397 (1960).

18. Strine & Walter, *supra* note 5, at 338 n.5 ("[W]e are not concerned about whether any of them would be described as a Burkean conservative, as opposed to a libertarian conservative, a social conservative, or any other kind of conservative.").

cordingly, the more generalized one's critique must become. A critique sufficiently generalized to cover a movement that runs from paleo-libertarians to Burkean conservatives to Reagan realists to liberaltarians¹⁹ risks morphing from a useful critique of a "few . . . individuals" to "an indictment of our entire American society."²⁰

Second, because Strine and Walter adopt such a broad definition of conservative, they overlook the diversity of opinion among those they so label on the very issue at hand. David Millon's recent article on shareholder primacy is especially apt in this regard.²¹ Millon draws a distinction between what he calls "radical shareholder primacy" and "traditional shareholder primacy." The former "asserts that corporate management is the agent of the shareholders and as such owes them a duty to maximize the return on their investments" in the short term "even at the expense of possibly greater long-term value."²² The latter, "which emerged in the last years of the nineteenth century and was embodied in corporate law and widely accepted for much of the twentieth century," assumes "that a business corporation is organized in order to generate profit," but does not require that management maximize short-term profit at the expense of long-term investments or "the interests of non-shareholder constituencies under circumstances management deems to be appropriate."²³ And therein lies the difficulty.

Millon's "radical shareholder primacy" model seems most akin to what Strine & Walter call "conservative corporate law theory," but some (perhaps many) right-of-center corporate law academics likely would associate themselves with Millon's "traditional shareholder primacy" model rather than the radical model. Indeed, as a card-carrying member of what John Coffee derisively dismissed as the "Tea Party Caucus" of corporate law academics,²⁴ I count myself among those who embrace the

19. For an overview of the multiple schools of conservative thought, see Conservatism, Wikipedia, <http://en.wikipedia.org/wiki/Conservatism> (on file with the *Columbia Law Review*) (last visited Feb. 13, 2015).

20. The reference in the text is a nod to Otter's opening statement at Delta House's trial in *Animal House*:

But you can't hold a whole fraternity responsible for the behavior of a few, sick perverted individuals. For if you do, then shouldn't we blame the whole fraternity system? And if the whole fraternity system is guilty, then isn't this an indictment of our educational institutions in general? I put it to you, Greg—isn't this an indictment of our entire American society? Well, you can do what you want to us, but we're not going to sit here and listen to you badmouth the United States of America. Gentlemen!

Animal House, at 1:05:28 (Universal Pictures 1978).

21. David Millon, *Radical Shareholder Primacy*, 10 U. St. Thomas L.J. 1013 (2014) [hereinafter Millon, *Radical Shareholder Primacy*].

22. *Id.* at 1013–14.

23. *Id.*

24. See John C. Coffee, Jr., *The Political Economy of Dodd-Frank: Why Financial Reform Tends to Be Frustrated and Systemic Risk Perpetuated*, 97 *Cornell L. Rev.* 1019, 1024 (2012) (identifying the late Larry Ribstein and myself as allies of Roberta Romano in

traditional model (subject to what I trust would be accepted as a friendly amendment) rather than the radical one.²⁵ Conversely, some (many?) left-of-center corporate law academics embrace some form of radical shareholder primacy. Table 1 lists those corporate law academics that Millon identifies as associated with the radical shareholder primacy model who are included in the OpenSecrets.org political donor database. While this is obviously a small sample, it is nevertheless instructive that the majority of those listed have made political contributions exclusively to Democratic candidates and groups. Indeed, it suggests that Strine and Walter perhaps should have focused on the implications of *Citizens United* for radical shareholder primacy theorists rather than conservative corporate law academics. Having said that, however, I will accept their terminology herein for convenience.

TABLE 1: POLITICAL DONATIONS BY RADICAL SHAREHOLDER PRIMACY THEORISTS

Name	Number of contributions to Democratic candidates or groups	Number of contributions to Republican candidates or groups
Stephen M. Bainbridge ²⁶	0	7
Lucian A. Bebchuk ²⁷	1	0

“Tea Party Caucus’ of corporate and securities law professors”); see also Creighton J. Miller, Jr. & Annmarie Zell, Keeping Up with New Legal Titles, 104 Law Libr. J. 577, 580 (2012) (“John C. Coffee . . . dubs Bainbridge, Romano, and similarly disposed academics the ‘Tea Party Caucus’ . . .”).

25. See Stephen M. Bainbridge, David Millon’s “Radical Shareholder Primacy,” ProfessorBainbridge.com (Aug. 21, 2014, 12:25 PM), <http://www.professorbainbridge.com/professorbainbridgecom/2014/08/david-millons-radical-shareholder-primacy.html> (on file with the *Columbia Law Review*) (explaining management should have regard for interests of non-shareholder constituencies under circumstances management deems appropriate only to extent management reasonably believes doing so will redound to benefit of shareholders in long term and not at all in final period situations).

26. Donor Lookup: Stephen M. Bainbridge, Ctr. for Responsive Politics, <https://www.opensecrets.org/indivs/search.php?name=stephen+bainbridge&cycle=All&sort=R&state=CA&zip=&employ=&cand=&submit=Submit> (on file with the *Columbia Law Review*) (last visited Feb. 13, 2015). As noted above, I self-identify with the traditional shareholder primacy model, but Millon’s article appears to place me in the radical camp, albeit while acknowledging that I do not “embrace the agency model” aspect of the radical model. Millon, Radical Shareholder Primacy, *supra* note 21, at 1039. Having said that, however, in subsequent email correspondence, Millon explained, “I most emphatically do not place you in the ‘radical SHP’ camp. It isn’t enough to posit a shareholder wealth maximization requirement; you also need the agency thing. That’s the heart of the matter and director primacy is in important respects the antithesis.” Email from David Millon, J.B. Stombock Professor of Law, Wash. & Lee Univ. Sch. of Law, to Stephen M. Bainbridge, William D. Warren Distinguished Professor of Law, UCLA Sch. of Law (Sep. 10, 2014, 1:03 PM) [hereinafter Email from David Millon] (on file with the *Columbia Law Review*). I have nevertheless included myself in the table to reinforce the point that conservative political leanings and traditional shareholder primacy are not mutually exclusive.

Daniel Fischel ²⁸	1	2
Ronald J. Gilson ²⁹	1	0
Jeffrey N. Gordon ³⁰	43	0
Henry Hansmann ³¹	23	0
Reinier Kraakman ³²	3	0
Charles K. Whitehead ³³	2	0

Finally, the role of the corporation in society is just one of many issues that a fully developed conservative corporate law theory necessarily would address. As former Delaware Chancellor William Allen observed, “the choices that are reflected in even the most technical legal subjects come, in the end, to reflect contestable visions of what constitutes the good life [and that] [b]eneath the surface of the most fundamental corporation law problems lie normative questions masquerading as technical corporation law questions.”³⁴ Whatever implications *Citizens United*

27. Donor Lookup: Lucian Bebchuk, Ctr. for Responsive Politics, <https://www.opensecrets.org/indivs/search.php?name=lucian+bebchuk&cycle=All&sort=R&state=&zip=&employ=&cand=&submit=Submit> (on file with the *Columbia Law Review*) (last visited Feb. 12, 2015). Bebchuk’s sole contribution was to the Senate campaign of his former Harvard Law School colleague Elizabeth Warren, id., and therefore perhaps should be discounted as an indicator of political affiliation.

28. Donor Lookup: Daniel R. Fischel, Ctr. for Responsive Politics, <https://www.opensecrets.org/indivs/search.php?name=daniel+fischel&cycle=All&sort=R&state=IL&zip=&employ=&cand=&submit=Submit> (on file with the *Columbia Law Review*) (last visited Feb. 12, 2015).

29. Donor Lookup: Ronald Gilson, Ctr. for Responsive Politics, <https://www.opensecrets.org/indivs/search.php?name=ronald+gilson&cycle=All&sort=R&state=&zip=&employ=&cand=&submit=Submit> (on file with the *Columbia Law Review*) (last visited Feb. 12, 2015).

30. Donor Lookup: Jeffrey Gordon, Ctr. for Responsive Politics, <https://www.opensecrets.org/indivs/search.php?name=jeffrey+gordon&cycle=All&sort=R&state=NY&zip=&employ=&cand=&submit=Submit> (on file with the *Columbia Law Review*) (last visited Feb. 12, 2015). Gordon’s inclusion on the list is subject to the qualification that he has “argued that shareholder primacy is socially undesirable for systemically important financial firms, even if not necessarily for all corporations.” Millon, *Radical Shareholder Primacy*, supra note 21, at 1039.

31. Donor Lookup: Henry Hansmann, Ctr. for Responsive Politics, <https://www.opensecrets.org/indivs/search.php?name=Henry+hansmann&cycle=All&sort=R&state=&zip=&employ=&cand=&submit=Submit> (on file with the *Columbia Law Review*) (last visited Feb. 12, 2015).

32. Donor Lookup: Reinier Kraakman, Ctr. for Responsive Politics, <https://www.opensecrets.org/indivs/search.php?name=Reinier+Kraakman&cycle=All&sort=R&state=&zip=&employ=&cand=&submit=Submit> (on file with the *Columbia Law Review*) (last visited Feb. 12, 2015).

33. Donor Lookup: Charles K. Whitehead, Ctr. for Responsive Politics, <https://www.opensecrets.org/indivs/search.php?name=Charles+K.+Whitehead&cycle=All&sort=R&state=&zip=&employ=&cand=&submit=Submit> (on file with the *Columbia Law Review*) (last visited Feb. 17, 2015).

34. Stephen J. Massey, *Chancellor Allen’s Jurisprudence and the Theory of Corporate Law*, 17 *Del. J. Corp. L.* 683, 694 n.36 (1992) (quoting William T. Allen, *Competing*

may have for the shareholder primacy debate, there is no reason to think (and Strine and Walter offer none) that *Citizens United* undermines conservative corporate law theory writ large.

II. STRINE AND WALTER'S ARGUMENT

Despite the article's considerable length and multiple parts, the gist of Strine and Walter's argument is quite simple. First, they claim that corporations inherently generate externalities, imposing some costs on both specific outsiders and society at large.³⁵ This point is uncontroversial, of course, even among those whom Strine and Walter label as conservative corporate law theorists.³⁶ Second, in appropriate cases, society uses law to force corporations to internalize at least some of those costs.³⁷ Again, this point is uncontroversial, even among those Strine and Walter label as conservative corporate law theorists, although there likely would be at least some debate over when regulatory intervention becomes appropriate.³⁸

Third, Strine and Walter contend that *Citizens United* unleashed a torrent of corporate spending, especially relative to labor spending:

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

Conceptions of the Corporation in American Law, Address at Rocco J. Tresolini Lecture in Law, Lehigh University 28 (Oct. 29, 1990)).

35. See Strine & Walter, *supra* note 5, at 356 (“Rather than deny that corporations focused on maximizing stockholder profits might have a rational incentive to externalize costs to other constituencies through . . . methods that leave the corporation with higher profits by off-loading risks to others, conservative corporate theory accepts that externality risk must be addressed.”).

36. See, e.g., Stephen M. Bainbridge, *Corporation Law and Economics* 425 (2002) [hereinafter *Bainbridge, Corporation Law and Economics*] (“Corporate conduct doubtless generates negative externalities.”).

37. See Strine & Walter, *supra* note 5, at 339 (“[C]onservative corporate theorists note that other constituencies affected by corporate behavior—workers, neighbors, customers, communities, and those affected by the corporation’s impact on the environment—are protected by societal regulation.”).

38. See, e.g., Bainbridge, *Corporation Law and Economics*, *supra* note 36, at 425 (“In appropriate cases, such externalities should be constrained through general welfare legislation, tort litigation, and other forms of regulation.”); Jonathan R. Macey, *An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties*, 21 *Stetson L. Rev.* 23, 42 (1991) (“If actions of a firm are genuinely detrimental to a local community, the members of that community can appeal to their elected representatives in state and local government for redress.”).

increased to over \$2.7 billion, while union donations were up to \$140 million.³⁹

Assuming Strine and Walter's figures to be accurate, at least arguendo, the absolute amounts being spent seem unremarkable. As I have observed previously, "in the 2008 election cycle, the total amount spent on all political campaigns by all actors was, according to OpenSecrets.org, \$5,285,680,883."⁴⁰ To put that figure in context, it is less than the amount Procter & Gamble alone spent on advertising in 2008.⁴¹ "As a society, we spend much more money selling stuff to wipe our bottoms with than we do deciding who should run the most powerful country in the world,"⁴² which perhaps suggests that the amounts at issue are not as unreasonable as Strine and Walter seem to think.

Instead, the more serious objection posed by Strine and Walter goes to the core of their argument; namely, that corporate political spending is deployed to erode regulations necessary to constrain the externalities inherent in corporate business activity:

Because corporate wealth far exceeds that held directly by human beings, if corporations are able to act directly to influence who is elected to office, the laws and regulations in our society will increasingly tend to tolerate the imposition of greater externalities, because they will be enacted by politicians who have been elected in an expensive process in which money matters, and in which securing the support of non-human corporate money with a monocular focus on profit will be important to electoral competitiveness.⁴³

In fact, however, much corporate political spending is likely to be defensive. As *The Economist* recently observed:

When America was founded, there were only three specified federal crimes—treason, counterfeiting and piracy. Now there are too many to count. In the most recent estimate, in the early 1990s, a law professor reckoned there were perhaps 300,000 regulatory statutes carrying criminal penalties—a number that can only have grown since then. For financial firms especially, there are now so many laws, and they are so complex (witness the

39. Strine & Walter, *supra* note 5, at 387 (footnotes omitted).

40. Stephen M. Bainbridge, *Is Citizens United the Death of Democracy?*, ProfessorBainbridge.com (Oct. 19, 2010, 12:53 PM), <http://www.professorbainbridge.com/professorbainbridgecom/2010/10/is-citizens-united-the-death-of-democracy.html> [hereinafter Bainbridge, *Death of Democracy*] (on file with the *Columbia Law Review*).

41. *Id.* See generally Bradley Johnson, *Procter & Gamble Co.'s Advertising Spending, 1987 to 2012*, Advertising Age (Oct. 29, 2012), <http://adage.com/article/special-report-pg-at-175/procter-gamble-s-advertising-spending-1987-2012/237974/> (on file with the *Columbia Law Review*) (reporting Procter & Gamble's total 2008 advertising expenditures as \$8.426 billion).

42. Bainbridge, *Death of Democracy*, *supra* note 40.

43. Strine & Walter, *supra* note 5, at 389.

thousands of pages of new rules resulting from the Dodd-Frank reforms), that enforcing them is becoming discretionary.⁴⁴

In this environment, it seems plausible that much corporate political spending goes to stave off additional regulation rather than to repealing existing laws. In the absence of a showing that the benefits of foregone regulations exceed their costs, there is no reason to assume that corporate political spending increases the extent to which corporations can externalize costs. Strine and Walter offer no convincing evidence that corporate political spending in fact has the effect they posit.

Strine and Walter also fail to take into account the likelihood that much corporate political spending will simply cancel out spending by other corporations. It seems intuitively obvious that specific regulations rarely advantage all businesses. If so, spending by opponents of particular laws or rules likely will be countered by those who benefit from them.⁴⁵ Accordingly, *Citizens United's* alleged anti-regulatory effect will be self-minimizing.

In addition, Strine and Walter fail to explore the implications of the fact that large corporations dominate corporate campaign spending.⁴⁶ First, spending by such corporations is highly constrained by reputational considerations due to “the seriousness with which large corporations treat any potential threats to their goodwill arising from . . . negative publicity” generated by unpopular contributions.⁴⁷ Second, and more important, while Strine and Walter assume corporations use political spending exclusively to externalize the negative costs of their activities, the reality is that large corporations frequently support regulations that force corporations to internalize social costs. They do so because such regulation can create significant costs for smaller competitors and barriers to entry for startups. Because regulatory costs frequently do not

44. The Criminalization of American Business, *Economist* (Aug. 30, 2014), available at <http://www.economist.com/news/leaders/21614138-companies-must-be-punished-when-they-do-wrong-legal-system-has-become-extortion> (on file with the *Columbia Law Review*).

45. See What's Wrong with Corporate Social Responsibility?: The Arguments Against CSR, Corporate Watch, <http://www.corporatewatch.org/content/whats-wrong-corporate-social-responsibility-arguments-against-csr> (on file with the *Columbia Law Review*) (last visited Feb. 19, 2015) (“Because companies will only lobby for the type of regulation that makes them more competitive, any regulation they support will be counterweighted by lobbying from competitors who would lose out if regulation is brought in.”).

46. See Thomas W. Joo, Corporate Governance and the Constitutionality of Campaign Finance Reform, 1 *Election L.J.* 361, 362 (2002) (“[L]arge corporations . . . dominate corporate political spending.”); Bainbridge, *Death of Democracy*, supra note 40 (“Many smaller companies stated that because they generally do not engage in the political process, they do not see the need to implement a policy regarding independent expenditures or trade association monitoring.”).

47. Michael A. Behrens, *Citizens United*, Tax Policy, and Corporate Governance, 12 *Fla. Tax Rev.* 589, 607 (2012). On the other hand, “while many large corporations may indeed be deterred by possible disclosure of campaign contributions that alienates shareholders and consumers . . . other corporations may not be as concerned with consumer and shareholder relations.” *Id.* at 609.

scale, they are often borne disproportionately by small businesses and startups.⁴⁸ This observation is not offered as a defense of corporate political spending, but solely as a critique of Strine and Walter's assumption that corporate political spending is inevitably anti-regulation.⁴⁹

III. EVEN IF STRINE AND WALTER WERE RIGHT, CONSERVATIVE CORPORATE LAW THEORY WOULD STILL PROPERLY JUSTIFY SHAREHOLDER PRIMACY

Building on the claims analyzed in the preceding Part, Strine and Walter arrive at their normative thesis:

Citizens United . . . undermines conservative corporate theory's reliance upon the regulatory process as an adequate safeguard against corporate overreaching for non-stockholder constituencies and society generally After *Citizens United*, the very success of the corporate form as a wealth-generating tool is in tension with conservative corporate theory because if the wealth impounded in corporations can be used in unlimited amounts to influence who is elected to the offices that determine the "rules of the game," the range of policy options is likely to move in a direction where there is greater danger of externality risk

. . . As a result, *Citizens United* can be rationally understood as buttressing conservative corporate law theory's primary rival. Under that very different rival theory, corporate managers not

48. See Stephen M. Bainbridge, Corporate Social Responsibility as Barrier to Entry, ProfessorBainbridge.com (Oct. 4, 2010, 10:54 AM), <http://www.professorbainbridge.com/professorbainbridge.com/2010/10/corporate-social-responsibility-as-barrier-to-entry.html> (on file with the *Columbia Law Review*) ("[B]ig business loves it when government mandates some purportedly socially responsible law. It creates barriers to entry making it tough for new competitors to succeed.").

49. In email correspondence, David Millon made the following interesting observation:

I think there's a further reason why *Citizens United* may not result in the high levels of political expenditure that S&W seem to assume. Big institutional shareholders—especially pension funds and some mutual funds—have powerful incentives to demand short-term share price maximization from corporate management. (As I explain in my 'Shareholder Social Responsibility' piece, pension funds must meet huge obligations to current retirees and many mutual funds (depends on the 'style') compete for investor dollars on the basis of annual performance based on portfolio value.) So this means that any discretionary expenditure that reduces net income in a given quarter is potentially problematic. That includes current expenses like R&D, advertising, etc. that have the potential to yield net gains over the long term. Political expenditures would fall into that category too. So there's a built-in limit, at least at companies that are managed to maximize quarterly earnings, on these kinds of expenditures. This also goes to S&W's criticism of Kennedy's naïve belief that shareholders can constrain political spending. Retail investors can't, but institutions can and probably do. Anyway, the amounts involved are usually so small for the large corporations that they don't even appear on the income statement.

Email from David Millon, *supra* note 26.

only may, but are required to, consider the best interests of all those affected by the corporation's conduct when exercising their power. As those of this school argue, by making clear that the for-profit corporation is a citizen like any other, *Citizens United* logically supports the proposition that a corporation's governing board must be free to think like any other citizen and put a value on things like the quality of the environment, the elimination of poverty, the alleviation of suffering among the ill, and other values that animate actual human beings.⁵⁰

The difficulty with this argument is that the political constraint argument is not the only—let alone the most important—arrow in conservative corporate law theory's quiver. Indeed, for the reasons set out below, conservative corporate law theorists would still oppose corporate social responsibility even in the proverbial night-watchman state.⁵¹ Put another way, even if the law permitted corporations to externalize social costs subject only to limited prohibitions on force, fraud, and the like, conservative corporate law theorists would still oppose permitting—let alone requiring—corporate directors and managers to make tradeoffs between the welfare of shareholders and that of nonshareholder constituencies.

A. *The Argument from Ownership*

Although Strine and Walter's characterization of Milton Friedman as a conservative corporate law theorist is questionable for the reasons discussed above, accepting it for sake of argument is useful because it invokes Friedman's classic article, *The Social Responsibility of Business Is to Increase Its Profits*.⁵² In it, Friedman argued that "a corporate executive is an employe [sic] of the owners of the business" and, in turn, that those owners are the company's stockholders.⁵³ In other words, a corporation's directors and executives are stewards entrusted with the management of

50. Strine & Walter, *supra* note 5, at 342–45 (footnotes omitted). Strine and Walter also posit that "[t]he more recent case of *Burwell v. Hobby Lobby Stores, Inc.* bears out this understanding. There, the same conservative five-Justice majority that decided *Citizens United* held explicitly that profit is *not* the sole end of corporate governance." *Id.* at 345 n.14 (citation omitted). For a contrary analysis of *Hobby Lobby*, see Stephen M. Bainbridge, *Does Hobby Lobby Sound a Death Knell for Dodge v. Ford Motor Co.?*, ProfessorBainbridge.com (July 3, 2014, 2:35 PM), <http://www.professorbainbridge.com/professorbainbridge.com/2014/07/does-hobby-lobby-sound-a-death-knell-for-dodge-v-ford-motor-co.html> (on file with the *Columbia Law Review*) (offering negative answer to titular question).

51. See generally Robert Nozick, *Anarchy, State, and Utopia* 26–27 (1974) (describing libertarian ideal of night-watchman state as "limited to the functions of protecting all its citizens against violence, theft, and fraud, and to the enforcement of contracts, and so on").

52. Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, *N.Y. Times Mag.*, Sept. 13, 1970, at 32.

53. *Id.*

the shareholders' property and, accordingly, must focus their attention on maximizing the earnings generated by and value of that property.⁵⁴

Conservative corporate law theorists who embrace the nexus of contracts model of the corporation, however, will be skeptical of this particular argument.⁵⁵ Their skepticism is premised on the observation that the corporation is a legal fiction representing a complex set of contracts between various stakeholders.⁵⁶ Because contractarian scholars "thus conceptualize the firm not as an entity, but as an aggregate of various inputs acting together to produce goods or services,"⁵⁷ ownership cannot be a meaningful concept in their model.⁵⁸ In turn, because the corporation is not a thing capable of being owned but simply a legal fiction, Friedman's property rights-based argument has no traction in the contractarian model.⁵⁹

Importantly for present purposes, however, not all corporate law scholars reject the property rights-based rationale for shareholder primacy. Professor Julian Velasco, for example, has offered a vigorous defense—on both normative and doctrinal grounds—of shareholder

54. See John Tyler, *Negating the Legal Problem of Having "Two Masters": A Framework for L3C Fiduciary Duties and Accountability*, 35 *Vt. L. Rev.* 117, 129 (2010) ("The property rights theory begins with shareholders as the owners of the business, which then is their property, and the directors are the stewards of the property for the shareholders.").

55. See Stephen M. Bainbridge, *Much Ado About Little? Directors' Fiduciary Duties in the Vicinity of Insolvency*, 1 *J. Bus. & Tech. L.* 335, 337 n.3 (2007) [hereinafter *Bainbridge, Much Ado About Little?*] ("The nexus of contracts model treats the corporation as a nexus of contracts among the various factors of production.").

56. See Viet D. Dinh, *Codetermination and Corporate Governance in a Multinational Business Enterprise*, 24 *J. Corp. L.* 975, 986 (1999) (arguing "the corporation is no more than a legal fiction, conceptually 'a useful heuristic,' that represents the contractual relationships among the various participants" (footnotes omitted) (quoting Stephen M. Bainbridge, *Participatory Management Within a Theory of the Firm*, 21 *J. Corp. L.* 657, 660 (1996))).

57. Bainbridge, *Much Ado About Little?*, *supra* note 55, at 337 n.3.

58. See Eugene F. Fama, *Agency Problems and the Theory of the Firm*, 88 *J. Pol. Econ.* 288, 289 (1980) (explaining corporations do not have "owners in any meaningful sense"). As Professor Dinh explains:

Although the concept of "ownership" of the corporation is prevalent in some contractarian accounts, the use of the term is in some respects a misnomer. No one owns a fiction, and property rights over a heuristic stretch the limits of logic and imagination. Thus, the separation of control and ownership is more properly conceptualized as the separation of management and control. Ownership in this context is thus simply the right to specify the terms not specified in an incomplete contract.

Dinh, *supra* note 56, at 986–87 (footnotes omitted).

59. See Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 *Nw. U. L. Rev.* 547, 565 (2003) [hereinafter *Bainbridge, Director Primacy*] (arguing contractarian model allows one to throw "Friedman's concept of ownership out the window, along with its associated economic and ethical baggage").

ownership of the corporation.⁶⁰ In turn, he contends that because “shareholders own the corporation, the end and means of corporate governance must be shareholder primacy.”⁶¹

It is not necessary here to resolve the debate between the contractarian and property-rights models. So long as at least one strand of conservative corporate law theory embraces the latter approach, the political constraint argument does not stand alone as a rationale for shareholder primacy. In turn, because the property rights-based argument provides a rationale for shareholder primacy independent of the political constraint argument, conservative corporate law theorists will still prefer shareholder primacy to corporate social responsibility even in the post-*Citizens United* era.

B. *The Argument from Accountability*

Although directors are not agents of the shareholders in a legal sense,⁶² their relationship creates a classic example of what economists refer to as the principal-agent problem.⁶³ The substantial discretion possessed by corporate directors and managers allows them to put their self-interest ahead of those of the corporate entity, its shareholders, and other stakeholders. Shareholder primacy responds to this problem by creating a standard to which directors may be held accountable.⁶⁴

60. See Julian Velasco, Shareholder Ownership and Primacy, 2010 U. Ill. L. Rev. 897, 928–39 (setting out “affirmative case for shareholder ownership”).

61. *Id.* at 948.

62. See Restatement (Third) of Agency § 1.01 cmt. f(2), 29 (2006) (“[D]irectors are neither the shareholders’ nor the corporation’s agents . . .”).

63. See Andrei Shleifer & Robert W. Vishny, A Survey of Corporate Governance, 52 J. Fin. 737, 740 (1997) (arguing principal-agent problem inherent in relationship between directors and shareholders is central problem of corporate governance).

64. See Brett H. McDonnell, Strategies for an Employee Role in Corporate Governance, 46 Wake Forest L. Rev. 429, 444 (2011) (noting “increased accountability that comes with shareholder primacy”). It is true that the business judgment rule in some situations has the effect of allowing directors and managers to consider nonshareholder interests in making corporate decisions without fear of liability to shareholder for doing so. As I have argued in detail elsewhere, however, that is not the rule’s intent. See Bainbridge, Director Primacy, *supra* note 59, at 601–05 (exploring relationship between business judgment rule and corporate social responsibility debate). Indeed, a review of “the case law provides no support for [the] argument that the business judgment rule is intended to allow directors to mediate between competing interest groups.” *Id.* at 605. In addition, as I have previously commented:

Because the shareholder wealth maximization norm is central to director socialization, the norm provides a forceful reminder of where the director’s loyalty lies. Even if the business judgment rule renders its rhetoric largely unenforceable, the shareholder wealth maximization norm is an ever present goad. By removing the psychological constraint that the shareholder wealth maximization norm provides, and simultaneously exacerbating the two masters problem, [abandoning shareholder primacy is] less likely to encourage directors to pursue the collective interests of the firm’s various constituents than to encourage directors to pursue their own self-interest.

Accountability is an essential component of corporate governance, as Strine himself has observed elsewhere.⁶⁵ If directors can take into account the interests of nonshareholder constituencies when making corporate decisions, however, it will become much harder to hold directors accountable.⁶⁶ Directors who are accountable to everyone, after all, are accountable to no one.⁶⁷

Director accountability would matter even in a night-watchman state. Whether corporations are forced to internalize social costs or not, we still would not want directors to use their position to enrich themselves at the expense of those whose funds they have been charged with managing. The argument from accountability thus provides another rationale for shareholder primacy independent of the political constraint argument.

C. *Other Arguments*

Jonathan Macey points out “when shareholders make investments in a corporation, they do not think that they are giving their money away.”⁶⁸ As I have explained elsewhere, however, it is doubtful that shareholders would be “willing to invest their retirement savings in corporate stock” if the corporation had “a license to reallocate wealth from shareholders to nonshareholder constituencies.”⁶⁹ Shareholder primacy thus may well be essential in order to promote investment and the economic growth that goes with it.

Macey also points out that nonshareholder constituencies can bargain for alternative protections, observing that such “benefits will vary depending on the nature of the nonshareholder constituency at issue. They may take the form of higher interest rates for bondholders, higher

Bainbridge, *Corporation Law and Economics*, supra note 36, at 422.

65. See Leo E. Strine, Jr., *Why Excessive Risk-Taking Is Not Unexpected*, N.Y. Times Dealbook (Oct. 5, 2009, 1:30 PM), <http://dealbook.nytimes.com/2009/10/05/dealbook-dialogue-leo-strine/> (on file with the *Columbia Law Review*) (“Ideally, we want a system where corporate boards are highly accountable and responsive to their stockholders for the generation of sustainable profits.”); see also William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., *The Great Takeover Debate: A Meditation on Bridging the Conceptual Divide*, 69 U. Chi. L. Rev. 1067, 1098 n.91 (2002) (“[T]he system we advocate should make corporate directors more accountable to the stockholders.”).

66. See Robert C. Clark, *Corporate Law* 20 (1986) (“A single objective goal like profit maximization is more easily monitored than a multiple, vaguely defined goal like the fair and reasonable accommodation of all . . . interests.”).

67. See David Hess, *Social Reporting: A Reflexive Law Approach to Corporate Social Responsiveness*, 25 J. Corp. L. 41, 60 (1999) (arguing when “management [becomes] accountable to everyone, they may become accountable to no one”); cf. Stephen Cianca, *Home Rule in Ohio Counties: Legal and Constitutional Perspectives*, 19 U. Dayton L. Rev. 533, 557 n.119 (1994) (“A representative who is accountable to everyone is accountable to no one.”).

68. Jonathan R. Macey, *Corporate Social Responsibility: A Law & Economics Perspective*, 17 Chap. L. Rev. 331, 331–32 (2014) [hereinafter Macey, *Corporate Social Responsibility*].

69. Bainbridge, *Corporation Law and Economics*, supra note 36, at 422.

wages or greater job security for workers, or higher taxes for local communities.”⁷⁰ To be sure, Strine and Walter argue that, “as labor movement trends arguably show, the utility of contracting might itself be influenced by regulatory policy.”⁷¹ As Macey demonstrates, however, contracting technology makes protecting nonshareholder interests by contract far more feasible than protecting shareholder interests by contract.⁷² As a result, limiting director fiduciary duties to shareholders is an essential gap-filler in the corporate nexus of contracts.⁷³ In any case, because enforcing contracts is a core function of the night-watchman state, conservative corporate law theory may properly embrace shareholder primacy so long as contracting between corporations and their nonshareholder constituencies is a viable—even if imperfect—option.

Finally, some of those Strine and Walter label as conservative corporate law theorists likely would view shareholder primacy as being necessary to preserving the night-watchman state. Hayek, for example, argued that:

[O]nce the management of a big enterprise is regarded as not only entitled but even obliged to consider in its decision whatever is regarded as the public or social interest, or to support good causes and generally to act for the public benefit, it gains indeed an uncontrollable power—a power which could not long be left in the hands of private managers but would inevitably be made the subject of increasing public control.⁷⁴

In other words, not only can shareholder primacy be justified even in a night-watchman state, shareholder primacy affirmatively contributes to preservation of a free society by limiting the need for political regulation of unchecked managerial power.

CONCLUSION

Perhaps what Strine and Walter really mean is simply that by undermining the political constraint argument, *Citizens United* makes conservative corporate law theory less persuasive to those for whom it is not an established normative prior. But that is not what they said. Instead, they made the much stronger claim that by undermining the political constraint, *Citizens United* invalidates conservative corporate law

70. Macey, Corporate Social Responsibility, supra note 68, at 333.

71. Strine & Walter, supra note 5, at 356.

72. See Macey, Corporate Social Responsibility, supra note 68, at 346–48 (discussing available contracting mechanisms).

73. See id. at 350 (“Fiduciary duties are a corporate governance device uniquely crafted to fill in the massive gap in this open-ended bargain between shareholders and corporate officers and directors.”).

74. 3 Friedrich Hayek, Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy 82 (1982).

theory⁷⁵ and thereby validates the argument for allowing—perhaps even requiring—directors to take the interests of nonshareholder constituencies into account when making corporate decisions.⁷⁶ We have seen, however, that this argument fails on two grounds. First, the claim that *Citizens United* undermines the ability of the political systems to regulate corporate externalities remains unproven. Second, the political constraint argument is just one of many arguments conservative corporate law theorists advance in favor of shareholder primacy. Many of those arguments would hold true even in a night-watchman state in which corporate externalities were largely unregulated. As such, even if Strine and Walter are right about the effect of *Citizens United* on the regulatory system, conservative corporate law theory would still favor shareholder primacy rather than corporate social responsibility.

Preferred Citation: Stephen M. Bainbridge, *Corporate Social Responsibility in the Night-watchman State*, 115 COLUM. L. REV. SIDEBAR 39 (2015), http://www.columbialawreview.org/Corporate_Bainbridge.

75. See, e.g., Strine & Walter, *supra* note 5, at 390 n.222 (quoting with approval various commentators arguing *Citizens United* renders shareholder primacy non-viable).

76. See *id.* at 345 (“*Citizens United* can be rationally understood as buttressing conservative corporate law theory’s primary rival.”); see also *id.* at 390 & n.222 (“If the for-profit corporation really is a citizen like any other, and a distinct one from that of any of its constituencies including its stockholders, then its board must be entitled to have it act as a patriotic, moral citizen imbued with a conscience.”).