Corporate Law, Misdirection, and the Obesity Epidemic

Eugene McCarthy†

INTRODUCTION

Soda is among the primary causes of the U.S. obesity epidemic, which kills approximately 300,000 Americans each year from heart disease, hypertension, stroke, and diabetes.[1] Currently, 42 percent of U.S. adults are obese, and studies suggest that by 2048 nearly *all* Americans may be overweight or obese.[2] Yet, the Coca-Cola Company ("Coke") spends billions of dollars annually to promote soda consumption.[3] To do so, Coke influences science and the legislative process to obscure the health risks of its products. From 2008 to 2016, Coke spent $146 million on "well-being related scientific research" and paid 907 scientists to publish 389 journal articles that prioritized the role of exercise (rather than diet) in fighting

† Eugene McCarthy is an Assistant Professor of Business Law at James Madison University. J.D., University of California, Los Angeles; Ph.D., University of California, Berkeley.

1. Ari LeVaux, *Misdirection and Outright Lies: Coca-Cola's Obesity Campaign Is Backfiring Spectacularly*, SALON (Aug. 19, 2015, 1:15 PM), https://www.salon.com/2015/08/19/the_obesity_crisis_coca_cola_simply_cannot_escape_partner/ [https://perma.cc/B8NL-ZHW8] (noting "a growing consensus among health researchers that sugary beverages are the primary culprits behind obesity and related conditions like diabetes and heart disease"); M. Neil Browne, Virginia Morrison, Barbara Keeley & Mark Gromko, *Obesity as a Protected Category: The Complexity of Personal Responsibility for Physical Attributes*, 14 MICH. ST. J. MED. & L. 1, 1 (2010) (observing that "[t]his year, more than 300,000 Americans will die as a result of obesity"); *see also* David B. Allison, Kevin R. Fontaine, JoAnn E. Manson, June Stevens & Theodore B. VanItallie, *Annual Deaths Attributable to Obesity in the United States*, 282 J. AM. MED. ASS'N 1530, 1535–36 (1999) (estimating the annual number of deaths attributable to obesity at about 280,000); Ali H. Mokdad, James S. Marks, Donna F. Stroup & Julie L. Gerberding, *Actual Causes of Death in the United States, 2000*, 291 J. AM. MED. ASS'N 1238, 1239–40 (2004) (estimating that poor diet and physical inactivity kills 400,000 Americans each year).

2. NAT'L CTR. FOR HEALTH STAT., DHHS PUBL'N NO. 2020-1209, PREVALENCE OF OBESITY AND SEVERE OBESITY AMONG ADULTS: UNITED STATES, 2017–2018 (2020), https://www.cdc.gov/nchs/data/databriefs/db360-h.pdf [https://perma.cc/6KU4-8LGU]; *see also* Ryan T. Williams, *Size Really Does Matter: How Obesity Is Undermining America's National Security*, 48 U. TOL. L. REV. 21, 37 (2016) (noting that "100% of Americans will be overweight or obese by 2048").

3. MICHAEL F. JACOBSON, CTR. FOR SCI. PUB. INT., MARKETING COKE TO KIDS: BROKEN PLEDGES, UNHEALTHY CHILDREN 25 (2016), https://cspinet.org/sites/default/files/attachment/coke-kids-report.pdf [https://perma.cc/EZ8R-KT4S].

obesity.[4] Coke donates millions of dollars to prominent health groups, like the American Heart Association, the American Diabetes Association, and the National Institutes of Health, in a "strategy to silence health critics and gain unlikely allies against soda regulations."[5] The company persuades federal agencies, such as the Centers for Disease Control and Prevention ("CDC"), to deemphasize soda's role in causing obesity.[6] In 2009, Coke participated in a $40 million lobbying effort to defeat a federal soda tax designed to curb consumption.[7] That same year, Coke contributed millions of dollars to stop soda taxes in New York and Washington state.[8] Coke employs misleading advertising to persuade consumers that soda provides "essential hydration" and that "laughing for 75 seconds" will burn away soda's calories.[9] Coke specifically targets minorities with its advertisements, despite the fact that minorities disproportionately suffer from obesity.[10] In developing nations, Coke purchases government water rights, leaving local populations without potable water.[11] Coke then sells soda to the locals, which causes community-wide spikes in obesity and diabetes.[12]

4. Liz Szabo, *Big Soda and the Ballot: Soda Industry Takes Cues from Tobacco to Combat Taxes*, NPR (Nov. 5, 2018, 4:58 PM), https://www.npr.org/sections/thesalt/2018/11/05/664435761/big-soda-and-the-ballot-soda-industry-takes-cues-from-tobacco-to-combat-taxes [https://perma.cc/GXD2-SAJC]; Paulo M. Serôdio, Martin McKee & David Stuckler, *Coca-Cola–A Model of Transparency in Research Partnerships? A Network Analysis of Coca-Cola's Research Funding (2008–2016)*, 21 PUB. HEALTH NUTRITION 1594, 1594, 1605 (2018) (discussing how most of the company's research support was "directed towards physical activity and disregards the role of diet in obesity").

5. Anahad O'Connor, *Coke and Pepsi Give Millions to Public Health, Then Lobby Against It*, N.Y. TIMES (Oct. 10, 2016), https://www.nytimes.com/2016/10/10/well/eat/coke-and-pepsi-give-millions-to-public-health-then-lobby-against-it.html [https://perma.cc/EHX8-S5JP].

6. Nason Maani Hessari, Gary Ruskin, Martin McKee & David Stuckler, *Public Meets Private: Conversations Between Coca-Cola and the CDC*, 97 MILBANK Q. 74, 83 (2019).

7. Amy-Lee Goodman, Note, *A "Natural" Stand Off Between the Food and Drug Administration and the Courts: The Rise in Food-Labeling Litigation & the Need for Regulatory Reform*, 60 B.C. L. REV. 271, 314 (2019).

8. Duff Wilson & Janet Roberts, *Special Report: How Washington Went Soft on Childhood Obesity*, REUTERS (Apr. 27, 2012, 5:01 AM), https://www.reuters.com/article/us-usa-foodlobby/special-report-how-washington-went-soft-on-childhood-obesity-idUSBRE83Q0ED20120427 [https://perma.cc/9VJY-NMHH].

9. Nancy Fink Huehnergarth, *Even If It Fails, Lawsuit Accusing Coca-Cola of Consumer Deception Could Yield Benefits for Health Advocates*, FORBES (Jan. 6, 2017, 1:59 PM), https://www.forbes.com/sites/nancyhuehnergarth/2017/01/06/lawsuit-alleges-coca-cola-uses-tobacco-industry-tactics-to-deceive-consumers/#4bc613dd63a4 [https://perma.cc/DF4L-L8RB].

10. Eliza Barclay, *Soda Companies Step Up Their Marketing to Black and Latino Kids*, NPR (Nov. 20, 2014, 11:35 AM), https://www.npr.org/sections/thesalt/2014/11/20/365219686/soda-companies-step-up-their-marketing-to-black-and-latino-kids [https://perma.cc/57J5-FEZM]; *see also Adult Obesity Facts*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 29, 2020), https://www.cdc.gov/obesity/data/adult.html [https://perma.cc/ZXT6-DW7V].

11. MICHELE SIMON, APPETITE FOR PROFIT: HOW THE FOOD INDUSTRY UNDERMINES OUR HEALTH AND HOW TO FIGHT BACK 189 (2006); Oscar Lopez & Andrew Jacobs, *In Town with Little Water, Coca-Cola Is Everywhere. So Is Diabetes.*, N.Y. TIMES (Jul. 14, 2018), https://www.nytimes.com/2018/07/14/world/americas/mexico-coca-cola-diabetes.html [https://perma.cc/W54V-UAFV].

12. Lopez & Jacobs, *supra* note 11.

As the following pages demonstrate, much of the food industry engages in similar antisocial behavior to promote harmful food consumption. Food industry executives behave this way because they are preoccupied with "maximizing shareholder value" and seek to attain globally "connected capitalism" through corporate political participation.[13] Some argue that the law even *compels* executives to employ socially destructive policies to promote the consumption of unhealthy but profitable processed foods, such as soda, snacks, and other junk food products.[14] They point to the doctrine of shareholder primacy, or a corporation's legal duty to "maximize profit," as a mandate to sell as much food as possible to increase revenue.[15] A primary means for maximizing profit arises from "corporate personhood," which gives corporations a constitutional right to spend unlimited funds to participate in the American political process.[16]

This Article challenges the simplistic narrative that corporate law compels food industry executives to actively promote the over-consumption of unhealthy processed food. On the contrary, corporate executives are misdirecting shareholder primacy and corporate personhood to rationalize, and *enable*, the industry's dangerous behavior. The food industry is not *obeying* corporate law—it is abusing it to confuse the public about diet, nutrition, and the industry's role in causing obesity. Shareholder primacy, despite rhetoric to the contrary, is not a legal mandate and has no enforceable basis in law. Likewise, corporate personhood is not an indisputable legal doctrine. In fact, it is the historical consequence of concerted corporate influence over members of the federal judiciary that began in the

13. Steve Denning, *How GE, GM, Coca-Cola and Kodak Put Shareholders Ahead of Employees*, FORBES (June 29, 2017, 2:59 PM), https://www.forbes.com/sites/stevedenning/2017/06/29/how-ge-gm-coca-cola-kodak-put-shareholders-ahead-of-employees/#207168486429 [https://perma.cc/J35A-RJLX]; *see also* Robert J. Foster, *Corporations as Partners: "Connected Capitalism" and the Coca-Cola Company*, 37 POL. & LEGAL ANTHROPOLOGY REV. 246, 251 (2014) ("Partnerships offer corporations political benefits as well. For Isdell [Coke's former CEO], connected capitalism is opposed to 'reckless capitalism' or capitalism that has become detached from society." (alteration in original)).

14. Michele Simon, *Can Food Companies Be Trusted to Self-Regulate? An Analysis of Corporate Lobbying and Deception to Undermine Children's Health*, 39 LOY. L.A. L. REV. 169, 233 (2006) [hereinafter *Self-Regulate*] ("It is not a corporation's job to protect public health; that is the government's role. A corporation's legal obligation is to make as much money as possible for its shareholders, and all other concerns must be secondary."); Barbara Bennett Woodhouse & Charles F. Woodhouse, *Children's Rights and the Politics of Food: Big Food Versus Little People*, 56 FAM. CT. REV. 287, 290 (2018).

15. David Stuckler & Marion Nestle, *Big Food, Food Systems, and Global Health*, 9 PLOS MED. 1–2 (2012) (noting that the food industry "has a legal mandate to maximize wealth for shareholders"); *see also* David G. Yosifon, *Legal Theoretic Inadequacy and Obesity Epidemic Analysis*, 15 GEO. MASON L. REV. 681, 685 (2008) (stating that food industry "[c]orporations, operating in a legal regime that facilitates their aggregation of capital, and insists on their pursuit of maximum profits for shareholders, have both the power and the incentive to discern and exploit this obscure but potent aspect of human reality").

16. Woodhouse & Woodhouse, *supra* note 14, at 292.

early nineteenth century and continues today. Therefore, the food industry's justification for promoting food consumption (shareholder primacy), and its tool for promoting processed foods (corporate personhood) are illegitimate legal doctrines. A more accurate widespread understanding of these legal principles will reveal that the food industry is not dutifully following the law, but it is instead *choosing* to sicken the nation in the pursuit of profit. This new public awareness will also clarify the basic principles of nutrition that can help end the obesity epidemic.

This Article about the food industry's exploitation of corporate law has three parts. Part I explains how the industry misleads the public into consuming unhealthy food. The message to "eat less" is not profitable to a company that wants to sell more, so the industry developed a blueprint to promote consumption. Armed with shareholder primacy and political participation rights, the industry funds nutritional science and the government to shape dietary guidelines that mislead people into eating unhealthy and fattening processed foods. Part II demonstrates that these corporate law "doctrines," upon which the industry's blueprint depends, are legal misconceptions. Shareholder primacy is not a legal mandate but is instead an economic ideology masquerading as a corporate law directive. It has no statutory or common law foundations. To promote a specific vision of market efficiency, the press, business schools, and the law and economics movement perpetuate the belief that corporations must maximize profit.[17] Alternatively, corporate personhood arose through collusion between the corporate bar and a handful of federal judges, beginning in *Trustees of Dartmouth College v. Woodward* and culminating in *Citizens United v. Federal Election Commission*.[18] Corporate personhood is, in fact, a transitory concept and the historical consequence of unethical judicial activism. Each time the judiciary resurrects the corporate person, the government acts to eliminate it—and must do so again. Part III shows how a proper understanding of corporate law can help combat obesity. Once the public grasps the food industry's blueprint for misdirection, it can reject the harmful products that the industry (and its allies) foist upon the nation.

I. THE FOOD INDUSTRY BLUEPRINT

Big Food is big business. "Big Food" applies to the global food and beverage industry consisting of agribusiness companies (e.g., Bayer-

17. David Millon, *Two Models of Corporate Social Responsibility*, 46 WAKE FOREST L. REV. 523, 529–30 (2011).

18. Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat) 518 (1819); Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

Monsanto), food sellers (e.g., Kraft Foods), restaurant chains (e.g., McDonald's), and industry trade organizations (e.g., The Sugar Association).[19] Big Food generates more than $5.7 trillion in annual revenues from growing and processing food and then selling it to consumers.[20] As this Part demonstrates, despite widespread agreement among nutritionists that Americans desperately need to "eat less," Big Food works hard to persuade the public into eating *more* processed, calorie-dense, and nutrient-poor foods.[21] Using vast corporate resources, the food industry has developed a "blueprint" to confuse consumers about diet and nutrition and to encourage them to eat more of these profitable—but unhealthy and fattening—processed foods. Big Food's blueprint begins with funding "science" to create doubt about the basic nutritional guidance to avoid fat, cholesterol, sugar, and sodium found in most processed foods.[22] Big Food uses its paid-for science and corporate constitutional rights to lobby the government in a campaign to further confuse the public about the role the food industry plays in the obesity epidemic.[23] Through lobbying, the industry captures administrative bodies, like the United States Department of Agriculture ("USDA"), to advance its interests.[24] As a result, the government issues confusing and contradictory public nutritional guidelines that help fuel consumption. The result of these industry efforts is a regime of self-regulation that allows Big Food to mislead Americans into eating more processed (and profitable) food that, in turn, exacerbates the obesity epidemic.

A. Misdirecting the "Eat Less" Message

Many factors contribute to obesity.[25] However, at the most basic level, people gain weight when they consume more calories than they burn.[26] Thus, the best way for Americans to fight obesity is to consume fewer calories by eating *fewer* unhealthy calorie-dense foods, because dietary

19. Kelly D. Brownell & Kenneth E. Warner, *The Perils of Ignoring History: Big Tobacco Played Dirty and Millions Died. How Similar Is Big Food?*, 87 MILBANK Q. 259, 263 (2009).

20. Mallorie McCue, Note, *Follow the Money: Insulating Agribusiness Through Lobbying and Suppression of Individual Free Speech*, 6 PITT. J. ENV'T PUB. HEALTH L. 215, 215 (2012).

21. Susan Dentzer, *The Child Abuse We Inflict Through Child Obesity*, 29 HEALTH AFFS. 342, 342 (2010).

22. Brownell & Warner, *supra* note 19, at 259.

23. *Id*.

24. Adam Benforado, Jon Hanson & David Yosifon, *Broken Scales: Obesity and Justice in America*, 53 EMORY L.J. 1645, 1775 (2004).

25. Tyler Rauh, Comment, *Regulating Sugar-Sweetened Beverages*, 27 U. MIA. BUS. L. REV. 269, 272–73 (2019).

26. Roberta F. Mann, *Controlling the Environmental Costs of Obesity*, 47 ENV'T L. 697, 701 (2017).

interventions are more effective than exercise in achieving weight loss.[27] This simple caloric equation presents a fundamental problem for the food industry, since any government guidance telling Americans to eat less conflicts with food industry interests to sell more.[28] Currently, Big Food generates far more food than the American population can consume, but the industry spends $30 billion annually, marketing this surplus to encourage people to eat more of it.[29] Worse yet for the food industry, there is scientific consensus about the types of food people should be eating, and avoiding, to prevent obesity and maintain health. Beginning in the 1970s, most scientists and nutritionists have been communicating a unified message to the public: the U.S. population should reduce the amount of fat, cholesterol, sugar, and salt that it consumes, while instead eating whole grains, fruits, and vegetables.[30] There is little debate in nutrition circles that "[b]y the late 1970s, scientists were in substantial (if not perfect) agreement that similar dietary changes could help prevent the two most important causes of death in the United States—coronary heart disease and cancer."[31]

The food industry resists the simple message to avoid processed foods and to eat whole grains, fruits, and vegetables for a number of reasons. First, fresh whole grains, fruits, and vegetables are not as profitable as processed food products.[32] Most fresh fruits and vegetables—which have limited processing potential besides cutting, canning, and freezing—yield minimal industry profit.[33] However, processing certain crops into "value-added" foods increases profits for corporate shareholders and executives alike.[34] The potato helps to illustrate this phenomenon: "Conversion of potatoes (cheap) to potato chips (expensive) to those fried in artificial fats or coated in soybean flour or herbal supplements (even more expensive) is an example of how value is added to basic food commodities."[35] Food companies likewise profit from processing highly subsidized (and therefore inexpensive) crops into more expensive snack foods.[36] The industry processes corn into high fructose corn syrup, which they include in "value-

27. Erin Allday, *Experts: For Losing Weight, Diet Beats Exercise*, SFGATE (Feb. 11, 2012, 8:43 AM), https://www.sfgate.com/health/article/Experts-For-losing-weight-diet-beats-exercise-3288732.php [https://perma.cc/Z3UT-DDR5].

28. MARION NESTLE, FOOD POLITICS: HOW THE FOOD INDUSTRY INFLUENCES NUTRITION AND HEALTH 31–32 (2013).

29. Emily J. Schaffer, *Is the Fox Guarding the Henhouse? Who Makes the Rules in American Nutrition Policy?*, 57 FOOD & DRUG L.J. 371, 374 (2002).

30. *Id.* at 402.

31. NESTLE, *supra* note 28, at 43.

32. *Id.* at 17.

33. *Id.* at 18.

34. *Id.*

35. *Id.* at 17.

36. Caroline Franck, Sonia M. Grandi & Mark J. Eisenberg, *Agricultural Subsidies and the American Obesity Epidemic*, 45 AM. J. PREVENTIVE MED. 327, 328 (2013).

added" foods such as soft drinks, fruit drinks, cereals, canned fruits, condiments, baked goods, and ice cream.[37] The industry likewise processes inexpensive soybeans into soy oil, which comprises "value-added" cooking oils and frying fats that account for 70 percent of American fat consumption.[38] Simply put, unhealthy processed foods provide greater profit than fresh fruits and vegetables, which have little or no potential for "added value."

The second reason for the industry's prioritization of processed foods is that fatty, salty, sweet, and other "value-added" foods are more palatable and will, therefore, result in greater demand and sales than fresh whole grains, fruits, and vegetables. Experts believe that human beings evolved to crave calorie-dense foods (those high in fat and sugar) in order to store energy to survive extended periods of food scarcity (e.g., winter, drought, or famine).[39] However, nature made these calorie-dense fats and sugars hard to obtain for our ancestors, whereas the food industry makes them incredibly easy for contemporary Americans to procure.[40] To exploit this evolutionary imperative, the food industry, "in pursuit of maximal profit, made foods high in fat and sugar *constantly available* to us and has manipulated the situational cues we rely on to make specific food choices."[41] The industry makes the foods we crave both ubiquitous and affordable—but in today's more secure living environment, we no longer need to store these calories as fat.

The final reason the food industry resists producing and marketing healthy foods is that whole foods actually satiate the appetite, while calorie-dense, nutrient-poor snacks and other processed foods have a lower "satiating effect," which encourages consumers to keep eating them.[42] There is a reason why the producers of potato chips are willing to "bet you can't eat just one": the industry chemically engineers processed food to ensure people keep eating it.[43] This tactic explains why roughly 70 percent of food advertisements market "convenience foods" (e.g., candy, snacks, and soda), while only 2.2 percent of food advertisements are for fruits, vegetables, and grains.[44] The industry's economic motivation to promote

37. *Id.*
38. *Id.*
39. Benforado et al., *supra* note 24, at 1681–82.
40. Robert H. Lustig, Laura A. Schmidt & Claire D. Brindis, *The Toxic Truth About Sugar*, 482 NATURE 27, 27–28 (2012), https://www.nature.com/articles/482027a [https://perma.cc/296Z-ADCT].
41. Benforado et al., *supra* note 24, at 1688 (emphasis added).
42. Dentzer, *supra* note 21, at 342.
43. Marc Ambinder, *Bet You Can't East Just One*, ATLANTIC (Mar. 29, 2010) (citing DAVID A. KESSLER, THE END OF OVEREATING: TAKING CONTROL OF THE INSATIABLE AMERICAN APPETITE (2009)), https://www.theatlantic.com/health/archive/2010/03/bet-you-cant-eat-just-one/38181/ [https://perma.cc/U52L-PRDU].
44. NESTLE, *supra* note 28, at 22.

the consumption of "value-added" processed food is clear. And Big Food's method for misdirecting the "eat less" message rests in the precise place that the "eat less" message originated: nutritional science.

B. Misdirecting Nutritional Science

The food industry has a long history of funding scientific studies to help promote their products—while, at the same time, concealing their dangers.[45] The goal of funding science is simple: the food industry sponsors "knowledge production" that it deploys to consumers as "independent" and "unbiased" scientific dietary advice to promote sales.[46] The food industry employs public relations firms to disseminate this "science" to challenge pre-existing evidence that designates particular foods as unhealthy.[47] It is now evident that "[a] critical corporate strategy is to create confusion and doubt about sound science on food and health. We can thank the popular media for fueling this bewilderment by regularly emphasizing how scientists keep 'changing their minds' on nutrition research."[48] Of course, scientists are not routinely changing their minds about nutrition; rather, the industry pays some experts to create ambiguity about demonstrably unhealthy foods.

The food industry's early efforts to misdirect the public by manufacturing conflicting scientific evidence emerged in the 1950s and 60s.[49] Beginning in the 1950s, diet and nutrition studies routinely concluded "that Americans needed to reduce their consumption of foods of animal origin, which together accounted for nearly forty-five percent of the total fat, sixty percent of the saturated fat, and all of the cholesterol in the American diet."[50] This mounting evidence did not bode well for the powerful meat industry, which immediately began to sponsor scientific studies and published "only the scientific data that supported its position, while ignoring contrary evidence of arguably greater scientific relevance."[51] The meat lobby fought hard to deny any link between meat, fat, and poor health, and it worked diligently to prevent the public from hearing dietary advice to limit meat consumption.[52]

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45. Cristin E. Kearns, Laura A. Schmidt & Stanton A. Glantz, *Sugar Industry and Coronary Heart Disease Research: A Historical Analysis of Internal Industry Documents*, 176 JAMA INT'L MED. 1680, 1680 (2016).
46. Benforado et al., *supra* note 24, at 1729.
47. *Id.* at 1732.
48. SIMON, *supra* note 11, at 172.
49. Schaffer, *supra* note 29, at 388–89.
50. *Id.* at 388.
51. *Id.* at 389.
52. *Id.*

At the same time, clear scientific evidence was emerging that sugar also caused coronary heart disease.[53] So, while the meat industry worked to save fat through science, the sugar industry simultaneously began sponsoring its own science to save sugar—by vilifying fat. In 1965, a sugar industry executive named John Hickson paid three prominent Harvard scientists to publish a study blaming fat for coronary heart disease while vindicating sugar as a harmless dietary choice.[54] Hickson hand-picked the data for these scientists to use in their study and even reviewed drafts of the article, which conveniently exonerated sugar consumption. After reviewing these drafts, Hickson said to the scientists, "Let me assure you this is quite what we had in mind, and we look forward to its appearance in print."[55] In 1967, the scientists published the sugar-friendly study in the prestigious *New England Journal of Medicine*.[56] Critics believe that this single, corrupt study shaped five decades of nutrition science and remains instrumental in many of the government's dietary recommendations.[57] Corrupted science and its emphasis on choosing low-fat, high-sugar foods (like the processed foods that inundate today's grocery stores and pantries) likely catalyzed the obesity epidemic in the 1970s.[58]

Today's food industry executives use precisely the same methods to misdirect the public's understanding of diet and nutrition. Coke founded the Global Energy Balance Network, through which it funnels millions of dollars to scientists who recommend policies that promote soda consumption.[59] General Mills founded the Bell Institute of Health and Nutrition, whose scientists found that Yoplait yogurt (which is, of course, a General Mills product) contributes to weight loss.[60] The company's press releases and subsequent advertisements that promoted these scientific findings failed to disclose that General Mills funded the research to produce this dubious marketing claim.[61] McDonald's founded the Global Advisory Council on Balanced Lifestyles, which consists of influential doctors and scientists who help explain ways in which the public can integrate fast food into a "healthy" diet and lifestyle.[62]

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53. Kearns et al., *supra* note 45, at 1680–81.

54. Anahad O'Connor, *How the Sugar Industry Shifted Blame to Fat*, N.Y. TIMES (Sept. 12, 2016), https://www.nytimes.com/2016/09/13/well/eat/how-the-sugar-industry-shifted-blame-to-fat.html [https://perma.cc/5RA3-X8CJ].

55. *Id.*

56. Robert B. McGandy, D. Mark Hegsted & Fredrick J. Stare, *Dietary Fats, Carbohydrates and Atherosclerotic Vascular Disease*, 277 NEW ENG. J. MED. 186 (1967).

57. O'Connor, *supra* note 54.

58. Cara Kaplan, Note, *Big Soda: Too Sweet to Fail?*, 44 FORDHAM URB. L.J. 1267, 1281 (2017).

59. *Id.* at 1281–82.

60. SIMON, *supra* note 11, at 187.

61. *Id.*

62. *Id.* at 180.

Funded nutrition science, past and present, has communicated roughly the same message. First, there are no "good" or "bad" foods, only "unbalanced diets."[63] Second, food does not cause obesity; an individual's bad decisions to overeat cause obesity, and weight loss boils down to an individual's *personal responsibility*.[64] Finally, as part of that personal responsibility to maintain a healthy weight, the industry promotes the message that all a person needs to do is "get more exercise and worry less about cutting calories."[65] (Yet, research shows that our society is now "obesigenic," meaning that if people continue eating according to the industry plan—despite exercising—they will inevitably become overweight or obese.[66]) In each case, the research aims to enable the food industry to "change the debate into one that is winnable, or at least one that hasn't already been lost."[67] The industry then uses this ambiguity—and the industry's constitutional right to use corporate treasuries to influence politicians—to persuade the government to assist in delivering this message. As a result, promoting this message is precisely what the U.S. government does.

C. Misdirecting Governmental Dietary Advice

Big Food has disrupted the "eat less" message by capturing the USDA.[68] The government tasks the USDA with providing support to the agricultural industry while simultaneously providing the general public with dietary and nutrition guidelines—a contradictory mandate that the food industry easily exploits.[69] The food industry also lobbies elected officials in Congress, state legislatures, and the White House to ensure it can continue persuading Americans to "eat more" processed "value-added" foods. In 2019, Big Food spent $163 million lobbying elected officials in order to promote food consumption.[70] This Section demonstrates how the government gives these corporations their money's worth.

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63. Benforado et al., *supra* note 24, at 1739.

64. Colin Hector, *Nudging Towards Nutrition? Soft Paternalism and Obesity-Related Reform*, 67 FOOD & DRUG L.J. 103, 103 (2012).

65. Anahad O'Connor, *Coca-Cola Funds Scientists Who Shift Blame for Obesity Away from Bad Diets*, N.Y. TIMES: WELL (Aug. 9, 2015, 5:25 PM), https://well.blogs.nytimes.com/2015/08/09/coca-cola-funds-scientists-who-shift-blame-for-obesity-away-from-bad-diets/ [https://perma.cc/2BLG-EU3V].

66. Lindsay F. Wiley, *Shame, Blame, and the Emerging Law of Obesity Control*, 47 U.C. DAVIS L. REV. 121, 145–46 (2013).

67. LeVaux, *supra* note 1.

68. Brownell & Warner, *supra* note 19, at 276.

69. Schaffer, *supra* note 29, at 391–93.

70. *Sector Profile: Agribusiness*, CTR. FOR RESPONSIVE POL., https://www.opensecrets.org/federal-lobbying/sectors/summary?cycle=2019&id=A [https://perma.cc/FD3K-ZYWK] (last visited Dec. 10, 2020) ("Total for Agribusiness: $140,852,101"); *Industry Profile: Food & Beverage*, CTR. FOR RESPONSIVE POL., https://www.opensecrets.org/federal-lobbying/industries/summary?cycle=2019&

1. USDA Nutrition Guidelines

Since the department's inception in 1862, the USDA has served the dual function of promoting U.S. agriculture to ensure an adequate food supply and providing Americans with nutritional and dietary guidance.[71] The USDA dietary guidance dictates how the government composes public nutrition and health programs, public school lunch menus, food labels, and medical research grants; thus, these guidelines largely determine the food the nation produces, buys, and eats.[72] At first, the USDA's dual function was practical, since Americans primarily suffered from malnutrition and *needed* to eat more food.[73] In point of fact, the U.S. military rejected 25 percent of World War II draftees due to malnutrition, which is in stark contrast to today's military that now rejects 25 percent due to obesity.[74] Since the food industry's profit motive and the public interest aligned in the nineteenth century, it made perfect sense for the USDA to tell Americans to "eat more" whole milk, eggs, and meat.[75] And, of course, the dairy and meat industries approved of this message.[76]

Industry approval of USDA guidance changed in 1977, however, when the U.S. Surgeon General told the Senate that

> [m]any experts now believe that we have entered a new era in nutrition, when the lack of essential nutrients no longer is the major nutritional problem facing most American people. Evidence suggests that the major problems of heart disease, hypertension, cancer, diabetes, and other chronic disease are significantly related to diet.[77]

Suddenly, the USDA found itself conflicted. If the USDA told Americans to *eat less*, it would fail to promote the agricultural industry; if it advised Americans to *eat more*, it would be providing harmful dietary advice.[78] As the government prepared to publish a report telling Americans for the first time to "eat less," the food industry demanded additional congressional

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id=N01 [https://perma.cc/Z42G-PZLZ] (last visited Dec. 10, 2020) ("Total for Food & Beverage: $24,640,280").

71. Schaffer, *supra* note 29, at 376.

72. Markham Heid, *Experts Say Lobbying Skewed the U.S. Dietary Guidelines*, TIME (Jan. 8, 2016, 5:00 AM), https://time.com/4130043/lobbying-politics-dietary-guidelines/ [https://perma.cc/A2R9-LERJ].

73. Schaffer, *supra* note 29, at 383–84.

74. *Id.*; Lustig et al., *supra* note 40, at 28 ("Because about 25% of military applicants are now rejected for obesity-related reasons, the past three US surgeons general and the chairman of the US Joint Chiefs of Staff have declared obesity a 'threat to national security.'").

75. Schaffer, *supra* note 29, at 381–82.

76. *Id.* at 382.

77. Sanford A. Miller, *Agriculture, Health, and the American Consumer*, *in* U.S. DEP'T OF AGRIC., AGRICULTURAL RESEARCH FOR A BETTER TOMORROW: COMMEMORATING THE HATCH ACT CENTENNIAL, 1887-1987, at 63 (1987).

78. Jeff Herman, *Saving U.S. Dietary Advice from Conflicts of Interest*, 65 FOOD & DRUG L.J. 285, 294 (2010).

hearings and submitted an "800-page document entitled *Supplemental Views*, which reflected the opinions of scientists hand-picked by the [food industry]."[79] The additional hearings proved pivotal to American public health, both then and now.

Facing pressure to revise the guidance that Americans should reduce meat and dairy consumption, the government caved to industry demands. Senator McGovern noted that the government "did not want to disrupt the economic situation of the meat industry and engage in a battle with that industry that [it] could not win."[80] After industry pushback, the government revised its planned recommendation to "*reduce* consumption of meat" to a more industry-palatable "*choose* meats, poultry, and fish which will reduce saturated fat intake."[81] Of course, this simple semantic flip deftly transformed the message from "eat less" to a recommendation to "eat more." Since 1980, the USDA's Dietary Guidelines, which it updates and releases every five years, have consistently obscured the "eat less" message.[82] As Marion Nestle observes, "[p]ressures from food companies have led government officials and nutrition professionals to produce dietary guidelines that disguise 'eat less' messages with euphemisms. Their true meaning can be detected only through careful reading, interpretation, and analysis . . . ."[83] The industry likewise resists any USDA recommendation to limit consumption of a specific food, advocating instead for obscure recommendations about individual nutritional factors.[84] That is, the Dietary Guidelines "refer to fat, saturated fat, and cholesterol, but not to the most important food sources of fats—meat, dairy, eggs, and fried and processed foods. They refer to salt and sugar, not to pretzels or soft drinks . . . ."[85] The food industry categorically resists attempts to identify specific foods, preferring instead abstract recommendations about nutrients that have little impact on an individual's food choices.[86]

Ironically, despite the industry's focus on sowing dietary confusion, Big Food blocked publication of the original USDA "food pyramid" on grounds that it was too *confusing*.[87] In reality, the USDA stopped publication because the food industry believed the pyramid "stigmatized" certain products by placing them in the narrow "eat less" section of the

79. Schaffer, *supra* note 29, at 397–98.
80. NESTLE, *supra* note 28, at 41.
81. *Id.* at 41–42 (emphasis added).
82. *See* Schaffer, *supra* note 29, at 372–73, 409.
83. NESTLE, *supra* note 28, at 66.
84. Marion Nestle, *Food Industry Funding of Nutrition Research: The Relevance of History for Current Debates*, 176 JAMA INT'L MED. 1685, 1686 (2016).
85. NESTLE, *supra* note 28, at 76–77.
86. *See id.*
87. *Id.* at 51–52.

pyramid.[88] Despite the clear preference of nutritionists for the straightforward pyramid design, the industry preferred a pie-chart graphic designed as a bowl of food that did not rank the food groups in hierarchical categories of "good" and "bad."[89] In 2011, the USDA quietly pivoted from the pyramid design to the "MyPlate" model (a pie-chart graphic designed as a plate of food).[90]

The current Dietary Guidelines now use a "puzzle theme" to present the MyPlate model, which suggests that the simple message to eat fewer processed foods is somehow a complex puzzle to solve.[91] This is perhaps fitting, since the Dietary Guidelines convey the MyPlate message in a rather perplexing fashion. The first "key recommendation" in the current Dietary Guidelines (adjacent to an unsolved puzzle diagram) tells Americans to "*[c]onsume* a healthy eating pattern that accounts for *all foods and beverages* within an appropriate calorie level."[92] This "eat less" message seems to instruct Americans to eat more—to consume *all* foods. The third guideline tells Americans to "*consume* an eating pattern low in added sugars, saturated fats, and sodium."[93] However, this sound advice appears next to appetizing pictures of a bottle of cola, an ice-cream sundae, a cheeseburger, a slice of pepperoni pizza, and a hoagie sandwich.[94] At first (and second) glance, this guideline suggests that one should actually *consume* soda, ice-cream, burgers, and pizza. The guideline essentially advertises the precise foods it is saying, in a round-about way, to avoid. Indeed, the USDA Dietary Guidelines have led doctors to suggest that the "government dietary guidelines for healthy eating are dangerously wrong in almost every respect," adding that "[a]s they stand today, and have for decades, the official recommendations of the USDA are determined by the commercial interests of agribusiness."[95] It appears to some that the USDA has become Big Food's "spokesperson" at the expense of American public health.[96]

88. *Id.* at 52.

89. *See id.* at 62.

90. *See A Brief History of USDA Food Guides*, U.S. DEP'T OF AGRIC., https://www.choosemyplate.gov/eathealthy/brief-history-usda-food-guides [https://perma.cc/5QHF-2P52] (last visited Dec. 10, 2020).

91. *See* U.S. DEP'T OF HEALTH & HUMAN SERVS. & U.S. DEP'T OF AGRIC., 2015–2020 DIETARY GUIDELINES FOR AMERICANS 16 (8th ed. 2015).

92. *Id.* at xiii (emphasis added).

93. *Id.* at xv–xvi (emphasis added).

94. *Id.*

95. Richard Jacoby & Raquel Baldelomar, *The FDA's Phony Nutrition Science: How Big Food and Agriculture Trumps Real Science—And Why The Government Allows It*, SALON (Apr. 12, 2015, 6:30 AM), http://www.salon.com/2015/04/12/the_fdas_phony_nutrition_science_how_big_food_and_agriculture_trumps_real_science_and_why_the_government_allows_it/ [https://perma.cc/2F3S-LD9W].

96. NESTLE, *supra* note 28, at 97–98.

The food industry uses a "revolving door" to transform the USDA into an advocacy group for its "eat more" message. The "revolving door" is the bi-directional process through which

> former government employees are hired by companies and special interest groups as lobbyists, consultants, and strategists, while corporate lobbyists move into government jobs. Critics of this informal system contend that it affords a vehicle for government officials to use their positions for personal or private gain at the taxpayer's expense, creates a pro-business bias in policy formulation, and erodes public trust in government . . . .[97]

The "revolving door" or "capture" phenomenon is as old as the very concept of government regulation.[98] And the phenomenon positively plagues the USDA. Sonny Perdue, the current USDA Secretary, has deep ties to agribusinesses and a history of appointing his agribusiness associates and campaign donors to key government positions.[99] Perdue's Deputy Secretary, Stephen Censky, previously served 21 years as CEO of the American Soybean Association, the trade association that supports the influential, and highly subsidized, soybean industry.[100] Additional USDA officials, like Ted McKinney and Rebeckah Adcock, joined the agency directly from prominent agribusiness and food lobbying positions.[101] USDA staffers Maggie Lyons and Kailee Tkacz are former lobbyists for the National Grocers Association, one of the food industry's most powerful trade groups.[102] Lyons and Tkacz work at keeping processed junk food and soda a part of the government's Supplemental Nutrition Assistance Program for impoverished Americans.[103] Such conflicts are routine at the USDA. A 2004 study found that "nearly every major officeholder at the USDA had previously owned, been employed by, or lobbied for agricultural companies

97. KAREN PERRY STILLERMAN, UNION OF CONCERNED SCIENTISTS, BETRAYAL AT THE USDA: HOW THE TRUMP ADMINISTRATION IS SIDELINING SCIENCE AND FAVORING INDUSTRY OVER FARMERS AND THE PUBLIC 4 (2018), https://www.ucsusa.org/sites/default/files/attach/2018/04/betrayal-at-the-usda-report-ucs-2018.pdf [https://perma.cc/42AK-WDR7].

98. Eugene McCarthy, *The Pharma Barons: Corporate Law's Dangerous New Race to the Bottom in the Pharmaceutical Industry*, 8 MICH. BUS. ENTREPRENEURIAL L. REV. 29, 38–39 (2018).

99. STILLERMAN, *supra* note 97, at 4.

100. *Deputy Secretary of Agriculture Stephen Censky*, U.S. DEP'T OF AGRIC., https://www.usda.gov/our-agency/about-usda/our-deputy-secretary [https://perma.cc/W7PN-HRL2] (last visited Dec. 10, 2020).

101. STILLERMAN, *supra* note 97, at 5.

102. Alex Kotch, *Revolving Door: Lobbyists-Turned-USDA-Officials Work with Junk Food Industry to Keep Soda, Candy in SNAP Program*, SLUDGE (Sept. 27, 2018, 3:59 PM), https://readsludge.com/2018/09/27/revolving-door-lobbyists-turned-usda-officials-work-with-junk-food-industry-to-keep-soda-candy-in-snap-program/ [https://perma.cc/FU7U-LPSP].

103. *Id.*

and organizations."[104] Since the USDA is composed of food industry insiders, it is little wonder that the agency works primarily to advance industry interests.

The industry likewise influences the Dietary Guideline Advisory Committee ("DGAC"), which drafts the USDA *Dietary Guidelines*. In 2000, seven of eleven members of the DGAC had close ties to the food industry.[105] In 2005, eleven of thirteen members of the DGAC had food industry conflicts of interest.[106] In 2010, nine of thirteen members of the DGAC had past or present ties to the food industry.[107] In response to the 2015 *Dietary Guidelines*, Dr. David Heber, Director of UCLA's Center for Human Nutrition, stated, "It's upsetting to see cycles of misinformation coming back over and over again . . . . The public has been confused and will remain confused by these guidelines."[108] Experts note that the 2020 DGAC, which is currently drafting the newest guidelines, has the same industry-friendly composition.[109] The food industry's corporate capture of the USDA explains why the government agency consistently communicates the dangerous "eat more" message to the American public—a message that fuels the obesity crisis.

2. Elected Officials and Lobbying

In addition to crony-capitalism at the USDA, the food industry directly lobbies state and federal lawmakers for legislation that will ensure that Americans continue eating profitable and value-added processed foods. In 2009, Congress initiated an Interagency Working Group ("IWG") consisting of the Food and Drug Administration ("FDA"), Federal Trade Commission, CDC, and USDA to establish a voluntary set of industry standards and nutritional guidelines for marketing food to children.[110] The industry disapproved of the IWG's proposed *voluntary* guidelines, because they conveyed an "eat less" message.[111] The industry pressured Congress to suppress the IWG report, which it did.[112] Also in 2009, Congress was considering a federal soda tax to curb sugar consumption.[113] The beverage

104. Herman, *supra* note 78, at 295.
105. *Id.* at 295–96.
106. *Id.*
107. *Id.*
108. Heid, *supra* note 72.
109. Marion Nestle, *At Last: The 2020 Dietary Guidelines Advisory Committee*, FOOD POL. (Feb. 26, 2019), https://www.foodpolitics.com/2019/02/at-last-the-2020-dietary-guidelines-advisory-committee/ [https://perma.cc/W4U3-ZEDQ].
110. Kathryn E. Hayes, Note, *Front-of-Package Nutrition Claims: Trustworthy Facts or Deceptive Marketing? Closing the Loopholes in Labeling*, 19 CARDOZO J.L. & GENDER 545, 570 (2013).
111. *Id.* at 571–72.
112. *Id.*
113. Woodhouse & Woodhouse, *supra* note 14, at 295.

industry ramped up its congressional lobbying efforts to $40 million that year, and Congress failed to pass the tax.[114] In 2011, Congress began to overhaul public school lunch menus, planning to make portions smaller and to include more vegetables to help fight childhood obesity.[115] Minnesota Senator Amy Klobuchar fought successfully to designate pizzas as a vegetable for public school students—because it includes *tomato sauce*.[116] Notably, Minnesota is home to Schwan Food Company, a $3 billion food corporation with a 70 percent share of the public school frozen pizza market.[117] Despite the fact that Klobuchar raised $160 thousand in food industry donations that year (including donations from Schwan's), she insisted there was no link between these campaign contributions and her designation of pizza as a vegetable for America's children.[118]

In addition to these smaller industry favors, Congress's real largesse toward the food industry comes in the form of crop subsidies. Agribusiness and food producers rely on crop subsidies to maximize profits.[119] Lobbyists have convinced Congress to "spend $35 billion each year to subsidize certain commodity crops such as corn and soybeans, which has artificially lowered their prices."[120] Recall that corn and soybeans are easily processed to make profitable "value-added" snack foods.[121] Accordingly, corn is the most heavily subsidized crop (i.e., the least expensive for the industry to cultivate), and most of that corn goes toward "producing inexpensive, high-calorie, highly-processed foods like soda, candy, and hotdogs."[122] Soy is likewise a heavily subsidized crop, which the industry processes into the oil that fast food restaurants use to fry food.[123] Crop subsidies incentivize the production of calorie-dense, nutrition-poor foods, while largely ignoring healthy whole grains, vegetables, and fruits. As a result, the inflation-adjusted grocery-store price for snack and junk food has steadily fallen, while the adjusted price for fruits and vegetables has substantially *increased* in recent decades.[124] Congress uses taxpayer money to subsidize the food industry to ensure that the public continues to "eat more" of the very foods

114. Goodman, *supra* note 7, at 313–14.
115. Wilson & Roberts, *supra* note 8.
116. *Id.*
117. *Id.*
118. *Id.*
119. McCue, *supra* note 20, at 232.
120. *Id.* at 230.
121. *See* Mann, *supra* note 26, at 707.
122. Benforado et al., *supra* note 24, at 1792–93.
123. Michael Pollan, *Why Did the Obamas Fail to Take on Corporate Agriculture?*, N.Y. TIMES MAG. (Oct. 5, 2016), https://www.nytimes.com/interactive/2016/10/09/magazine/obama-administration-big-food-policy.html [https://perma.cc/ZE8E-YXSU].
124. Williams, *supra* note 2, at 47.

that are killing 300,000 Americans a year.[125] In other words, the industry has tricked Americans into subsidizing their own obesity.

State legislatures participate in the lobbying action, too. Case studies show that sugar taxes work to curb soda consumption and combat obesity.[126] Yet, state legislatures consistently refuse to pass proposed soda taxes.[127] When New York proposed a soda tax in 2009, the beverage industry spent $13 million lobbying the state legislature, which ultimately voted down the tax.[128] In response, New York Governor Paterson stated, "We ran into the machine the way anti-smoking activists did in the early '60s . . . . It's not a fight you're going to win right away."[129] Alternatively, in response to industry lobbying efforts, more than twenty states have passed "cheeseburger laws," which insulate the food industry by forbidding certain obesity-related lawsuits.[130] Thirteen states have even passed agricultural disparagement (or "food libel") laws, which provide food producers, marketers, and sellers with a cause of action *against* members of the public who disparage their food products as unsafe or unhealthy.[131]

The White House is likewise susceptible to industry influence to prevent the spread of the "eat less" message. The Trump administration repeatedly delayed the FDA's new nutrition labels that require disclosure of added sugars, in what critics have seen as the government caving to "food industry demands."[132] And such caving to food industry demands is a bipartisan effort. In 2010, the Obama administration put members of the food industry "on notice" that they needed to "step it up" and reformulate their processed foods and stop marketing junk food to children.[133] Shortly thereafter, the CEOs of Nestlé, Kellogg's, and General Mills, along with lobbyists from the Grocery Manufacturers Association and the Better Business Bureau, paid personal visits to the White House to discuss the administration's position.[134] The Obama administration, specifically First Lady Michelle Obama, immediately pivoted to a "Let's Move" campaign, which emphasized exercise instead of dietary change—the *precise* message that the food industry seeks to convey to the public.[135] This new approach

125. Browne et al., *supra* note 1.

126. Maria A. Cabrera Escobar, J. Lennert Veerman, Stephen M. Tollman, Melanie Y. Bertram & Karen J. Hofman, *Evidence That a Tax on Sugar Sweetened Beverages Reduces the Obesity Rate: A Meta-Analysis*, 13 BMC PUB. HEALTH 1072, 1072 (2013).

127. Wilson & Roberts, *supra* note 8.

128. *Id.*

129. *Id.*

130. Melissa Mortazavi, *Tort as Democracy: Lessons from the Food Wars*, 57 ARIZ. L. REV. 929, 960 (2015).

131. McCue, *supra* note 20, at 220, 229.

132. Woodhouse & Woodhouse, *supra* note 14, at 299, 301.

133. Wilson & Roberts, *supra* note 8.

134. *Id.*

135. *Id.*

makes children who fail to exercise personally responsible for their obesity. One cynical industry observer noted, "I'd focus more on exercise, too, if my husband was up for re-election."[136] Due to lobbying and the revolving door, the government is complicit in the food industry's campaign of misdirection.

D. Misdirecting Consumers

The primary result of the food industry's capture of public health, science, and government is industry "self-regulation." Self-regulation allows the food industry to mislead and confuse consumers into consuming processed food. For instance, Kraft Foods publicly promised to scale back junk food advertising to children.[137] However, it set no meaningful parameters for this promise and incorporated no system of enforcement or accountability.[138] Shortly after a barrage of positive free press in the wake of its announcement, Kraft Foods quietly joined the Alliance for American Advertising, a lobbying group with the stated purpose to "defend the industry's First Amendment rights to advertise to children."[139] Kraft Foods then partnered with Kellogg's and Unilever to create its own system of nutrition labeling called the "Smart Choices" certification system, which assists consumers in choosing "healthy" foods at the grocery store.[140] Such "Smart Choices" include Froot Loops, Cheese Stuffed Crust Pizza, and Fudgesicles.[141]

Similarly, self-regulated front-of-package labeling on processed foods misleads consumers into eating unhealthy food.[142] For instance, front-of-package labels declare that sugar-laden Apple Jacks cereal "keep[s] children focused at school"; highly processed and sodium-saturated Spaghettios include a "full serving of vegetables" and "bonebuilding calcium"; and Cocoa Krispies cereal "helps support your child's immunity."[143] A recent study found that, of children's foods with such front-of-package health claims, 84 percent failed to meet basic federal nutrition standards and 95 percent contained added sugar.[144] Adding to consumer confusion, the food

136. *Id.*
137. *Self-Regulate*, *supra* note 14, at 202.
138. *Id.* at 202–03.
139. *Id.* at 210.
140. Hayes, *supra* note 110, at 559.
141. *Id.*
142. *Id.* at 552.
143. *Id.* at 545, 566.
144. JULIET SIMS, LESLIE MIKKELSON, PHEBE GIBSON & EMILY WARMING, CLAIMING HEALTH: FRONT-OF-PACKAGE LABELING OF CHILDREN'S FOOD 8 (2011), https://www.preventioninstitute.org/publications/claiming-health-front-of-package-labeling-of-childrens-food [https://perma.cc/M4JQ-KTUB].

industry uses at least twenty-one different names on its product labels for added sugars including fruit nectar, cane juice, evaporated corn sweetener, fruit juice concentrate, crystal dextrose, glucose, and liquid fructose.[145]

Additionally, the government has not issued a formal, binding definition of what constitutes "natural" for use in food labeling.[146] Consequently, Americans spend $40 billion annually on "natural" food products.[147] These "all natural" foods include 7UP soda and Kellogg's Pop-Tarts, which are baked with "Real Fruit."[148] (According to a recent USDA definition, these same "all natural" Pop-Tarts also qualified as "healthy," while almonds did not.[149]) Public health organizations like the American Heart Association also allow the food industry to purchase front-of-package certifications, like its heart-healthy (or "heart smart") seal of approval.[150] For a mere $7,500 fee per product, companies can add "heart smart" labels to qualifying "healthy foods" like (once again) Kellogg's Pop-Tarts, Frosted Flakes, Cocoa Frosted Flakes, and Fruity Marshmallow Krispies.[151] The industry has used corporate wealth and influence to create a self-regulated oversight system that allows it to confuse and misdirect consumers into purchasing and eating more unhealthy processed foods that fuel the obesity epidemic. As the next Part demonstrates, the industry's justifications and tools for accomplishing this misdirection emerge from, of all places, "corporate law."

II. CORPORATE LAW CONFUSION

At law, corporations are "persons" with clearly delineated "traits," among which are the ability to enter into contracts, commit torts, and sue and be sued in a capacity separate from the corporation's shareholders and managers.[152] Corporations also enjoy perpetual existence, the ability to muster capital via the public sale of securities, and limited liability for debts and obligations.[153] The food industry would have consumers believe that

145. Sarah P. McDonough, *Sweet Knowledge: How Declaring Added Sugars Will Help Consumers Make Informed Food Choices*, 70 FOOD & DRUG L.J. 553, 567 (2015).

146. Goodman, *supra* note 7, at 285–86.

147. Anahad O'Connor, *Is Your Food 'Natural'? F.D.A. to Weigh In*, N.Y. TIMES: WELL (May 17, 2016), https://well.blogs.nytimes.com/2016/05/17/is-your-food-natural-f-d-a-to-weigh-in [https://perma.cc/856R-VZWR].

148. Julie Creswell, *Is It 'Natural'? Consumers, and Lawyers, Want to Know*, N.Y. TIMES (Feb. 16, 2018), https://www.nytimes.com/2018/02/16/business/natural-food-products.html [https://perma.cc/PM65-B3NA].

149. Goodman, *supra* note 7, at 293.

150. NESTLE, *supra* note 28, at 124–25.

151. *Id.*

152. Lyman Johnson & David Millon, *Corporate Law After* Hobby Lobby, 70 BUS. LAW. 1, 8 (2014).

153. STEPHEN M. BAINBRIDGE, CORPORATE LAW 3–9 (3d ed. 2015).

included among these corporate personality traits are the doctrines of shareholder primacy and constitutional corporate personhood. Industry observers attest that it is a fundamental edict of U.S. corporate law for a board of directors and executives to "increase long-term shareholder value," or to seek corporate profit for the benefit of shareholders, no matter the public cost.[154] Additionally, corporations now have the constitutional right to spend unlimited corporate treasury funds to influence politics.[155] Food industry critics begrudgingly—but *uniformly*—accept these legal precepts. Industry gadfly Marion Nestle notes that "[t]o *satisfy stockholders*, food companies *must* convince people to *eat more* of their products."[156] Other critics confirm that "corporations, operating in a regime that facilitates their aggregation of capital, and *insists* on their pursuit of *maximum profits for shareholders*, have both the *power* and the incentive" to promote the "eat more" agenda.[157] That power, according to Kelly Brownell of Yale's Rudd Center for Food Policy and Obesity, rests in "the *Citizens United* case and with companies being *able to lobby almost without limit*."[158] According to this narrative, the obesity epidemic is tragic, but unavoidable—*the law is the law*.

Shareholder primacy, despite the acquiescence of food industry critics, is not, in fact, the law. The apparent public consensus surrounding shareholder primacy arises from decades of corporate misdirection in the press and academia.[159] Shareholder primacy simply has no enforceable basis in statutes, case law, or anywhere else. Likewise, corporate personhood is not the irrefutable legal doctrine many believe it to be. In fact, the constitutional corporate person is a rogue concept that arose through concerted corporate (and judicial) collusion that began in the early nineteenth century. In connection with the emergence of constitutional corporate personhood, historians, legal scholars, and even members of the Supreme Court have levied accusations of judicial misconduct, collusion, and outright conspiracy against the judges who created it. The following Section recalibrates corporate law to show that the food industry's justification for misdirecting the public (shareholder primacy) and its tool for accomplishing that end (constitutional corporate personhood) are entirely illegitimate from a legal perspective. A recognition of this fact can help the American public come to grips with a system based in self-dealing deceit and corruption. It can

154. Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439 (2001).
155. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 357–58 (2010).
156. NESTLE, *supra* note 28, at 1 (first emphasis added).
157. Yosifon, *supra* note 15, at 685 (emphasis added).
158. Wilson & Roberts, *supra* note 8 (emphasis added).
159. Millon, *supra* note 17, at 529–30.

also eliminate the industry's rationalization for engaging in antisocial behavior and corrupting the political process. Armed with the reality of the food industry's misdirection campaign, Americans can begin making better decisions about the food they eat.

A. Misdirecting Shareholder Primacy

The standard shareholder primacy narrative begins with the premise that "fiduciary duties require corporate managers to further the interests of shareholders, and thus require them to maximize corporate profits subject to the obligation to comply with independent legal constraints."[160] According to this narrative, shareholder primacy emerges from statutory law, case law, and simple market logic. From a statutory perspective, the code of Delaware General Corporate Law ("DGCL") states that a board of directors owes a fiduciary duty to the corporation and its stockholders.[161] From a case law perspective, *Dodge v. Ford Motor Co*. establishes a fiduciary duty that "[a] business corporation is organized and carried on primarily for the profit of the stockholders."[162] The standard narrative asserts that courts reaffirmed this edict in *Revlon, Inc. v. MacAndrews & Forbes Holding, Inc*. and *eBay Domestic Holdings, Inc. v. Newmark*.[163] The market logic basis for this fiduciary duty rests in the "agency problem" that arises from a corporation's "separation of ownership and control," whereby shareholders "own" the corporation and directors (and managers) "control" it.[164] To prevent managerial self-dealing at the expense of shareholders, the law commands that all corporate decisions must maximize shareholder value to align shareholder and managerial interests.[165] The standard shareholder primacy narrative is tidy and well-rehearsed and has only one flaw: it is not true. In fact, shareholder primacy has no basis in legal statutes, case law, or in the reality of corporate governance.[166]

160. Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 736 (2005).

161. DEL. CODE ANN. tit. 8, § 102(b)(7) (2020) (emphasis added).

162. Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919).

163. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986) ("A board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders."); eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34 (Del. Ch. 2010) ("Having chosen a for-profit corporate form, the craigslist directors are bound by the fiduciary duties and standards that accompany that form. Those standards include acting to promote the value of the corporation for the benefit of its stockholders.").

164. ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 119–25 (1932).

165. Adolph A. Berle, *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049 (1931).

166. Lynn A. Stout, *The Shareholder Value Myth*, *in* BUSINESS IN ETHICAL FOCUS: AN ANTHOLOGY 79, 79 (Fritz Allhoff et al. eds., 2d ed. 2017); *see also* Robert J. Rhee, *A Legal Theory of Shareholder Primacy*, 102 MINN. L.R. 1951, 1957 (2018) (In defending the shareholder primacy narrative, without irony, Rhee concedes, "The uncertain legal status is seen when one searches for legal

1. Statutory Law

There is no statutory authority that mandates shareholder primacy, whether in Delaware or elsewhere.[167] In fact, the statutes state the opposite legal rule: corporate managers may, but need not, consider shareholder wealth maximization among other concerns while running a business.[168] Turning first to Delaware law, which governs nearly two-thirds of U.S. publicly traded corporations, it is clear that the Delaware General Corporation Law does not mandate shareholder primacy.[169] DGCL section 141(a) instills all corporate decision-making authority in the board of directors.[170] Directors have plenary authority in making corporate decisions. DGCL section 101(b) states that a "corporation may be incorporated or organized under this chapter to conduct or promote *any lawful business or purposes*."[171] The code section sets no other limitations on corporate purpose. Thus, the board of directors can run the business as it sees fit, so long as it does not promote illegality. DGCL section 102(b)(7) states that corporate managers owe fiduciary duties to *both* the corporation and its stockholders.[172] These fiduciary duties include the "triad" of good faith, loyalty, and the duty of care.[173] This bifurcation of fiduciary duties between the corporation and the shareholders indicates that a "corporation is something other than—and presumably more than—simply the shareholders alone. It could, for example, be thought of as an entity existing separately from its shareholders and other stakeholders, or perhaps as an aggregation of its various constituencies."[174] The DGCL is not ambiguous; the code's plain language simply does not mention, imply, or contemplate the concept or duty to maximize shareholder wealth.

Moreover, the DGCL and most other state statutes affirmatively grant directors the power to consider other constituents beyond shareholders or, alternatively, to use corporate assets for purely charitable purposes. At least

authority in the traditional way that lawyers find the law: cases, statutes, and regulations stating a prescription, prohibition, or permission. Shareholder primacy seems to exist not as a pinpoint citation, but in the ether. It is real in that no one disputes the sense of obligation in the boardroom and executive suites, but finding the law's command is elusive.").

167. Elhauge, *supra* note 160, at 738.

168. Millon, *supra* note 17, at 526.

169. *Id.*

170. DEL. CODE ANN. tit. 8, § 141(a) (2020) ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation.").

171. § 101(b) (emphasis added).

172. § 102(b)(7).

173. Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 361 (Del. 1993) ("To rebut the rule, a shareholder plaintiff assumes the burden of providing evidence that directors, in reaching their challenged decision, breached any one of the *triads of their fiduciary duty—good faith, loyalty or due care.*" (emphasis added)).

174. Millon, *supra* note 17, at 526.

forty-one states have enacted "non-shareholder constituency" statutes, which authorize directors to consider non-shareholder interests while making corporate decisions.[175] Certain constituency statutes even *require* directors to take the interests of non-shareholders into account when making corporate decisions.[176] These statutes are likewise not ambiguous and address the "myth" of shareholder primacy. Take, for instance, the Indiana Code: "A director may, in considering the best interests of a corporation, consider the effects of any action on shareholders, *employees*, *suppliers*, and *customers* of the corporation, and *communities* in which offices or other facilities of the corporation are located, and *any other factors the director considers pertinent*."[177]

In addition to these constituency statutes, every state has a statute authorizing corporations to make charitable donations.[178] DGCL section 122(9) states that corporations can "[m]ake donations for the public welfare or for charitable, scientific or educational purposes, and in time of war or other national emergency in aid thereof."[179] These charitable contributions can be significant in value. For instance, the Delaware Supreme Court upheld Occidental Petroleum Corporation's $50 million charitable contribution to build the Armand Hammer Museum of Art in Westwood, California, despite shareholder objections about the large expenditure.[180] These contributions undoubtedly reduce shareholder wealth, yet the law permits corporations to engage in such charitable giving.

If this evidence were not already conclusive, the "business judgment rule" eliminates any remaining doubt about shareholder primacy's statutory viability. The business judgment rule arises from DGCL section 141(a), which empowers the board of directors to manage the corporation.[181] The business judgment rule gives directors "near total discretion to run firms the way they see fit," even if the board's decisions are "bad, strange, negligent, or even disastrous" for the company.[182] For instance, when the owner of the Chicago Cubs stubbornly refused to install lights at Wrigley Field during the 1960s, despite shareholder protests that this decision hurt profits, the court refused to intervene, citing the rule that courts will not second-guess a director's business judgment.[183] The policy behind the business judgment rule is rational: society wants to encourage corporate innovation

175. *Id.*
176. Elhauge, *supra* note 160, at 737.
177. IND. CODE § 23-1-35-1(d) (2020) (emphasis added).
178. Elhauge, *supra* note 160, at 738.
179. DEL. CODE ANN. tit. 8, § 122(9) (2020).
180. Kahn v. Sullivan, 594 A.2d 48, 63 (Del. 1991).
181. § 141(a).
182. David G. Yosifon, *The Law of Corporate Purpose*, 10 BERKELEY BUS. L.J. 181, 223 (2013).
183. Shlensky v. Wrigley, 237 N.E.2d 776, 780 (Ill. App. 1968).

and tactical risk-taking, and insulating directors from disgruntled shareholders using hindsight to second-guess decisions is an efficient way of accomplishing that end.[184] In short, corporate codes do not prevent directors from considering non-shareholder interests in making business decisions.[185] In fact, they encourage directors to look beyond shareholder wealth maximization and to manage the corporation according to their own business judgment.

2. Case Law

Proponents of shareholder primacy typically turn to three cases to support their position: *Dodge v. Ford Motor Co.*, *Revlon, Inc. v. MacAndrews & Forbes Holding, Inc.*, and *eBay Domestic Holdings, Inc. v. Newmark*.[186] However, close examination (even cursory examination) of these cases demonstrates that there is no generalizable corporate law mandate to maximize shareholder value in the common law. These cases apply only to idiosyncratic corporate transactions involving conflicts of interest between shareholders in closely held corporations and singular "end-game," or "going-dark," corporate mergers in which the corporation will cease to exist after the transaction.

Dodge involved a dispute between Henry Ford, the Ford Motor Company's controlling shareholder, and the Dodge brothers, who were minority shareholders in the company.[187] The Dodge brothers brought suit after Ford suspended the company's special dividend and announced plans to use the corporate funds to instead expand the Ford Motor Company and produce less expensive cars for the public.[188] In non-binding dicta, the court stated that "[a] business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end."[189] However, the court decided the case on the grounds that Ford was preventing the Dodge brothers from starting their own automobile company by depriving them of the capital and liquidity that

184. BAINBRIDGE, *supra* note 153, at 117.

185. Christopher M. Bruner, *The Enduring Ambivalence of Corporate Law*, 59 ALA. L. REV. 1385, 1395 (2008).

186. Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919); Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986); eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34 (Del. Ch. 2010); *see also* Yosifon, *supra* note 182, at 191–94 ("As with the Dodge court in Michigan, the proposition seemed so obvious and fundamental to Chandler that it needed no citation. Those who prefer to have one now have eBay.").

187. *Dodge*, 170 N.W. at 670–71. The Ford Motor Company was a closely held corporation until 1956. Jim Henry, *Henry Ford Never Wanted His Company to Go Public*, AUTO. NEWS (June 16, 2003, 1:00 AM), https://www.autonews.com/article/20030616/SUB/306160730/henry-ford-never-wanted-his-company-to-go-public [https://perma.cc/LH4N-GN6Q].

188. *Dodge*, 170 N.W. at 670–71.

189. *Id.* at 684.

the special dividend would have provided.[190] Indeed, citing the business judgement rule, the Michigan court permitted Ford to reinvest funds in the plant expansion and to purposefully decrease profits, but ordered him to pay the Dodge brothers the special dividend he owed them.[191] In other words, the court permitted Ford to do what he liked with the company—but it prevented him from *punishing* a minority shareholder who sought to *compete* with him in the market. The fact that Delaware courts have cited *Dodge* only once (and in that instance only in the minority shareholder oppression context) confirms this interpretation.[192]

eBay is essentially a modern retelling of *Dodge*. In *eBay*, Craig Newmark and James Buckmaster were the controlling shareholders of craigslist, a closely held corporation that provided free online classifieds.[193] eBay Holdings was a minority shareholder, who sought to use craigslist's technology to launch a competing online classified service.[194] Newmark and Buckmaster initiated a shareholder rights plan that disempowered eBay and prevented it from successfully competing with craigslist.[195] Again in dicta, and without any statutory or case law citation, the court suggested that Newmark and Buckmaster were obliged to maximize corporate profit.[196] However, the case's holding rests on the court's ruling "that Jim and Craig acted to *punish* eBay for *competing* with craigslist."[197] In other words, the court in *eBay* (like the court in *Dodge* before it) chastised a closely held corporation's controlling shareholder for oppressing a minority shareholder in an effort to prevent market competition.

Shareholder primacy advocates likewise misplace reliance on *Revlon*. This case, which involves a hostile takeover bid with plans for a subsequent corporate dissolution, requires a board of directors to maximize shareholder value—but only in a single context.[198] The duty applies solely in the narrow context of an "end-game" merger, in which the directors decide to sell the

190. Lynn A. Stout, *Why We Should Stop Teaching* Dodge v. Ford, 3 VA. L. & BUS. REV. 163, 167 (2008).

191. *Dodge*, 170 N.W. at 684–85.

192. Stout, *supra* note 190, at 168; *see also* Johnson & Millon, *supra* note 152, at 1, 12 ("The general statement quoted here also is not necessary to the decision of the case, which appears to be a case involving oppression of minority shareholders in a closely held corporation.").

193. eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 6 (Del. Ch. 2010). Craigslist remains a private, closely held corporation today. Fraser Moore & Jim Edwards, *Craigslist Founder Craig Newmark Explains Why He Chose Philanthropy over an IPO*, BUS. INSIDER (Jan. 30, 2018, 3:00 AM), https://www.businessinsider.com/why-craigslist-isnt-public-according-to-craig-newmark-philanthropy-2018-1 [https://perma.cc/9TYU-2EF9].

194. *eBay*, 16 A.3d at 6, 17.

195. *Id.* at 35.

196. *Id.* at 34.

197. *Id.* at 35 (emphasis added).

198. Lynn A. Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189, 1203–04 (2002).

company and to end its corporate existence.[199] In *Revlon*, the directors resisted Pantry Pride's hostile takeover bid, instead agreeing to sell the company at a lower price to a preferred rival bidder.[200] The court enjoined the sale, and held that, in this single context of an end-game corporate takeover, "[t]he directors' role changed from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company."[201] In addition to its limited application, corporate law scholars suggest that *Revlon* no longer even represents "a robust doctrine," as subsequent decisions have limited its holding and rendered it largely obsolete.[202]

Since *Revlon*, Delaware courts, as well as the U.S. Supreme Court, have routinely confirmed that there is no legal mandate to maximize shareholder value. In *Unocal Corp. v. Mesa Petroleum Co.*, the Unocal board resisted Mesa's hostile takeover bid after deeming the offer coercive.[203] The court sanctioned Unocal's resistance and held that, when running a business or contemplating a merger, the board might take into consideration "the impact on 'constituencies' other than shareholders (i.e., creditors, customers, employees, and perhaps even the community generally)."[204] Likewise, in *Paramount Communications, Inc. v. Time Inc.*, the Delaware court reiterated a board's legal right to consider non-shareholder constituencies in making both short- and long-term business decisions (even, as here, in the context of an "end-game" merger).[205] In 2014, the U.S. Supreme Court unequivocally settled the shareholder primacy debate in *Burwell v. Hobby Lobby Stores, Inc*.[206] In this case about corporate religious freedom, the Court responded to the government's shareholder primacy argument by declaring, "[a]ny suggestion that for-profit corporations are incapable of exercising religion because their purpose is simply to make money flies in the face of modern corporate law."[207] While recognizing that corporations do generally pursue profits, the Court matter-of-factly declared that "*modern corporate law does not require for-profit corporations to pursue profit* at the expense of everything else, and many do not do so."[208] So, if statutory and case law both clearly

199. *Id.*
200. Revlon, Inc. v. MacAndrews & Forbes Holdings, 506 A.2d 173, 178–79 (Del. 1986).
201. *Id.* at 182.
202. Lyman Johnson & Robert Ricca, *The Dwindling of* Revlon, 71 WASH. & LEE L. REV. 167, 224 (2014).
203. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 949 (Del. 1985).
204. *Id.* at 955.
205. Paramount Commc'ns, Inc. v. Time Inc., 571 A.2d 1140, 1153 (Del. 1989).
206. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).
207. *Id.* at 684.
208. *Id.* at 711–12 (emphasis added).

demonstrate that there is no corporate law shareholder primacy mandate, why does the shareholder primacy narrative persist?

3. Market "Logic"

Shareholder primacy is actually the byproduct of ideological and self-serving corporate misdirection. The doctrine of shareholder primacy emerged in economic circles in 1962 with Milton Friedman's *laissez-faire* vision of neoliberal capitalism.[209] As Friedman later framed it, in a widely read 1970 article in New York Magazine, "[i]n a free-enterprise, private-property system, a corporate executive is an employee of the owners of the business," and executives have a responsibility "to make as much money as possible while conforming to the basic rules of the society."[210] Scholars at the University of Chicago incorporated this ideology into legal discourse in the late 1970s.[211] Specifically, Daniel Fischel and Frank Easterbrook reiterated the principle that corporate managers must maximize shareholder value.[212] Then, in 2001, Henry Hansmann and Reiner Kraakmen asserted the superiority and total victory of shareholder primacy, because it out-competed all other corporate governance models.[213]

This neoliberal ideology, of course, appeals to many corporate managers. Focusing on short-term profit and propping up a corporation's share price not only satisfies institutional investors who demand high annual returns, but also increases the corporate managers' own stock and stock-option compensation.[214] With these incentives in place, it is unsurprising that some assert the "dominance of a shareholder-centered ideology of corporate law among the business, government, and legal elites in key commercial jurisdictions."[215] Indeed, the shareholder primacy model "has been amplified through its acceptance by a worldwide network of corporate intermediaries, including international law firms, the big five accounting firms, and the principal investment banks and consulting firms."[216] In other words, the "corporate intermediaries" who most stand to profit from

209. Lenore Palladino, *The American Corporation Is in Crisis—Let's Rethink It*, BOS. REV. (Oct. 2, 2019), https://bostonreview.net/forum/lenore-palladino-american-corporation-crisis%E2%80%94lets-rethink-it [https://perma.cc/3XGB-JE9L].

210. Milton Friedman, *A Friedman Doctrine-- The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES (Sept. 13, 1970), https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html [https://perma.cc/573R-3LT8].

211. Johnson & Millon, *supra* note 152, at 14.

212. FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 15–22 (1991).

213. Hansmann & Kraakman, *supra* note 154, at 468.

214. Millon, *supra* note 17, at 528–29.

215. Hansmann & Kraakman, *supra* note 154, at 439.

216. *Id.* at 449.

shareholder primacy—such as food industry executives—strongly advocate for its status as a "legal mandate."

Make no mistake: shareholder primacy is a self-serving and relatively recent ideological norm, *not* a legal doctrine. The business press and business schools "preach" the shareholder primacy ethic, but they are "misapprehending the law."[217] Shareholder primacy is a normative managerial *choice*—not a corporate law mandate. Modern business practice, contemporary corporate governance, and "market logic" prove this point. In 2019, the CEOs of 181 of the world's largest corporations (including Coke) issued a "new Statement on the Purpose of a Corporation."[218] According to these CEOs, the "Updated Statement Moves Away from Shareholder Primacy," and "Includes Commitment to All Stakeholders."[219] In disavowing the shareholder primacy model of governance, these companies asserted, "Each of our stakeholders is essential. We commit to deliver value to all of them, for the future success of our companies, our communities and our country."[220] Of course, some cynics suggest that this new corporate purpose and commitment to corporate social responsibility is an inauthentic and self-serving public relations stunt.[221] However, the sincerity of these CEOs in disavowing shareholder primacy is irrelevant; the relevant point is that the law did not prevent them from publicly rejecting shareholder wealth maximization.

Stephen Bainbridge, among the most prominent law and economics scholars in the field,[222] has conceded that shareholder primacy amounts to little more than a "rhetorical command."[223] Of shareholder primacy as a legal mandate, Lynn Stout succinctly concludes: "The idea is fable."[224]

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217. Millon, *supra* note 17, at 529.

218. *Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans'*, BUS. ROUNDTABLE (Aug. 19, 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans [https://perma.cc/CHE7-LXPU].

219. *Id.*

220. *Id.*

221. *See* Robert Reich, *The Biggest Business Con of 2019: Fleecing Workers While Bosses Get Rich*, GUARDIAN (Dec. 29, 2019, 4:00 AM), https://www.theguardian.com/commentisfree/2019/dec/29/boeing-amazon-business-ethics-robert-reich [https://perma.cc/WK4R-3EE7].

222. *Stephen M. Bainbridge*, UCLA LAW, https://law.ucla.edu/faculty/faculty-profiles/stephen-m-bainbridge/ [https://perma.cc/W2Z6-CVGA] (last visited Dec. 10, 2020).

223. Stephen M. Bainbridge, *The Shareholder Wealth Maximization Principle Versus Non-Shareholder Constituency Statutes*, PROFESSORBAINBRIDGE.COM (May 5, 2012), https://www.professorbainbridge.com/professorbainbridgecom/2012/05/the-shareholder-wealth-maximization-principle-versus-non-shareholder-constituency-statutes.html [https://perma.cc/93E6-H6Q2] ("Granted, the statutes modify the common law's rhetorical command to maximize shareholder wealth. Because the business judgment rule will continue to shield operational decisions from review, however, just as it did at common law, one might argue that the statutes do no more than to bring the law's rhetoric into line with its reality.").

224. LYNN A. STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC 25 (2012).

However, after decades of corporate misdirection, the shareholder primacy fable has taken on great significance among the American public. This is unfortunate, since the fable's moral message works to exonerate food industry executives who use it to justify misleading Americans into eating more "value-added" processed food. For instance, the wealth-maximization legal myth drives companies like McDonald's to "supersize" portions of their demonstrably unhealthy food products to extract significant surplus value, despite the fact that society "would be better off if the vendor avoided using welfare-destroying supersizing and instead sold only the regular size to all consumers."[225] In making these antisocial choices, food executives hide behind a convenient "legal duty," while profiting at the expense of public health. And while shareholder primacy serves as the industry's corporate law *justification* for exacerbating the obesity epidemic, constitutional corporate personhood serves as its *tool* for promoting consumption. As the next Section demonstrates, if the shareholder primacy narrative is a fable, the constitutional corporate personhood narrative is a horror story.

B. Misdirecting Constitutional Corporate Personhood

The concept of constitutional corporate personhood has changed the face of American government and food industry regulation.[226] In recent years, the courts have attached extensive constitutional rights to the practical concept of corporate personhood, including the right to use money to influence law and politics.[227] As one food industry observer frames it, after the *Citizens United v. Federal Election Commission* case in 2010, "corporations are free to expend unlimited resources from their corporate treasuries in support of a candidate who is favorable to their regulatory needs."[228] And, as the previous Part demonstrates, Big Food generously deploys its resources to influence and control its regulatory environment.[229]

The story of how corporations secured the right to spend unlimited resources to influence politics is sordid and filled with examples of collusion, corruption, and (according to some historians) conspiracy. Indeed,

225. Paul W. Dobson & Eitan Gerstner, *For a Few Cents More: Why Supersize Unhealthy Food?*, 29 MKT. SCI. 770, 774 (2010).

226. Corporate personhood, on one hand, is a pragmatic legal attribute that allows corporate entities to conduct business without having to have individual shareholders sign off on basic day-to-day transactions, such as property and deed transfers. BAINBRIDGE, *supra* note 153, at 3. *Constitutional* corporation personhood, on the other hand, is a relatively recent judicial construct that affords artificial business entities the same fundamental liberties as natural, living persons in the U.S. *See infra* Section II.B.4.

227. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

228. David G. Yosifon, *The Public Choice Problem in Corporate Law: Corporate Social Responsibility After* Citizens United, 89 N.C. L. Rev. 1197, 1206 (2011).

229. *See supra* Part I.

corporate lawyers have worked from the early days of the American republic to establish and reinforce constitutional corporate personhood to insulate corporate interests from government regulation.[230] The government has generally resisted these efforts, but in four pivotal instances, the corporate bar and members of the Supreme Court appear to have engaged in unethical collusion to entrench constitutional corporate personhood in American law. These four cases—and the government's subsequent attempts to erase them—have produced a confused approach to (and understanding of) constitutional corporate personhood. Indeed, constitutional corporate personhood "lacks a principled definition and, therefore, seems to expand, or contract, depending on the circumstances and on the personal predilections of the speaker."[231] As this Section demonstrates, constitutional corporate personhood rests on illegitimate legal foundations that undermine the validity of the doctrine. A general public recognition of this fact may spur the government to once again act to limit the political rights of corporations and to protect the American public from Big Food's undue influence over government dietary regulations.

1. *Trustees of Dartmouth College v. Woodward* (1819)

The constitutional corporate personhood story begins with *Trustees of Dartmouth College v. Woodward*.[232] The case settled a dispute between Dartmouth College and the state of New Hampshire, in which the state sought to revoke Dartmouth's corporate charter and convert it from a private to a public college.[233] The Court held that, under the Contract Clause of the U.S. Constitution, the state could not impair a contract between a corporation and another party.[234] At first glance, the *Dartmouth* decision appears uncontroversial. The controversy emerges upon closer examination of *how* the Court reached its decision to grant constitutional rights to corporate persons. The historical record shows that the *Dartmouth* decision resulted from the legal profession's "collusion with the advance guard of commercial and industrial capitalism."[235] More specifically, the *Dartmouth* decision was the "collective accomplishment" of corporate lawyer Daniel Webster, Supreme Court Justices Joseph Story and John Marshall, and a

230. Gregory A. Mark, Comment, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1442 (1987).

231. Malcolm J. Harkins III, *The Uneasy Relationship of* Hobby Lobby*,* Conestoga Wood*, the Affordable Care Act, and the Corporate Person: How a Historical Myth Continues to Bedevil the Legal System*, 7 ST. LOUIS U. J. HEALTH L. & POL'Y 201, 204 (2014).

232. Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 518 (1819).

233. *Id.*

234. *Id.* at 518, 636.

235. R. Kent Newmyer, *Daniel Webster as Tocqueville's Lawyer: The* Dartmouth College *Case Again*, 11 AM. J. LEGAL HIST. 127, 146–47 (1967).

"unified and conservative professional elite" working together to advance commercial interests against government regulation.[236]

Daniel Webster argued before the Supreme Court on Dartmouth's behalf in March of 1818.[237] The Court did not decide the case during the 1818 term.[238] The government retained star lawyer William Pinkney to reargue the case against Webster in the 1819 term.[239] Between terms, Justice Joseph Story secretly advised Webster to publish his oral argument in the case and disseminate it to a network of influential conservative lawyers who would lobby the Court on Dartmouth's behalf.[240] After publishing his argument, Webster delivered copies to Justice Story, who "had more legal connections and authority than any man in New England."[241] Next, he provided copies to the influential Chancellor James Kent in New York, who, a colleague informed Webster, "is brought completely over to our side . . . . I believe he will take every proper & prudent measure to impart correct views to others."[242] Webster continued the corporation's "proselytizing mission" in the south, lobbying none other than Chief Justice John Marshall in Richmond, Virginia.[243] Both Marshall and Story were "firm believers in private property," so the Dartmouth case resonated with their ideological convictions.[244] To this end, Story worked on fast-tracking a favorable cognate case to the Supreme Court in order to assist Webster in his arguments during the next term.[245]

The 1819 hearing became moot when the Court unexpectedly refused to entertain new arguments, and Chief Justice Marshall instead issued a sweeping opinion that erected the Constitution "as a shield against legislative interference with corporate property."[246] *Dartmouth* opened the door to corporate assertions of constitutional rights. Legal historians describe the case as a "joint venture" between the legal aristocracy, which included the "subtle guiding hand" of Justice Story, Marshall's "brilliant and bold improvisations," and the profession-wide pressure to institute "conservative principles of law and political-economy."[247] In *Dartmouth*, Webster functioned as a "broker between the capitalist interest group and

236. *Id.* at 137.
237. *Id.* at 130.
238. *Id.* at 134.
239. *Id.* at 135–36.
240. *Id.*
241. *Id.* at 132.
242. *Id.*
243. *Id.* at 132–33.
244. Mark, *supra* note 230, at 1450.
245. Newmyer, *supra* note 235, at 136.
246. *Id.* at 137.
247. *Id.*

the power of the state."[248] As the unusual backstory of *Dartmouth* indicates, collusion between commercial interests, corporate lawyers, and Supreme Court justices gave birth to the constitutional corporate person. The immediate effect of *Dartmouth* was to limit "the power of democratic state legislatures to meddle with private property and regulate corporate rights."[249]

However, the Supreme Court would soon limit *Dartmouth*'s unexpected outcome. After Chief Justice Marshall's death, the Court, under Chief Justice Roger Taney, wasted little time erasing the ill-begotten corporate rights that Marshall, Story, and Webster manufactured in *Dartmouth*.[250] In 1839, the Court decided another corporate rights issue in *Bank of Augusta v. Earle*—the power of a corporation from one state to do business in another.[251] In *Earle*, the Court reversed (or, at least, dramatically limited) *Dartmouth* in determining that

> [w]henever a corporation makes a contract, it is the contract of the legal entity, of the artificial being created by the charter, and not the contract of the individual members. *The only rights it can claim are the rights which are given to it in that character*, and not the rights which belong to its members as citizens of a state.[252]

The Supreme Court summarily blotted out *Dartmouth*'s vision of constitutional corporate personhood, determining instead that "the foundational document setting out a corporation's rights was the corporate charter, *not the Constitution*."[253] After *Earle*, the Supreme Court consistently denied corporations constitutional rights throughout the nineteenth century, most notably in the *Slaughter-House Cases* and *Munn v. Illinois*, both of which denied corporations Fourteenth Amendment rights.[254] The Court's commitment to curtailing corporate rights persisted until another case of collusion between the corporate bar and the Supreme Court—one far more egregious than *Dartmouth*.

248. *Id.* at 146.
249. *Id.* at 130.
250. ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS 101–02 (2018).
251. Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 519 (1839).
252. *Id.* (emphasis added).
253. David H. Gans & Douglas T. Kendall, *A Capitalist Joker: The Strange Origins, Disturbing Past, and Uncertain Future of Corporate Personhood in American Law*, 44 J. MARSHALL L. REV. 643, 655 (2011) (emphasis added).
254. Harkins, *supra* note 231, at 214; Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 76 (1873) (refusing to afford corporations the privileges and immunities contemplated in the Fourteenth Amendment); Munn v. Illinois, 94 U.S. 113, 125 (1876) (refusing to apply corporations due process protections under the Fourteenth Amendment).

2. *Santa Clara County v. Southern Pacific Railroad Co.* (1886)

The Court's erasure of constitutional corporate personhood and its denial of Fourteenth Amendment rights to corporations was a blow, in particular to powerful railroad corporations.[255] They were now subject to extensive state regulation aimed at protecting the public interest.[256] However, collusion between the corporate bar and members of the Supreme Court would again reanimate the constitutional corporate person in *Santa Clara County v. Southern Pacific Railroad Co.*, a seemingly pedestrian railroad tax case.[257] *Santa Clara* began as a tax dispute between California and the Southern Pacific Railroad Company, but ended as a landmark case that shaped modern corporate capitalism.[258] Indeed, some historians have framed *Santa Clara* as a corporate conspiracy and a constitutional coup d'état.[259] While these claims may be overstated, there is little doubt that *Santa Clara* was the result of a "quartet of corporationalists" who "doggedly sought a ruling by the Supreme Court extending Fourteenth Amendment rights to corporations."[260] This group included corporate lawyer Roscoe Conkling; Supreme Court Reporter J.C. Bancroft Davis; Supreme Court Justice Stephen Field; and the Southern Pacific Railroad Company, which would emerge from *Santa Clara* as a full-fledged constitutional corporate person.[261]

First, Roscoe Conkling played an indirect, but crucial, role in *Santa Clara*. The Southern Pacific retained him as counsel in the company's companion railroad tax case, *San Mateo County v. Southern Pacific Railroad Co*.[262] Conkling was one of the nation's top corporate lawyers and had twice turned down a seat on the Supreme Court.[263] As a former Senator, he had also helped draft the Fourteenth Amendment as a member of the Joint Congressional Committee on Reconstruction.[264] In *San Mateo*, Conkling made the audacious (and, in hindsight, spurious) argument that the Joint Committee had intentionally drafted the Equal Protection Clause of the Fourteenth Amendment to specifically protect corporate persons in addition to freed slaves.[265] Evidence would subsequently reveal that Conkling was

255. Harkins, *supra* note 231, at 214.
256. *Id.*
257. Santa Clara Cnty. v. S. Pac. R.R. Co., 118 U.S. 394 (1886).
258. Harkins, *supra* note 231, at 217.
259. E.S. BATES, THE STORY OF CONGRESS 233–34 (1936); *see also* Gans & Kendall, *supra* note 253, at 661 ("Critics charged that John Bingham and Roscoe Conkling had 'smuggled' into the Fourteenth Amendment 'a capitalist joker.'").
260. WINKLER, *supra* note 250, at 115–17.
261. *Id.* at 117.
262. *Santa Clara Cnty.*, 118 U.S. at 394.
263. Harkins, *supra* note 231, at 238.
264. *Id.*
265. *Id.* at 239.

probably lying to the Court.[266] The Court never decided *San Mateo*—and historians attribute the Court's inaction to the sheer magnitude of Conkling's attempted fraud.[267]

Conkling's efforts, however, planted the seed for the argument that corporations are entitled to equal protection of the laws under the Constitution's Fourteenth Amendment. The Southern Pacific made precisely this argument in *Santa Clara* before the Circuit Court.[268] As it had in *San Mateo*, the Southern Pacific argued that California's disparate tax treatment of railroad corporations and natural persons violated the Fourteenth Amendment's Equal Protection Clause.[269] In 1882, the Circuit Court agreed and permitted the Southern Pacific to invoke constitutional rights, including the equal protection of the laws under the Fourteenth Amendment.[270] Despite the Circuit Court's ruling, when *Santa Clara* reached the Supreme Court four years later, Chief Justice Morrison Waite informed counsel that the Court would *not* entertain constitutional arguments in the case, and would instead decide the tax issue on narrower grounds.[271] The Court ultimately ruled in favor of the Southern Pacific, but on narrow state law grounds, finding "no occasion to consider the grave questions of constitutional law upon which the case was determined below."[272] This outcome incensed Justice Stephen Field, who wrote in a companion case:

> I regret that it has not been deemed consistent with [the Court's] duty to decide the important constitutional questions involved, and particularly the one which was so fully considered in the circuit court, and elaborately argued here, that in the assessment, upon which the taxes claimed were levied, an unlawful and unjust discrimination was made between the property of the defendant and the property of individuals, to its disadvantage, thus subjecting it to an unequal share of the public burdens, *and to that extent depriving it of the equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution*.[273]

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266. Gans & Kendall, *supra* note 253, at 661. For a viewpoint that Conkling may have been telling the truth, *see* HOWARD JAY GRAHAM, EVERYMAN'S CONSTITUTION: HISTORICAL ESSAYS ON THE FOURTEENTH AMENDMENT, THE "CONSPIRACY THEORY," AND AMERICAN CONSTITUTIONALISM 123, n.57 (2013) ("[T]he writer feels that the so-called 'secondary intention hypothesis' best accords with the facts as they stand: Bingham and his colleagues drafted section one to safeguard the rights of [freed slaves] and Southern loyalists. Yet they probably soon became aware, by reason of the insurance company and railroad petitions, and as draftsmen obliged to consider all meanings of their texts, that 'persons' as a generic term embraced corporations.").

267. Harkins, *supra* note 231, at 241–42.

268. Santa Clara Cnty. v. S. Pac. R.R. Co., 18 F. 385, 400 (C.C.D. Cal. 1883).

269. *Id.*

270. *Id.*

271. WINKLER, *supra* note 250, at 148.

272. Santa Clara Cnty. v. S. Pac. R.R. Co., 118 U.S. 394, 411 (1886).

273. San Bernardino Cnty. v. S. Pac. R.R. Co., 118 U.S. 417, 422 (1886) (Field, J., concurring) (emphasis added).

Field would soon get his chance to address these "important constitutional questions."[274]

When the Court decided *Santa Clara*, J.C. Bancroft Davis served as the Supreme Court's Reporter of Decisions.[275] Davis had resigned as a federal judge to take the reporter position, which involved summarizing and compiling Supreme Court decisions for publication and sale.[276] Notably, Davis was also a former railroad corporation president.[277] While preparing the *Santa Clara* opinion for publication, Davis included a case headnote that stated—despite the case's clear holding to the contrary—"[t]he defendant Corporations are persons within the intent of the clause in section 1 of the Fourteenth Amendment to the Constitution of the United States, which forbids a state to deny to any person within its jurisdiction the equal protection of the laws."[278] He then misattributed the following quotation to the Chief Justice:

> Before argument MR. CHIEF JUSTICE WAITE said: "The [C]ourt does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution which forbids a State to deny to any person within its jurisdiction the equal protection of the laws applies to these corporations. We are all of opinion that it does."[279]

In fact, in an earlier letter to Davis, Chief Justice Waite had specifically instructed him to make it clear that the Court "*avoided* meeting the constitutional question in the decision."[280] Davis's motivations for his legal legerdemain remain a mystery, but historians suspect he had a "personal interest in expanding the rights of corporations like the Southern Pacific."[281]

Two reasons explain how Davis got away with so audaciously misstating the holding in the *Santa Clara* headnote. First, Chief Justice Waite was ill at the time Davis published the headnote; Waite died four days later.[282] Second, Davis's misstatement would be just one of his many inaccurate headnotes that plagued the Court during his tenure as reporter.[283] In fact, Davis's headnotes prompted the Court to affirmatively remind the public that case headnotes are *not the law*, but are merely the court reporter's understanding of the decision "prepared for the convenience of the

274. Harkins, *supra* note 231, at 216.
275. WINKLER, *supra* note 250, at 149–50.
276. *Id.*
277. *Id.* at 152.
278. Santa Clara Cnty. v. S. Pac. R.R. Co., 118 U.S. 394, 394–95 (1886).
279. *Id.* at 396.
280. C. PETER MAGRATH, MORRISON R. WAITE: THE TRIUMPH OF CHARACTER 223–24 (1963) (emphasis added).
281. WINKLER, *supra* note 250, at 152.
282. Harkins, *supra* note 231, at 289–90.
283. WINKLER, *supra* note 250, at 151.

profession."[284] While a headnote is not binding law, it becomes binding precedent once a judge cites it in another case.[285]

Enter Justice Stephen Field, who a contemporary district attorney referred to as "one of the most dishonest characters that has ever discharged the function of the judicial office."[286] Field was a strong proponent of corporate rights, *laissez-faire* capitalism, and of a judge's "duty" to *make* law in his own ideological image.[287] He was also close friends with Leland Stanford, Charles Crocker, Mark Hopkins, and Collis Huntington, who controlled the Southern Pacific.[288] Indeed, the Court had admonished him for his unseemly fraternization with these railroad executives who had cases pending before the Court.[289] In keeping with his "dishonest character," Field actually hand-picked counsel for the Southern Pacific in the *Santa Clara* case and—like Justice Story in *Dartmouth*—provided the corporate attorneys with inside information and litigation strategy throughout the case.[290] Angered at the Court's refusal to address the constitutional corporate personhood argument in *Santa Clara*, Field used Davis's headnote to "seize victory from the jaws of his *Santa Clara* defeat and establish a critical legal principle."[291] Field spent the next forty-six months citing the *Santa Clara* headnote in a series of corporate law cases and "created a web of cross-corroborating decisions claiming that corporate personhood had been definitively established by Supreme Court precedent."[292] In other words, Field cheated.

The Court did not detect Field's fraud for two reasons. First, he re-established constitutional corporate personhood in several entirely forgettable corporate law cases—*none* of which implicated corporate personhood, and *all* of which ruled against the corporation.[293] After citing Davis's inaccurate headnote, Field would use the previous case in which he also

284. United States v. Detroit Lumber Co., 200 U.S. 321, 337 (1906).
285. WINKLER, *supra* note 250, at 151–53.
286. DONALD R. BURRILL, SERVANTS OF THE LAW: JUDICIAL POLITICS ON THE CALIFORNIA FRONTIER, 1849–89, at 256 (2010).
287. GRAHAM, *supra* note 266, at 149.
288. Harkins, *supra* note 231, at 216.
289. Magrath, *supra* note 280, at 260.
290. Harkins, *supra* note 231, at 216–17.
291. *Id.* at 275.
292. *Id.* at 210.
293. *Id.* at 272. Those cases included *Santa Clara County v. Southern Pacific Railroad*, 118 U.S. 394 (1886); *Pembina Mining Co. v. Pennsylvania*, 125 U.S. 181 (1888); *Missouri Pacific Railway v. Mackey*, 127 U.S. 205 (1888); *Minneapolis & St. Louis Railway v. Herrick*, 127 U.S. 210 (1888); *Home Insurance Co. v. New York*, 134 U.S. 594 (1890); *Minneapolis & St. Louis Railway v. Beckwith*, 129 U.S. 26 (1889); *Charlotte, Columbia & Augusta Railroad v. Gibbes*, 142 U.S. 386 (1892); *Covington & Lexington Turnpike Road Co. v. Sandford*, 164 U.S. 578 (1896). Harkins, *supra* note 231, at 262–71.

cited the *Santa Clara* headnote as additional precedent to reinforce the doctrine he was manufacturing.[294] Second, during the nineteenth century, a single justice authored the Court's opinion and the other justices only reviewed the opinion to confirm it accurately communicated the basic holding and the vote tally.[295] The justice who drafted the opinion had free rein in stating the Court's reasoning.[296] Thus, the Court likely did not even know that Field was creating false precedent for constitutional corporate personhood in the margins of several non-controversial cases.[297] However, in 1897, the Court silently embraced the constitutional corporate person in *Gulf, Colorado & Santa Fe Railroad. Co. v. Ellis*, holding that "[i]t is well settled that corporations are persons within the provisions of the Fourteenth Amendment of the Constitution of the United States."[298] The case relied on each of Field's manufactured opinions as precedent.[299] Justice David Brewer wrote the *Ellis* opinion—he was Justice Field's nephew.[300]

The constitutional corporate person remained on the books from Field's day through the 1930s.[301] As history shows, corporations grew dramatically in size, power, and influence during this period.[302] However, Congress (and the Court) once again worked to erase corporate personhood from the law. In 1907, Congress passed the Tillman Act, which made it illegal for corporations to make political contributions to politicians running for federal office.[303] In 1938, Justice Hugo Black specifically repudiated *Santa Clara* and constitutional corporate personhood in *Connecticut General Life Insurance Co. v. Johnson*.[304] Justice Black lamented that "of the cases in this Court in which the Fourteenth Amendment was applied during the first fifty years after its adoption, less than one-half of one percent invoked it in protection of the [African American] race, and more than fifty percent asked that its benefits be extended to corporations."[305] That same year, following Black's commentary, in *United States v. Carolene Products Co.*, the Court limited application of the Fourteenth Amendment to cases of discrimination against *natural* persons who were "discrete and insular

294. *Gibbes*, 142 U.S. at 391 (citing *Santa Clara Cnty.*, 118 U.S. 394; *Pembina Mining Co.*, 125 U.S. at 189; *Beckwith*, 129 U.S. 26) ("Private corporations are persons, within the meaning of the amendment. It has been so held in several cases by this court.").

295. Harkins, *supra* note 231, at 288–89.

296. *Id.*

297. *See id.* at 272.

298. Gulf, Colo. & Santa Fe Ry. Co. v. Ellis, 165 U.S. 150, 154 (1897).

299. Harkins, *supra* note 231, at 273.

300. *Id.*

301. Gans & Kendall, *supra* note 253, at 646.

302. *See generally* ALFRED D. CHANDLER JR., THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS (1977).

303. 41 CONG. REC. 22 (1906).

304. Conn. Gen. Life Ins. Co. v. Johnson, 303 U.S. 77, 87 (1938).

305. *Id.* at 90.

minorities."[306] The Court once again erased the constitutional corporate person, just as the Taney-led Court had summarily erased the powers that *Dartmouth* granted corporate persons. After 1938, the constitutional corporate person was, in the words of the Court, "a relic of a bygone era."[307] However, in 1978, another conflicted Supreme Court Justice would excavate this relic and re-vivify the constitutional corporate person.

3. *First National Bank of Boston v. Bellotti* (1978)

In 1971, Lewis Powell, an influential corporate lawyer and board member of tobacco giant Philip Morris Inc., wrote a confidential memorandum to the U.S. Chamber of Commerce.[308] The Chamber of Commerce is a powerful private business organization that lobbies and advocates on behalf of 3 million U.S. corporations.[309] In his memorandum, Powell attempted to arm U.S. corporations for "guerilla warfare" against anti-capitalist forces.[310] This warfare included infiltrating the media, universities, and politics to establish pro-corporate sentiment to protect the "free enterprise system."[311] Specifically, Powell advised the Chamber to exploit the power of the Supreme Court, observing that "[u]nder our constitutional system, *especially with an activist-minded Supreme Court*, the judiciary may be the most important instrument for social, economic and political change."[312] He instructed the Chamber to employ a "highly competent staff of lawyers" and to "appear as counsel amicus in the Supreme Court" while carefully "selecting the cases in which to participate, or the suits to institute."[313] Manipulating the Supreme Court, he concluded, "merits the necessary effort."[314]

Just two months after delivering this incendiary memorandum to the Chamber of Commerce that called for infiltrating the Supreme Court, Lewis

306. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

307. Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 365 (1973).

308. Confidential Memorandum from Lewis F. Powell Jr. to Eugene B. Sydnor, *Attack on the American Free Enterprise System* (Aug. 23, 1971) [hereafter *Powell Memo*]; *see also* Jeff Clements, *The Conservative vs. the Corporatist: Justice Rehnquist and "Corporate Speech" Rights*, 51 ARIZ. ATT'Y 40, 42 (2015) ("Lewis Powell had practiced corporate law in Richmond, Virginia, had a national client base that included some of the largest corporations in the world, and he eventually served as president of the American Bar Association. He was a member of numerous corporate boards and an active participant on the executive committee of tobacco giant Philip Morris Inc.").

309. *About the U.S. Chamber of Commerce*, U.S. CHAMBER OF COM., https://www.uschamber.com/about/about-the-us-chamber-of-commerce [https://perma.cc/29XC-YV88] (last visited Dec. 10, 2020).

310. *Powell Memo*, *supra* note 308, at 8.

311. *Id.* at 1–3.

312. *Id.* at 26.

313. *Id.* at 27.

314. *Id.*

Powell *joined* the Supreme Court as Associate Justice.[315] After his confirmation, an anonymous source leaked his corporate call-to-arms to the press, prompting calls for Powell's immediate removal as unfit to serve on the Court.[316] The public did not heed these calls, and Justice Powell remained a member of the Court and quickly began the "fabrication of a First Amendment 'corporate speech' doctrine" that would ultimately give corporations the right to spend freely to influence U.S. politics.[317] Powell formed a "shifting majority" of justices to establish what he described broadly and matter-of-factly in his confidential notes as "rights for corporations."[318]

In 1978, Powell accomplished these ends in *First National Bank of Boston v. Bellotti*.[319] The case involved a challenge to a Massachusetts state law that banned corporations from spending money to influence state voter referendums.[320] In *Bellotti*, Justice Powell sought to grant corporations a First Amendment right to political speech via a "listener's rights theory."[321] Following the advice from Powell's memo, the Chamber of Commerce submitted an amicus brief in support of these corporate rights.[322] Armed with his "listener's rights theory" and this corporate support, Justice Powell secured a majority vote for corporate free speech rights.[323] As Justice Powell framed it in his *Bellotti* opinion, "If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decision making in a democracy, and this is no less true because the speech comes from a corporation, rather than an individual."[324] In other words, it did not matter *who* was speaking—what mattered was *what* that (corporate) person was saying. To reinforce his argument, Powell fittingly cited the *Santa Clara* headnote in ruling that "[i]t has been settled for almost a century that corporations are persons within the meaning of the [Constitution]."[325] Over the

315. R. Betsy Emmert, Comment and Casenote, *The Corporate Clique in the Courtroom: A Jurisprudential Study of the Success and Influence of Amicus Curiae Briefs Filed by the U.S. Chamber of Commerce During the 2014–2017 Terms of the U.S. Supreme Court*, 87 U. CIN. L. REV. 227, 229 (2018).

316. WINKLER, *supra* note 250, at 300–01.

317. Clements, *supra* note 308, at 40.

318. *Id.* at 43 (citations and quotations omitted).

319. First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 795 (1978).

320. *Id.* at 765.

321. Clements, *supra* note 308, at 43.

322. *Id.*

323. *Id.*

324. *Bellotti*, 435 U.S. at 777.

325. *Id.* at 780 n.15.

next decade, Justice Powell (like Justice Field before him) would author several opinions that reinforced constitutional corporate personhood.[326]

Justice William Rehnquist routinely dissented from Justice Powell's corporate rights opinions, accusing Powell of returning "to the bygone era," when "it was common practice for this Court to strike down economic regulations adopted by a State based on the Court's own notions of the most appropriate means for the State to implement its considered policies."[327] Rehnquist recognized that Powell was continuing the unethical advocacy for corporate constitutional rights that Justices Marshall, Story, and Field undertook in the nineteenth century. Powell was engaging in ideological judicial activism and pushing Supreme Court precedent "beyond the breaking point" to support his personal vision of corporate rights.[328]

Justice Powell retired from the Court in 1987.[329] Again, Congress and the Court quickly curtailed the illegitimate corporate rights that a rogue justice (here, Powell) established during his tenure.[330] In 1990, the Court held in *Austin v. Michigan Chamber of Commerce* that Michigan could ban corporations from using general treasury funds to influence state elections.[331] Michigan's ban on corporate political participation was constitutional because it prevented "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."[332] Congress likewise stepped in and passed the Bipartisan Campaign Reform Act ("BCRA"). The BCRA determined, among other things, that corporations could not use general treasury funds to engage in "express advocacy" via "electioneering communications" during prescribed periods prior to federal elections.[333] In 2003, the Court reaffirmed *Austin* and upheld the BCRA in *McConnell v. Federal Election Commission*, noting that "Congress' power to prohibit corporations and unions from using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates in federal elections has been firmly embedded in our law."[334] The government had successfully

326. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 571–72 (1980) (granting corporations the right to speak via promotional advertising); *see also* Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 32 (1986) (Rehnquist, J., dissenting) (acknowledging the majority recognized a corporation's right to exercise a constitutionally protected "freedom of conscience").

327. *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 589 (Rehnquist, J., dissenting).

328. *Pac. Gas & Elec. Co.*, 475 U.S. at 32–34 (Rehnquist, J., dissenting).

329. Clements, *supra* note 308, at 46.

330. *Id.*

331. Austin v. Mich. Chamber of Com., 494 U.S. 652, 655 (1990).

332. *Id.* at 660.

333. Bipartisan Campaign Reform Act, 2 U.S.C. § 441b(b)(2) (since transferred to 52 U.S.C. § 30118).

334. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 203 (2003).

undone Powell's dirty work. However, yet another act of Supreme Court collusion with the corporate bar was on the horizon.

4. *Citizens United v. Federal Election Commission* (2010)

Meanwhile, the Chamber of Commerce continued to methodically follow the blueprint Powell laid out in his confidential 1971 memorandum. As Powell advised, the Chamber created its own litigation team of power lawyers who routinely petition the Court to protect (and enhance) corporate rights.[335] Per Powell's blueprint, the Chamber's lawyers submit amicus briefs and advocate for businesses at every level of the U.S. judicial system.[336] An amicus brief is a third-party brief (from a "friend of the court" not involved in the dispute) that "brings to the attention of the Court relevant matter not already brought to its attention by the parties."[337] The Chamber's lawyers have close connections to the Supreme Court. Five members of the Chamber's seven-member legal team are former Supreme Court clerks.[338] One of the five clerked for Justice Samuel Alito.[339] Two other Chamber lawyers—while members of the Bush administration—prepared both Justices Alito and Roberts for their successful Senate confirmation hearings.[340]

Given these close connections to the Supreme Court, it is not surprising that the Chamber's briefs carry a great deal of influence with the justices. One member of the Supreme Court bar describes the Chamber's influence in the following terms: "Except for the Solicitor General representing the United States, no single entity has more influence on what cases the Supreme Court decides and how it decides them than the [Chamber of Commerce]."[341] Indeed, the Chamber prevails in nearly 70 percent of

335. David L. Franklin, *What Kind of Business-Friendly Court? Explaining the Chamber of Commerce's Success at the Roberts Court*, 49 SANTA CLARA L. REV. 1019, 1023–25 (2009); *see also* John Shiffman, *Chamber of Commerce Forms Its Own Elite Law Team*, REUTERS (Dec. 8, 2014), http://www.reuters.com/article/us-scotus-firms-chamber/chamber-of-commerce-forms-its-own-elite-law-team-idUSKBN0JM10Q20141208 [https://perma.cc/NY93-8BTQ] ("The chamber has created the equivalent of a boutique law firm at its headquarters, one whose roster of talent now rivals some of Washington's most elite practices.").

336. Emmert, *supra* note 315, at 230.

337. Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 VA. L. REV. 1901, 1912–14 (2016) (quotations omitted).

338. *Who We Are*, U.S. CHAMBER LITIG. CTR., https://www.chamberlitigation.com/who-we-are [https://perma.cc/7MTC-3MNR] (last visited Dec. 10, 2020).

339. *Tara Morrissey*, U.S. CHAMBER LITIG. CTR., https://www.chamberlitigation.com/who-we-are/tara-morrissey [https://perma.cc/S6G6-4MKU] (last visited Dec. 10, 2020) ("During the 2010 Term of the Supreme Court of the United States, Morrissey served as a law clerk to the Honorable Samuel A. Alito, Associate Justice.")

340. Emmert, *supra* note 315, at 230.

341. *Chamber's Litigation Center Celebrates 30th Anniversary*, U.S. CHAMBER OF COM. (Sept. 11, 2007, 8:00 PM), https://www.uschamber.com/press-release/chambers-litigation-center-celebrates-30th-anniversary [https://perma.cc/H42S-B393].

Supreme Court cases in which it files an amicus brief.[342] When another party petitions the Court to hear a case, the Court agrees to hear that case less than one percent of the time; when the Chamber petitions the Court, it agrees to hear the case a staggering 26 percent of the time.[343] These skewed outcomes have led some litigants to argue that the Court should prohibit the Chamber from submitting amici briefs, because the Chamber is not a "friend of the court," but rather a "close confidant."[344] Concern about the Court's objectivity is reinforced by the fact that Justices Alito and Roberts are empirically the two most business-friendly justices in Supreme Court history.[345] In fact, since Justice Alito's arrival, the Court has invalidated or limited almost every campaign finance restriction it has considered, further empowering wealthy corporations.[346]

Ironically (or, for some, troublingly), Justices Alito and Roberts played a pivotal role in the controversial 2010 case *Citizens United v. Federal Election Commission*.[347] *Citizens United* began as a "sleepy case" in which a corporation sought a narrow exception to the BCRA.[348] Citizens United, a nonprofit corporation, wished to distribute its anti-Hillary Clinton documentary via on-demand cable television within 30 days of a federal election, which would violate the BCRA.[349] It sought declaratory relief from the Court that the BCRA did not apply, since its documentary was neither "express advocacy" nor "electioneering communication," but rather a feature length film.[350] The Chamber of Commerce submitted an amicus brief on behalf of Citizens United.[351] The Chamber's brief made a more audacious argument than Citizens United, asking the Court to invalidate the BCRA as unconstitutional and to overrule *Austin*.[352] In other words, the Chamber wanted to once again resurrect the constitutional corporate person.

During oral arguments, Justice Samuel Alito paved the way for the Chamber's argument to take center stage. Justice Alito posed a seemingly non-sequitur question to Deputy Solicitor General Malcolm Stewart, who argued on the government's behalf.[353] As Stewart responded to Citizens

342. Emmert, *supra* note 315, at 237.
343. Franklin, *supra* note 335, at 1025.
344. Emmert, *supra* note 315, at 234, 237.
345. Lee Epstein, William M. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1449 (2013).
346. Ann Southworth, *Elements of the Support Structure for Campaign Finance Litigation in the Roberts Court*, 43 LAW & SOC. INQUIRY 319, 320 (2018).
347. Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).
348. Gans & Kendall, *supra* note 253, at 692.
349. *Citizens United*, 558 U.S. at 310–11.
350. *Id.* at 311.
351. Brief of Amicus Curiae Chamber of Commerce in Support of Appellant, Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (No. 08-205), 2009 WL 154011.
352. *Id.* at 8–9.
353. WINKLER, *supra* note 250, at 354.

United's arguments for a narrow carve out to the BCRA, Justice Alito asked Stewart whether under the BCRA the government could ban the documentary's message if that message were instead delivered in a book at the public library.[354] As a hypothetical book-banning scenario had nothing to do with the case at bar, Stewart repeatedly attempted to address the legal issue before the Court.[355] Alito interrupted Stewart, asking "I'm not asking what the *statute says*. The government's position is that the First Amendment *allows the banning of a book* if it's published by a corporation?"[356] Justice Roberts soon intervened with a similar hypothetical question about banning books.[357] Justice Breyer attempted to bring the discussion back to the issue before the Court. Breyer dismissed the book-banning hypothetical, pointing out that "I don't think I have to worry about that in this case, do I?"[358] Stewart responded: "That's correct, both because the question isn't presented here and because Congress—" at this point, Justice Roberts interrupted with another book-banning hypothetical.[359] As a result of these interventions, the oral arguments devolved into a discussion of book-banning that raised much different—and larger—questions than those before the Court in *Citizens United*.[360]

Justices Alito and Roberts successfully reframed Citizens United's argument into the Chamber's argument. Instead of deciding the case on the narrow terms that the parties actually sought, the Court "shocked the legal world" and requested a rehearing of the case to address the larger constitutional issues that the Court (not the litigants) believed were at stake.[361] In the additional round of briefing, the Chamber submitted another amicus brief to assist the Court.[362] When the Court decided *Citizens United*, it invalidated as unconstitutional the corporate campaign finance restrictions of the BRCA and overruled both *Austin* and *McConnell*.[363] In doing so, the Court "in a rather rare instance" cited the Chamber's amicus brief—*twice*.[364] *Citizens United* gave corporations a constitutional right to "speak" via unlimited political campaign expenditures.[365] In dissent, Justice Stevens accused the Court of highly inappropriate judicial conduct, noting

354. Transcript of Oral Argument, at 26–27, Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (No. 08-205).
355. *Id.* at 27.
356. *Id.* at 27–28 (emphasis added).
357. *Id.* at 29–30.
358. *Id.* at 32.
359. *Id.*
360. *Id.* at 32–38.
361. Yosifon, *supra* note 228, at 1217.
362. Supplemental Brief of Amicus Curiae Chamber of Commerce in Support of Appellant, Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (No. 08-205), 2009 WL 2365220.
363. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 365–66 (2010).
364. Emmert, *supra* note 315, at 239.
365. Yosifon, *supra* note 228, at 1206.

"five Justices were unhappy with the limited nature of the case before us, so they changed the case to give themselves an opportunity to change the law."[366] In a more celebratory tone, Justices Roberts and Alito concluded in their concurrence that "to exclude or impede corporate speech is to muzzle the principal agents of the modern free economy. We should celebrate rather than condemn the addition of this speech to the public debate."[367]

However, it is not entirely clear who, precisely, should be celebrating the addition of corporate speech to the public debate. Since *Citizens United*, corporate political spending has spiked by an additional $1 billion.[368] Corporate personhood's problematic ethical foundations produce even more questionable ethical outcomes in the politics of public health. Recall that in the year the Court decided *Citizens United*, the CEOs from Nestlé, Kellogg's, and General Mills paid personal visits to the White House to discuss the Obama administration's "Let's Move" campaign.[369] After these meetings (which resulted in the administration abandoning the "eat less" message), Nestlé, Kellogg's, and General Mills each made record political expenditures during the remainder of the Obama presidency.[370] Similar ethical questions arose in connection with Senator Klobuchar's designation of pizza as a vegetable for public school lunches.[371] Klobuchar, of course, denies that food industry campaign contributions motivated her efforts to transform frozen pizza into a vegetable.[372] However, she cannot deny that she submitted a statement to the USDA advocating for pizza's vegetable designation that matched verbatim the congressional testimony of an official from Schwan's (her political donor) on the same issue.[373] It is difficult to see these outcomes, in a practical sense, as anything short of political bribery at the public's expense—bribery that a handful of complicit judges made possible.

Yet, as this Section demonstrates, constitutional corporate personhood and the food industry's related "political participation rights" amount to

366. *Citizens United*, 558 U.S. at 398 (Stevens, J., dissenting).
367. *Id.* at 393 (Roberts, J., concurring).
368. WINKLER, *supra* note 250, at 373.
369. *See supra* notes 132–36 and accompanying text.
370. *See Nestle SA: Lobbying*, CTR. FOR RESPONSIVE POL., https://www.opensecrets.org/orgs/lobbying?id=D000042332 [https://perma.cc/HM9U-EK6Y] (last visited Dec. 10, 2020); *Kellogg Co: Lobbying*, CTR. FOR RESPONSIVE POL., https://www.opensecrets.org/orgs/lobbying?id=D000026978 [https://perma.cc/6DLR-657K] (last visited Dec. 10, 2020); *General Mills: Lobbying*, CTR. FOR RESPONSIVE POL., https://www.opensecrets.org/orgs/lobbying?id=D000000467 [https://perma.cc/4XNY-BWLQ] (last visited Dec. 10, 2020).
371. *See supra* Section I.C.2.
372. Wilson & Roberts, *supra* note 8.
373. *Id.*

little more than a judicial coup.[374] Whether one calls it collusion, corruption, or outright conspiracy, it is clear that the principle of constitutional corporate personhood rests on illegitimate legal foundations. Thus, the food industry's tool for capturing government regulators is ripe for legal challenge. Knowing constitutional corporate personhood's controversial and inconsistent history (as well as the fact that the government has on multiple occasions erased corporate personhood), the American public should again demand the eradication of this "relic" of a bygone era.

III. CONCLUSION

Big Food's misdirection of corporate law has catastrophic public health consequences. Each year, 300 thousand Americans die from obesity, and the epidemic is rapidly trending in the wrong direction. America's 42 percent obesity rate is expected to double within a generation, which will only exacerbate these tragic outcomes.[375] A recent study suggests that the U.S. diet perhaps already causes *half a million* American fatalities a year.[376] Over 122 million Americans have diabetes or prediabetes.[377] Obesity in the U.S. causes $210 billion in direct annual health care costs (and $450 billion in indirect social costs).[378] Due to obesity, for the first time in our nation's history, children are expected to have shorter lifespans than their parents.[379] The Joint Chiefs of Staff have declared obesity a threat to national security, fearing America will no longer be able to field an army due to the nation's growing weight problem.[380] Prominent food industry critics blame the obesity crisis on the fact that food industry corporations behave like "psychopaths," because corporate law grants them the "freedom from the obligation to abide by the same moral and ethical constraints as everybody else."[381] But this Article shows that this assertion is not true. Corporate law provides no such legal justification and mandates no such industry deceit. Shareholder primacy is a myth, and corporate personhood is an illegitimate swindle. So, knowing this, what are we to do?

374. Harkins, *supra* note 231, at 272–73.

375. *See supra* INTRODUCTION.

376. Gisela Crespo, *Poor Diets Threaten US National Security—and It's Serious*, CNN (July 20, 2020, 2:43 PM), https://www.cnn.com/2020/07/20/health/us-poor-nutrition-illness-death-wellness/index.html [https://perma.cc/E29G-J8ML].

377. *National Diabetes Statistics Report*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 28, 2020), https://www.cdc.gov/diabetes/data/statistics/statistics-report.html [https://perma.cc/8X5V-9MT8].

378. Rauh, *supra* note 25, at 272.

379. Woodhouse & Woodhouse, *supra* note 14, at 290.

380. Lustig et al., *supra* note 40.

381. SIMON, *supra* note 11, at 3.

First, Americans must expose the illegitimacy of the food industry's justification for fueling the obesity epidemic. The law does not tie the industry's hands and force it to act like a psychopath to satisfy a shareholder primacy mandate. As a result, the public might demand a greater industry commitment to corporate social responsibility. But, as Robert Reich points out, corporate social responsibility is often a "con," and just another part of the larger blueprint for corporate misdirection.[382] Corporations that recently committed to a more "responsible" stakeholder theory of governance have subsequently covered up deadly safety hazards to avoid financial liability (e.g., Boeing), cut part-time employee benefits to maximize profit (e.g., Amazon), and cancelled employee pensions in an effort to reduce corporate costs (e.g., General Electric).[383] Coke also agreed to this new stakeholder theory of corporate social responsibility.[384] Coke's CEO, after getting caught funding bogus science, publicly announced, "I am disappointed that some actions we have taken to fund scientific research and health and well-being programs have served only to create more confusion and mistrust. I know our company can do a better job engaging both the public-health and scientific communities—and we will."[385] But just a year after making this promise, Coke once again got caught funding public health organizations to deemphasize soda's dietary risks.[386] Practicing corporate social responsibility, it turns out, is easier said than done.

However, public awareness through exposure of the industry's blueprint is a key step in combating obesity. Consumers can now ignore "psychopathic" profit-maximizing claims that Pop-Tarts are healthy, Apple Jacks help children concentrate, and Coke is good for hydration. Similarly, when a scientist like Bradley Johnston at Dalhousie University publishes studies declaring that red meat and sugar are healthy, an informed public can correctly surmise (as was indeed the case with Dr. Johnston's studies) that the food industry—to "maximize shareholder value"—paid him to reach these counterfactual, but profitable, nutritional conclusions.[387]

Next, Americans must confront corporate personhood, which serves as the industry's tool for ensuring that the public continues to eat unhealthy

382. Reich, *supra* note 221.

383. *Id.*

384. *Our Commitment: Statement on the Purpose of a Corporation*, BUS. ROUNDTABLE, https://opportunity.businessroundtable.org/ourcommitment/ [https://perma.cc/T3G3-FNG3] (last visited Dec. 10, 2020).

385. Muhtar Kent, Opinion, *Coca-Cola: We'll Do Better*, WALL ST. J. (Aug. 19, 2015, 6:46 PM), https://www.wsj.com/articles/coca-cola-well-do-better-1440024365 [https://perma.cc/VLH4-H7S8].

386. O'Connor, *supra* note 5.

387. Tara Parker-Pope & Anahad O'Connor, *Scientist Who Discredited Meat Guidelines Didn't Report Past Food Industry Ties*, N.Y. TIMES (Oct. 4, 2019), https://www.nytimes.com/2019/10/04/well/eat/scientist-who-discredited-meat-guidelines-didnt-report-past-food-industry-ties.html [https://perma.cc/KQ4G-8XXP].

processed food. The historical record indicates that the government will probably act to limit corporate political participation, as it has repeatedly done in the past.[388] However, a judicial remedy will likely be slow in arriving. The Roberts Court is, empirically, among the most business-friendly in Supreme Court history.[389] And, given the Court's current demographic composition, its conservative economic ideologies are unlikely to change in the foreseeable future.[390] Constitutional change is likewise a far-fetched solution. Critics of corporate personhood have called for a constitutional amendment to end corporate political participation.[391] However, James Bopp (former lawyer for Citizens United and a corporate rights advocate) gives the amendment campaign a sobering diagnosis: "I hope that is all [amendment advocates] do for the next several centuries. Because it will be that long."[392] In the contemporary United States, the Constitution is nearly impossible to amend.[393]

The more immediate method of disrupting the food industry's blueprint for misdirection is political accountability. Until the government restrains corporate political participation, the public must hold politicians accountable who accept the food industry's legally sanctioned bribes. The public needs to decry the politicians who sell out to the food industry.[394] This includes Presidents Trump and Obama, Senator Klobuchar, and a host of others.[395] Political corruption also occurs on the state and local levels. After New York state senator Jeff Klein received substantial campaign contributions from the soda industry, he suddenly withdrew his support for New York's proposed soda tax, and then proved instrumental in killing it.[396] Klein subsequently left office to become a lobbyist.[397] Americans need to hear these stories. The public can catalyze a government response by exposing politicians who take food industry contributions to subvert the nation's

388. *See supra* Section II.B.

389. Epstein et al., *supra* note 345, at 1472.

390. Henry Gass, *Supreme Court Conservatives Poised to Make Their Mark in New Term*, CHRISTIAN SCI. MONITOR (Oct. 7, 2019), https://www.csmonitor.com/USA/Justice/2019/1007/Supreme-Court-conservatives-poised-to-make-their-mark-in-new-term [https://perma.cc/TH8E-9NFV].

391. WINKLER, *supra* note 250, at 375.

392. *Id.* at 376.

393. Eric Posner, *The U.S. Constitution Is Impossible to Amend*, SLATE (May 5, 2014, 4:22 PM), https://slate.com/news-and-politics/2014/05/amending-the-constitution-is-much-too-hard-blame-the-founders.html [https://perma.cc/TFP3-5WSL].

394. *See supra* Section I.C.2.

395. *See supra* Section I.C.2.

396. Samuel Goldsmith, *Lobbyists Targeted Westchester Pols to Make Soda Tax Idea Go Flat*, DAILY NEWS (Mar. 25, 2010), https://www.nydailynews.com/news/lobbyists-targeted-westchester-pols-soda-tax-idea-flat-article-1.177774 [https://perma.cc/4JJM-HHQC].

397. Mike Vilensky, *How Politicians Ousted in New York's Blue Wave Spend Their Days*, WALL ST. J. (July 7, 2019, 11:00 AM), https://www.wsj.com/articles/how-politicians-ousted-in-new-yorks-blue-wave-spend-their-days-11562511601 [https://perma.cc/2QKE-ZTSN].

public health. After all, the information about which politicians accept food industry funding is both publicly available and easy to access.[398]

Ultimately (and ironically), Americans can find the most direct tool for fighting the obesity epidemic in the industry's own blueprint for misdirection: *personal responsibility*. However, unlike the industry's "personal responsibility" mantra of getting more exercise and being "disciplined," this Article premises an entirely different sort of responsibility. Armed with the reality of the industry's tactics, consumers have a personal responsibility to cut through the corporate distortion to the reality of the food industry's "psychopathic" behavior. For decades, the food industry and paid-for scientists and politicians have misled the public about diet and nutrition guidelines. But the proper diet and nutrition guidelines are not difficult to discern. Disinterested nutrition experts note that dietary advice has remained consistent since the 1970s: Americans need to eat less fat, sugar, and salt in processed foods, while eating more fruits, vegetables, and whole grains.[399] Indeed, this has been the consistent, common-sense dietary advice since the 1890s.[400] At that time, Wilbur Atwater (the "father of American nutrition science"[401]) advised Americans to eat less sugar and fat and even established the dietary parameters for which modern, uncompromised nutritionists still advocate.[402]

It is our personal responsibility to ignore industry claims about mandates to "maximize shareholder wealth," and the baseless health claims about processed foods that spring from this "legal doctrine." It is likewise our personal responsibility to challenge both the government and industry when they assert a corporation's constitutional right to participate in the political process. When Senator Mitt Romney next declares that "corporations are people, my friend," we can confidently point out the illegitimacy of this anemic legal claim.[403] Behind the industry's corporate law misdirection sits this simple truth: Americans need to avoid the "value-added" processed foods that Big Food foists upon us, or face obesity's tragic consequences.

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398. *Food & Beverage: Money to Congress*, CTR. FOR RESPONSIVE POL., https://www.opensecrets.org/industries/summary.php?ind=n01&cycle=2020&recipdetail=M&sortorder=U [https://perma.cc/2Y2H-KLWY] (last visited Dec. 10, 2020).

399. *See supra* Section I.A.

400. NESTLE, *supra* note 28, at 33.

401. Judy McBride, *Wilbur O. Atwater: Father of American Nutrition Science*, 41 AGRIC. RSCH. 4, 4 (1993).

402. NESTLE, *supra* note 28, at 33.

403. Frank James, *Romney's 'Corporations Are People' A Gift to Political Foes*, NPR (Aug. 11, 2011, 3:13 PM), https://www.npr.org/sections/itsallpolitics/2011/08/11/139551684/romneys-corporations-are-people-getting-lots-of-mileage [https://perma.cc/8NJ4-WQAC].