

SYMPOSIUM INTRODUCTION

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On March 24, 2017, scholars, lawyers, and advocates gathered at Stetson Law School to discuss the role of business in democracy in a Symposium entitled, “Can Corporations Be Good Citizens? How Corporate Law, Litigation, Lobbying and Money in Politics Intersect.” Ben Cohen of Ben & Jerry’s Ice Cream delivered the keynote address about money in politics, restoring the right to vote in Florida, and the positive role ethical businesses can play in American society.

March 24th was a beautiful sunny day on the Gulfport, Florida campus, yet the stormy start to the Trump presidency hung ominously over the proceedings. As speakers on the dais pointed out, the refusal of President Trump to divest from his businesses raises conflicts of interest and constitutional issues under the domestic and foreign Emoluments Clauses of the Constitution. President Trump’s cabinet is also filled with former executives and bankers eager to revise many regulations and consumer protections crafted by previous administrations. Meanwhile, all of the pre-2017 issues, such as corporate dark money and the choices made by the Supreme Court in *Citizens United v. FEC*, remained salient topics for discussants.

When Symposium participants gathered, the nation was only a few weeks into the new presidency. The intervening months have been tumultuous with the appointment of a federal Special Counsel to investigate the role of Russian interference in the 2016 election and any possible links to the Trump presidential campaign.¹ The Special Counsel has power under 28 CFR 600.4(a) and the Deputy Attorney General’s grant of jurisdiction, which includes “the authority to investigate and prosecute federal crimes committed in the course of, and with intent to interfere with, the

1. Rebecca R. Ruiz & Mark Landler, *Robert Mueller, Former F.B.I. Director, Is Named Special Counsel for Russia Investigation*, N.Y. TIMES (May 18, 2017), <https://www.nytimes.com/2017/05/17/us/politics/robert-mueller-special-counsel-russia-investigation.html?mcubz=2>.

Special Counsel's investigation, such as perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses" and the authority to pursue "any matters that arose or may arise directly from the investigation." Certain press reports indicate this investigation will not just be into members of the Trump campaign but also their business dealings, including those of National Security Advisor Michael Flynn,² the President's son-in-law Jared Kushner,³ and former campaign manager Paul Manafort.⁴

Some speakers focused on descriptive narratives about the current state of economic and political affairs, while others advocated for normative reforms to adapt to dynamic political changes. The conversation at the Symposium was wide ranging from the issue of violations of the Foreign Emoluments Clause of the U.S. Constitution, to potential violations of the Foreign Corrupt Practices Act, to the history of corporate constitutional rights, to the new administration's hostility towards scientific method in an attempt to benefit industry, to corporate dark money in elections, to the need for robust public financing in elections, to the desire for more transparency for investors of corporate political spending, to the misperceptions of the public of the magnitude of business involvement in elections, to the creation of benefit corporations to foster more socially responsible businesses.

Five of our Symposium participants, as well as a recent graduate of Stetson Law School, have contributed pieces to this Symposium Issue of the *Stetson Law Review*. Journalist Kathy Kiely argues in her pithy piece about transparency: "In a digital world, advocates for public disclosure need to understand some basic and inconvenient truths: (1) functionality follows format; (2) public doesn't necessarily mean accessible; and (3) open doesn't

2. Nathan Layne, Mark Hosenball & Julia Edwards Ainsley, *Exclusive: Special Counsel Mueller to Probe Ex-Trump Aide Flynn's Turkey Ties*, REUTERS (June 2, 2017, 10:52 AM), <http://www.reuters.com/article/us-usa-trump-flynn-turkey-exclusive-idUSKBN18T276>.

3. Sari Horwitz, Matt Zapposky & Adam Entous, *Special Counsel Is Investigating Jared Kushner's Business Dealings*, WASH. POST (June 15, 2017), https://www.washingtonpost.com/world/national-security/special-counsel-is-investigating-jared-kushners-business-dealings/2017/06/15/5d9a32c6-51f2-11e7-91eb-9611861a988f_story.html?nid&utm_term=.99ca83cf343f.

4. Brooke Seipel, *Special Counsel Investigation Includes Manafort, May Expand to Sessions: Report*, THE HILL (June 2, 2017, 5:56 PM EDT), <http://thehill.com/blogs/blog-briefing-room/news/336168-russia-special-counsel-investigation-includes-manafort-may>.

necessarily equal socially useful.”⁵ She urges transparency advocates to be more thoughtful about exactly what they are seeking from an open government.

For one, Ms. Kiely complains about what she calls “Analog Antiquarianism” in governmental disclosure, or in other words, governmental filings that are made on paper instead of in an electronic file. The key offender here is the U.S. Senate which has resisted legislation which would require senatorial campaign finance reports to be filed in electronic form with the Federal Election Commission (FEC).⁶ She also would prefer machine-readable governmental filings instead of reams of essentially unsearchable pdfs like those piling up at the FCC.⁷ And she wants government webpages to be redesigned with better user interfaces so that potential treasure troves like the DOJ’s Foreign Agent Registration Act database does not function as a logic puzzle frustrating the public seeking information on foreigners lobbying our government. Finally, she warns about Freedom of Information Act (FOIA) data dumps from government agencies as “Obfuscation by Information.” One way for the government to claim there is transparency is to provide so much information that few would have the time or energy to sort through it, especially if the format is neither downloadable nor machine readable.

Ms. Kiely argues that the beneficiaries of these government data problems are frequently wealthy individuals or businesses who can try to hide their political influence in plain sight. As a solution, she urges sufficient funding for the government employees generating data for the public. Ms. Kiely also suggests the adoption of a “Global Legal Identifier” for all corporate entities that would be used to identify a business across all public filings so that its behavior could be aggregated across the terabytes of data. And she rightfully counsels against corporate rent seekers

5. Kathy Kiely, *Digital Disclosure Cheats: An Anthology of Cautionary Tales and Pro Tips for the Public Interest Advocate*, 47 STETSON L. REV. 295 (2018).

6. *E-Filing Senate Campaign Reports*, CTR. FOR RESPONSIVE POL. (Feb. 2017), <https://www.opensecrets.org/action/issues/efiling-senate-campaign-finance-reports/> (“Senate campaign committees remain the only federal candidate committees not required to file their financial disclosure reports electronically directly with the Federal Election Commission.”).

7. *Improve the FCC’s Political File Database*, SUNLIGHT FOUND. (2013), <https://sunlightfoundation.com/policy/one-pagers/improve-fcc-political-file-database/> (“In addition, the information that was collected by the FCC was not made available in a searchable, sortable format, making it much more difficult for users to parse and analyze the data.”).

who would like their particular proprietary brand of technology to be used for government data.

Law Professor Douglas Spencer is also animated by a desire for better empirics, but here he is particularly concerned about the sphere of election law.⁸ In Professor Spencer's piece, he compares and contrasts two fears that swirl around American elections: (1) that voter fraud will happen on a wide scale, or (2) that corporate campaign finance loopholes are hiding foreign spending in American elections. He then compares two policy approaches that have been proposed to address these two fears: respectively, stricter voter IDs and increased transparency of money in politics. Looking at the empirics of documented voter fraud and the number of people disenfranchised by voter ID, Professor Spencer argues that the low risk of voter fraud has not justified strict voter ID laws and the disenfranchisement that it has engendered. By comparison, while we know that roughly five percent of money spent in federal elections since *Citizens United* is dark money, the lack of strong disclosure laws makes it difficult to know whether fear of foreign money hiding among dark money is a realistic fear or a phantom.⁹ Professor Spencer also argues that the Supreme Court should reconsider its holding in *Citizens United v. FEC* in part because the transparency of corporate political spending predicted by the decision has not materialized in the seven years since the ruling. He also encourages the Court to consider more as-applied challenges to campaign finance laws instead of more sweeping facial challenges.

Public Citizen's Vice President Lisa Gilbert wrote about the need for real change after the "change election" of 2016, including actually draining the swamp of Washington political corruption that candidate Trump invoked continually on the campaign trail and then failed to implement upon taking office.¹⁰ She notes that a deregulatory Supreme Court coupled with a Senate Majority Leader who abhors campaign finance reform, makes the prospects for even maintaining the status quo with respect to money in

8. Douglas M. Spencer, *Corporations as Conduits: A Cautionary Note About Regulating Hypotheticals*, 47 STETSON L. REV. 225 (2018).

9. Ciara Torres-Spelliscy, *The Astronomical Scale of Money in Politics*, BRENNAN CTR. BLOG (Jan. 13, 2015), <https://www.brennancenter.org/blog/astronomical-scale-money-politics>.

10. Lisa Gilbert, *After the "Change Election," the Money in the Political Landscape*, 47 STETSON L. REV. 259 (2018).

politics a difficult task. Thus, reformers have decided to work on two separate tracks to improve transparency of money in politics and to bolster reforms like public financing. The first track is using existing corporate law rules to offer pro-transparency shareholder proposals at publicly traded companies. This approach has already created more information flow from many publicly traded companies to the investing public.¹¹ The second track is to redeploy efforts to boost campaign finance reforms at the state and local level. As options become fewer at the federal level, the chances for reform in states and cities remain wide open.

If Professor Spencer, Ms. Gilbert, and Ms. Kiely are concerned about a lack of data including the true sources of dark money in politics, Dr. Gretchen Goldman and her co-authors from the Union of Concerned Scientists worry about the ability of government scientists to study and interpret accessible data in ways that are consistent with the scientific method across three different presidential administrations.¹² Dr. Goldman worries that science itself can be politicized to the detriment of the public which relies on factual findings from scientists throughout the federal government to inform wise policy choices.

Dr. Goldman describes how scientific findings were altered for political reasons during President George W. Bush's administration. This prompted the Union of Concerned Scientists to write a report entitled, "Federal Science and the Public Good."¹³ This report served as a guide for the incoming Obama administration and Congress on how to preserve scientific integrity going forward. President Obama issued a directive that resulted in twenty-three agencies and departments adopting scientific integrity policies. The quality of these policies ranged from robust to mere window dressing. She also discusses how new whistle blower protections initiated in 2012 have not provided full protections for federal scientists to speak out about perceived problems in their respective agencies.

11. Bruce Freed & Nanya Springer, *Guess Who's Addressing Money in Politics? It's Not the Government*, THE HILL (May 24, 2017), <http://thehill.com/blogs/pundits-blog/campaign/334951-guess-whos-addressing-money-in-politics-its-not-the-government>.

12. Gretchen Goldman, Genna Reed & Jacob Carter, *Risks to Science-Based Policy Under the Trump Administration*, 47 STETSON L. REV. 267 (2018).

13. Union of Concerned Scientists, *Federal Science and the Public Good: Securing the Integrity of Science in Policy Making* (Feb. 2008), http://ucsusa.org/scientific_integrity/solutions/big_picture_solutions/federal-science-and-the.html.

Then Dr. Goldman turns to the Trump administration and identifies three new threats to scientific integrity in the federal policy making: corporate capture of the federal government; dismantling the process of science-based rulemaking; and the intimidation of governmental scientists. Even before assuming office, the Trump transition team asked the Department of Energy for a list of employees who had done climate change-related work.¹⁴ This request was refused by the outgoing Obama administration, but the request alone likely had a chilling effect on Department employees. Dr. Goldman notes the conflicts of interest that exist for the President and members of his cabinet who have particular business interests.

She also notes the early actions by the new Congress to roll back environmental protections, such as the Stream Protection Rule, issued by the Department of Interior's Office of Stream Mining Reclamation and Enforcement (OSMRE).¹⁵ But as Dr. Goldman and her co-authors warn: "[G]reater risk lies in what decisionmakers are doing to dismantle the very process by which we use science and evidence to inform policy decisions, across many issues and executive departments and agencies." Recent troubling developments include legislation introduced by Congress which would give Congress more power over regulations which currently require scientific input at the agency level, and a revived congressional rule that allows Congress to cut the salary of any federal employee to one dollar (including scientists working throughout the federal agencies). As Dr. Goldman and her co-authors conclude: "Engagement is crucial and the public must sound the alarm when science is silenced, manipulated, or otherwise compromised. Our nation depends on it. When science cannot inform policy decisions, Americans lose."

If the previous four authors were primarily focused on the role of government, attorney Frederick H. Alexander from the B Lab is

14. Steven Mufson & Juliet Eilperin, *Trump Transition Team for Energy Department Seeks Names of Employees Involved in Climate Meetings*, WASH. POST (Dec. 9, 2016), https://www.washingtonpost.com/news/energy-environment/wp/2016/12/09/trump-transition-team-for-energy-department-seeks-names-of-employees-involved-in-climate-meetings/?utm_term=.ec4952c3adb6.

15. Eliza Collins, *Congress Passes First Rollback of Obama Environmental Rule*, USA TODAY (Feb. 2, 2017), <https://www.usatoday.com/story/news/politics/2017/02/02/stream-protection-rule-reverse-mcconnell-paul-yarmuth-trump/97413470/>.

much more focused on the role of the private sector.¹⁶ Mr. Alexander writes about the responsibilities that come with ownership, whether that is ownership of a home or ownership of stocks in a company. He notes that “in the U.S., business and consumer spending account for eighty percent of GDP, while government spending accounts for just twenty percent.” And thus, while there is considerable debate about the twenty percent that runs through the government, more focus should be placed on where the majority of wealth really is: in the private sector where the control is largely in the hands of the boards of directors of private entities. Mr. Alexander encourages investors to ask for more than the narrow parochial goal of maximizing profits, and instead that they should demand positive social impacts and better environmental impacts from the firms they own. Mr. Alexander looks back to the warning of Adam Smith in the *Wealth of Nations* that the invisible hand of self-interest might break down if absentee owners left their assets to be managed by others.¹⁷ But as stock ownership has expanded, frequently corporate managers have no direct relationships with the investors. Additionally, intermediaries like institutional investors invest vast sums on behalf of others like the beneficiaries of public pension funds. Thus, typically, there is a sizable degree of remove between the average investors and the companies that they ultimately own.

Mr. Alexander argues that the shareholder primacy model, which focuses on profit maximization, incentivizes corporate managers to make more money no matter how that money is made. In particular, he critiques how these incentives push many corporations to create negative externalities that can hurt either society, the planet, or possibly both. He encourages institutional investors to take a broader view of value and to consider human rights, labor conditions in supply chains, and environmental impacts in addition to the financial bottom line. As a solution beyond classic ESG (Environmental, Social, and Governance) investing, Mr. Alexander suggests that huge investors should encourage more corporations to change their governance rules to take into consideration the impact of corporate actors on

16. Frederick H. Alexander, *Whose Portfolio is it, Anyway?*, 47 STETSON L. REV. 311 (2018).

17. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1776), available at <https://www.adamsmith.org/the-wealth-of-nations/>; see also DAVID C. KORTEN, WHEN CORPORATIONS RULE THE WORLD (2015).

stakeholders (in addition to shareholders). One model that could achieve this goal is the benefit corporation—a new legal form available in over thirty states.¹⁸ Mr. Alexander also offers the reader “investment principles for aligned governance,” including acting in the long-term interests of investors, creating corporations that are transparent and accountable to investors about external impacts, and urging investors to support mission aligned entities like benefit corporations.

Rounding out this Symposium Issue, and picking up on many of the themes from Mr. Alexander, is a piece by recent Stetson Law graduate Izi Pinho who writes about Florida’s new benefit corporation law.¹⁹ As she explains, before the advent of the benefit corporation laws, social entrepreneurs were given a stark choice: found a for-profit business or a non-profit.²⁰ The benefit corporation laws allow these social entrepreneurs a third option: found a benefit corporation (or B Corp) and put investors on notice that some of the company’s resources will be used for the public good.

The first benefit corporation law was adopted in Maryland in 2010 and since then, thirty states, including Delaware, have adopted this new business form. Florida’s benefit corporation statute took effect in 2014. As Ms. Pinho notes, in Florida, “benefit corporations have statutory public benefit purposes and require transparency through their annual benefit reports to shareholders, which describe the companies’ efforts to achieve their social purposes or benefits.” She describes early adopters in Florida such as Clean the World Management Inc., which provides soap to third world countries; SEQUIL Systems, Inc., which provides sustainability advice to the construction industry; and B Storytelling, Inc., a start-up company that helps the professional development of women who were victims of human trafficking.

Ms. Pinho also offers suggestions for how to improve Florida’s benefit corporation law. She suggests requiring benefit corporations to file a copy of their annual benefit reports with the

18. *State by State Status of Legislation*, B LAB (2017), <http://benefitcorp.net/policymakers/state-by-state-status> (showing benefit corporation laws have been enacted in thirty-three states as of July 10, 2017).

19. Carolina Bolado, *Fla. Woos Do-Gooders with New Benefit Corporation Law*, LAW360 (June 30, 2014), <https://www.law360.com/articles/552474/fla-woos-do-gooders-with-new-benefit-corporation-law>.

20. Izi Pinho, *The Advent of Benefit Corporations in Florida*, 47 STETSON L. REV. 333 (2018).

Florida Attorney General's office instead of just internally with shareholders, and allowing for a loss of benefit corporation status if the annual benefit report is untruthful. Ms. Pinho also advocates for providing more transparency to potential investors in Florida benefit corporations. Though she can see room for improvement with Florida's statute, she argues that benefit corporations provide a positive alternative for social entrepreneurs who wish to do good while doing well.

In this collection of writings, we see advocates and lawyers struggling with which rules should apply to the post-*Citizens United* landscape of American politics where corporations are empowered to spend politically, but are not yet required to be transparent about that spending for either voters or investors. These pieces also beg the question of from whence the most effective reforms will issue. For some, the reforms must be done by law through changes to government rules requiring better transparency, whether in the campaign finance system, in securities law, or in every federal agency subject to FOIA requests. For others, progress is much more likely to be generated in the private sector as investors and entrepreneurs choose to do business in a different and more socially responsible way that is more careful about environmental and human rights stewardship.