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***Beyond Citizens United v. FEC:***  
**Re-Examining Corporate Rights**

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# **Beyond *Citizens United v. FEC*: Re-Examining Corporate Rights**

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## I. INTRODUCTION

One of the highlights of the Supreme Court's 2009-2010 term will be the decision in *Citizens United v. FEC*, a campaign finance law case in which the Court is considering overruling *Austin v. Michigan Chamber of Commerce*<sup>1</sup> and *McConnell v. FEC*.<sup>2</sup> *Austin* upheld the constitutionality of state regulation of corporate political expenditures, and the relevant part of *McConnell* affirmed the constitutionality of federal restrictions on corporate campaign expenditures. Whether or not the Supreme Court's decision in *Citizens United* explicitly addresses "corporate rights" under the Constitution, a holding that overrules *Austin* and *McConnell* would rest on the remarkable – and erroneous – assumption that the Constitution provides corporations with First Amendment and Fourteenth Amendment rights equivalent to those of people for purposes of political expenditures.

While a surprising re-argument order at the end of the Court's 2008-2009 term and an abbreviated briefing and argument schedule may have suggested that the public might overlook the case, that is not what happened. Instead, the threatened extension of corporate rights in *Citizens United* has created increasing public alarm. Debate about whether corporations as corporations are even capable of having constitutional rights entered the mainstream media. Just a few examples include the *New York Times* quoting Thomas Jefferson's desire to "crush" corporations that "dare to challenge" self-government of the people;<sup>3</sup> The Bill Moyers Journal on PBS hosting a face-off of Floyd Abrams and Trevor Potter, former counsel to Senator John McCain's presidential campaign;<sup>4</sup> the *National Journal* describing the "pitched battle" of amicus briefs in the case;<sup>5</sup> and even Stephen Colbert on the Colbert Report weighing in with a satire of the Court's concern for the newest "oppressed minority," corporations.<sup>6</sup>

Likewise, senators from across the political spectrum have sounded warnings to the Court, with Senator Russ Feingold (D-WI) pointedly stating on the Senate floor that to overrule *Austin* and *McConnell*, "the Court would have to ignore several time-honored principles that have served for the past two centuries to preserve the public's respect for and acceptance of its

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<sup>1</sup> *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

<sup>2</sup> *McConnell v. FEC*, 540 U.S. 93 (2003).

<sup>3</sup> Editorial, *A Threat to Fair Elections*, NEW YORK TIMES, Sept. 8, 2009, at A24.

<sup>4</sup> Bill Moyers Journal, Floyd Abrams and Trevor Potter, Sept. 4, 2009, <http://www.pbs.org/moyers/journal/09042009/profile.html>.

<sup>5</sup> Eliza Newlin Carney, *Citizens United Sparks Pitched Battle*, NATIONAL JOURNAL, Aug. 31, 2009.

<sup>6</sup> Colbert Nation, Sept. 15 2009, available at <http://www.colbertnation.com/the-colbert-report-videos/249055/september-15-2009/the-word---let-freedom-ka-ching>.

decisions.”<sup>7</sup> Senator McCain (R-AZ) took to the floor to directly challenge Justice Scalia by name, inveighing against “activist judges, regardless of whether it is liberal or conservative activism,” and warning “the voices of millions and millions of Americans . . . could be drowned out by large corporations if the decades-old restrictions on corporate electioneering are rescinded.”<sup>8</sup>

Whether Chief Justice Roberts and Justice Alito join Justices Kennedy, Scalia, and Thomas in their stated intention to overrule *Austin* and *McConnell* remains to be seen. What is clear, though, is that the Court’s decision to examine whether corporations have First and Fourteenth Amendment rights to free speech and political activity has renewed a debate about the place of corporations in our constitutional jurisprudence that has simmered for more than a century.

This Issue Brief seeks to show that if the Court deems Congress and the states to be powerless to restrict corporate political expenditures, the piecemeal and unwarranted fabrication of a corporate rights doctrine that has gathered pace over the past three decades will have reached an extreme conclusion. Such a conclusion by the Court would not only be wildly out of touch with the realities of corporate power in contemporary American life, but would disregard the Court’s proper separation over 200 years of the constitutional rights of people from those claimed by corporations.

## II. CORPORATE RIGHTS ARE NOT FOUND IN THE CONSTITUTION

### A. Background of *Citizens United v. FEC*

Citizens United is a nonprofit corporation created under the laws of Virginia. During the 2008 presidential primary race, Citizens United produced and sought to distribute *Hillary: The Movie*, which portrayed Senator Hillary Clinton as unfit for office and encouraged voters to vote against her. If *Hillary: The Movie* was an “electioneering communication” against a candidate for election within 60 days of an election, corporate funding of the effort would be prohibited by the Bipartisan Campaign Reform Act of 2002 (known as BCRA or McCain-Feingold). Given the nature of the movie, such a conclusion was likely, and Citizens United sought an injunction to prevent the Federal Elections Commission (FEC) from enforcing BCRA, arguing that corporate spending restrictions violated the First Amendment.

A three-judge panel of the United States District Court for the District of Columbia denied Citizens United’s motion and entered summary judgment for the FEC. Citizens United appealed directly to the Supreme Court, which is the procedure specified under BCRA for constitutional challenges to the law, and the Court first heard argument in March 2009. By the end of the Court’s term in June, the Court declined to issue a decision and instead ordered re-

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<sup>7</sup> Sen. Russ Feingold, Statement on Citizens United v. FEC, Oct. 21, 2009, *available at* <http://feingold.senate.gov/record.cfm?id=319214>.

<sup>8</sup> Sen. John McCain, Statement on the U.S. Supreme Court case Citizens United v. FEC (Oct. 21, 2009), *available at* [http://mccain.senate.gov/public/index.cfm?FuseAction=PressOffice.FloorStatements&ContentRecord\\_id=791f053f-f04d-13af-f29d-ce7e5c124af1&Region\\_id=&Issue\\_id=](http://mccain.senate.gov/public/index.cfm?FuseAction=PressOffice.FloorStatements&ContentRecord_id=791f053f-f04d-13af-f29d-ce7e5c124af1&Region_id=&Issue_id=)

argument in September, following briefing of the specific question of whether the Court should overrule *Austin* and *McConnell*.

In *Austin*, the Michigan Chamber of Commerce, a non-profit corporation created pursuant to Michigan statute that represents the interests of thousands of business corporations, challenged a Michigan law that prohibited corporations from using corporate treasury funds for expenditures in support of or in opposition to state election candidates. The Supreme Court rejected the Chamber of Commerce’s argument that the law violated its First and Fourteenth Amendment rights. Instead, the Court concluded that the state’s regulation of corporate political contributions was justified by the statutory nature of the corporate form itself:

State law grants corporations special advantages – such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets – that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders’ investments. These state-created advantages not only allow corporations to play a dominant role in the Nation’s economy, but also permit them to use ‘resources amassed in the economic marketplace’ to obtain ‘an unfair advantage in the political marketplace.’<sup>9</sup>

The *Austin* Court found “the unique state-conferred corporate structure that facilitates the amassing of large treasuries warrants the limit on independent expenditures.”<sup>10</sup> Even as applied to a “non-profit ideological corporation like a chamber of commerce,” states could regulate corporate political expenditures because the aim of the regulation was not accumulated wealth or a large volume of expenditures *per se*. Rather, the regulation targeted the use in elective politics of a particular legal structure created by statute for certain purposes.<sup>11</sup>

In *McConnell*, the Court considered the constitutionality of various components of BCRA, which amended the Federal Election Campaign Act and continued federal restrictions on corporate political expenditures that Congress first enacted in 1907. *McConnell* specifically upheld Section 203 of BCRA, which prohibited certain expenditures by corporations and unions for “electioneering communications.”<sup>12</sup> As in *Austin*, the *McConnell* Court recognized “the legislative judgment that the special characteristics of the corporate structure require particularly careful regulation” and that legislation may aim at “the corrosive and distorting effects of

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<sup>9</sup> *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 658- 59 (1990) (quoting *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 257 (1986)).

<sup>10</sup> *Austin*, 494 U.S. at 660.

<sup>11</sup> *Id.* at 661 (“some closely held corporations, just as some publicly held ones, may not have accumulated significant amounts of wealth, they receive from the State the special benefits conferred by the corporate structure and present the potential for distorting the political process”). The Court distinguished *Massachusetts Citizens for Life*, 479 U.S. 238, as involving a narrowly focused organization “formed for the express purpose of promoting political ideas, and cannot engage in business activities;” which did not have “shareholders or other persons affiliated so as to have a claim on its assets or earnings;” and was “independent from the influence of business corporations.” 494 U.S. at 663-64.

<sup>12</sup> *McConnell v. FEC*, 540 U.S. 93, 203-04 (2003).

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."<sup>13</sup>

## B. The Court's History of Rejecting Corporate Rights

While Justice Scalia has argued that corporations are akin to associations of people,<sup>14</sup> this view is most certainly incorrect. "Those who feel that the essence of the corporation rests in the contract among its members rather than in the government decree . . . fail to distinguish, as the eighteenth century did, between the corporation and the voluntary association."<sup>15</sup>

That distinction remains valid in the 21st century. A corporation is a government-created structure for doing business, and is available only by statute.<sup>16</sup> The structure has state-created advantages (shareholder limited liability, for instance) and disadvantages (taxation of corporate profits and shareholder dividends, for instance) as compared to other structures. Non-profit corporations have other statutory advantages (such as the ability to raise tax deductible money) and disadvantages (such as various compliance requirements and restrictions on political activity).

The corporate legal form remains today not simply an association of people but a pure creation of statute that, unlike associations of people, may or may not be permitted by law. Indeed, a corporation is not fundamentally different now than in 1819 when Chief Justice Marshall writing for the Court explained that a corporation, as a "mere creature of law . . . possesses only those properties which the charter confers upon it. . . ."<sup>17</sup> Corporations remain creatures of statute, subject to various government compliance requirements.<sup>18</sup>

Lawmakers have come to deem a corporation to be a legal "person" for limited purposes, such as transacting business, suing and being sued, and other acts. The policy choice of using a "person" metaphor to address corporate law issues is just that: a policy choice resting on perceived advantages of convenience and economic gains. The Constitution, however, does not enshrine particular policy choices. For most of our history, with exceptions to be discussed below, the Court has been careful to distinguish between real people and our constitutional rights on one hand, and, on the other hand, the fiction of a corporate "person" that legislatures and common law courts may use for economic and other policy reasons in non-constitutional matters.

If we are to take seriously the notion that the words and context of the Constitution, the intent of the Framers of the Constitution, and the practices of the American people are central to constitutional jurisprudence, it is hard to make a case that corporations may assert on behalf of the corporation the protections of the Bill of Rights to invalidate democratic enactments. Indeed, the evidence is to the contrary. During the colonial period, only "a handful of native business

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<sup>13</sup> *Id.* at 205 (citations omitted).

<sup>14</sup> *Id.* at 256 (Scalia, J., dissenting).

<sup>15</sup> OSCAR HANDLIN & MARY FLUG HANDLIN, *COMMONWEALTH: A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY, MASSACHUSETTS, 1774-1861*, 92 & n.18 (New York Univ. Press 1974).

<sup>16</sup> HARRY G. HENN & JOHN R. ALEXANDER, *LAW OF CORPORATIONS*, WEST HORNBOOK SERIES, 14-35 (3d ed. 1981).

<sup>17</sup> *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 636 (1819).

<sup>18</sup> *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89-91 (1987) ("state regulation of corporate governance is regulation of entities whose very existence and attributes are a product of state law.").

corporations carried on business,” and only 20 business corporations were formed by 1787, when the American people convened the Constitutional Convention.<sup>19</sup> Legislatures soon created more corporations but chartered these only for specific *public* purposes, often with limited time periods.<sup>20</sup> Restrictions on corporate purposes were the norm.<sup>21</sup>

In fact, it is difficult to imagine that the Founders’ generation believed the Constitution barred legislation to prevent corporate expenditures to influence politics. James Wilson – signer of the Declaration of Independence, member of the Continental Congress, a drafter of the Constitution, and one of the nation’s first six Supreme Court justices – expressed a prevailing view at the time that corporations were to be limited and constrained:

A corporation is described to be a person in a political capacity created by the law. . . . It must be admitted, however, that, in too many instances, those bodies politick have, in their progress, counteracted the design of their original formation. . . . This is not mentioned with a view to insinuate, that such establishments ought to be prevented or destroyed: I mean only to intimate, that they should be erected with caution, and inspected with care.<sup>22</sup>

James Madison viewed corporations as “a necessary evil” subject to “proper limitations and guards.”<sup>23</sup> Thomas Jefferson hoped to “crush in its birth the aristocracy of our moneyed corporations, which dare already to challenge our government to a trial of strength and bid defiance to the laws of our country.”<sup>24</sup>

“[T]hroughout the greater part of our history,” the American people, state and federal governments, and the Supreme Court knew that corporations remained subject to democratic control.<sup>25</sup> President Andrew Jackson warned of partisan activity by the second Bank of the United States corporation: “[T]he question is distinctly presented whether the people of the United States are to govern through representatives chosen by their unbiased suffrages or whether the money and power of a great corporation are to be secretly exerted to influence their judgment and control their decisions.”<sup>26</sup> President Martin Van Buren spoke “of the dangers to

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<sup>19</sup> HENN & ALEXANDER, *supra* note 16, at 24 & n.2, (citing EDWIN MERRICK DODD, *AMERICAN BUSINESS CORPORATIONS UNTIL 1860* (1954), JOSEPH DAVIS, *ESSAYS IN THE EARLIER HISTORY OF AMERICAN CORPORATIONS* (Harvard Univ. Press 1917), Simeon Eban Baldwin, *American Business Corporations Before 1789*, 1 ANNUAL REP’T OF AM. HISTORICAL ASS’N, 253-274 (1902)). See also HANDLIN & HANDLIN, *supra* note 15, at 99, 162.

<sup>20</sup> HANDLIN & HANDLIN, *supra* note 15, at 106-33; *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 548-60 (1933) (Brandeis, J., dissenting). Justice Brandeis’s dissenting opinion comprehensively documents the development of the corporation in America. See *Liggett*, 288 U.S. at 548-67.

<sup>21</sup> *Liggett*, 288 U.S. at 549; *Head & Amory v. Providence Ins. Co.*, 6 U.S. 127, 166-67 (1804) (“corporation can only act in the manner prescribed by law”).

<sup>22</sup> COLLECTED WORKS OF JAMES WILSON, Vol. 2. Ch. X, Of Corporations, (ed. Kermit L. Hall & Mark David Hall) <http://oll.libertyfund.org/title/2074/166648/2957866>, (last visited July 22, 2009).

<sup>23</sup> WRITINGS OF JAMES MADISON, VOL. 9 (Gaillard Hunt ed., G.P. Putnam’s Sons, 1900), To J.K Paulding, <http://oll.libertyfund.org/title/1940/119324> (last visited July 22, 2009).

<sup>24</sup> University of Virginia, Favorite Jefferson Quotes, Thomas Jefferson Digital Archive, To George Logan, <http://etext.virginia.edu/jefferson/quotations/jeff5.htm> (last visited July 22 2009).

<sup>25</sup> *Liggett*, 288 U.S. at 548 (Brandeis, J., dissenting).

<sup>26</sup> Andrew Jackson, 1833 Annual Message to Cong. (Dec. 3, 1833) (transcript available at the University of Virginia, Miller Center of Public Affairs, <http://millercenter.org/scripps/archive/speeches/detail/3640>).

which the free and unbiased exercise of political opinion . . . would be exposed by any further increase of the already overgrown influence of corporate authorities.”<sup>27</sup>

These warnings continued as corporations became dominant in our economy. “Corporations, which should be the carefully restrained creatures of the law and the servants of the people, are fast becoming the people’s masters,” wrote President Grover Cleveland.<sup>28</sup> Theodore Roosevelt sought to end “a riot of individualistic materialism” and remediate the “total absence of governmental control [that] led to a portentous growth in the financial and industrial world both of natural individuals and of artificial individuals – that is, corporations.”<sup>29</sup> He successfully called on Congress to enact federal restrictions on corporate political contributions, stating: “Let individuals contribute as they desire; but let us prohibit in effective fashion all corporations from making contributions for any political purpose, directly or indirectly.”<sup>30</sup>

Since the beginning of the Republic, the Court has affirmed that the elected governments of the nation and of the states may regulate, in an even-handed manner, “the corporate structure” because governments create that structure. *Trustees of Dartmouth College v. Woodward* described the corporate entity as “an artificial being . . . existing only in contemplation of law,” and created only for such “objects as the government wishes to promote.”<sup>31</sup> The Court brought this understanding of the corporation to other constitutional provisions, such as diversity jurisdiction under Article III and the Judiciary Acts.<sup>32</sup> In the Founders’ era and beyond, the Court considered state citizenship of shareholders rather than the corporation itself to determine whether people who formed corporations could enter the federal courts in the corporate name.<sup>33</sup> The Court eventually bowed to expediency and overruled these cases, developing a shortcut strictly limited to diversity jurisdiction.<sup>34</sup>

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<sup>27</sup> Martin Van Buren, 1837 Annual Message to Cong. (Dec. 5, 1837) (transcript available at the University of Virginia, Miller Center of Public Affairs, <http://millercenter.org/scripps/archive/speeches/detail/3589>).

<sup>28</sup> Grover Cleveland, 1888 Annual Message to Cong. (Dec. 3, 1888) (transcript available at the University of Virginia, Miller Center of Public Affairs, <http://millercenter.org/scripps/archive/speeches/detail/3758>).

<sup>29</sup> THEODORE ROOSEVELT, AN AUTOBIOGRAPHY 50 (Scribner & Sons 1929) (1913).

<sup>30</sup> Theodore Roosevelt, 1906 Annual Message to Cong. (Dec. 3, 1906) (transcript available at the University of Virginia, Miller Center of Public Affairs, <http://millercenter.org/scripps/archive/speeches/detail/3778>).

<sup>31</sup> *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 636-37 (1819).

<sup>32</sup> Article III provides “The judicial Power shall extend . . . to Controversies . . . between Citizens of different States. . . .” U.S. CONST. art III, § 2.

<sup>33</sup> *Commercial & R.R. Bank of Vicksburg v. Slocomb*, 39 U.S. 60 (1840); *Breithaupt v. Bank of Georgia* 26 U.S. 238 (1828); *Sullivan v. Fulton Steamboat Co.*, 19 U.S. 450 (1821); *Bank of the United States v. Deveaux*, 9 U.S. 61, 86 (1809) (corporation is a “mere legal entity . . . not a citizen”); *Hope Ins. Co. v. Boardman* 9 U.S. 57, 58 (1809).

<sup>34</sup> *Carden v. Arkoma Assoc.*, 494 U.S. 185, 197 (1990) (“special treatment for corporations.”). A thorough discussion of diversity jurisdiction corporate “citizenship” is beyond the scope of this Issue Brief. In short, *Louisville Railroad Co. v. Letson* decreed that a corporation “is to be deemed” a citizen of the state of its creation. *Louisville R.R. Co. v. Letson*, 43 U.S. 497, 557-58 (1844). Nine years later, the Court followed *Letson* but reiterated that “an artificial entity cannot be a citizen,” and “State laws by combining large masses of men under a corporate name, cannot repeal the Constitution.” *Marshall v. Baltimore & Ohio R.R. Co.*, 57 U.S. 314, 327 (1853) (quotation and citation omitted). The Court soon began simply to treat “a suit by or against a corporation in its corporate name, as a suit by or against citizens of the State which created the corporate body. . . .” *Ohio & Mississippi R.R. Co. v. Wheeler*, 66 U.S. 286, 296 (1861). The Court confined this doctrine to diversity jurisdiction, and it has never been defended with enthusiasm for its soundness. See *Carden*, 494 U.S. 185; see also Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 523 (1928).

In *Bank of Augusta v. Earle*<sup>35</sup> and *Paul v. Virginia*,<sup>36</sup> the Supreme Court refused to extend “special treatment” for corporations to the protection of citizen rights under the Privileges and Immunities Clause of Article IV. Repeatedly, the Court has held that corporations are not citizens under that clause, or under the Privileges or Immunities Clause of the Fourteenth Amendment.<sup>37</sup>

As the Industrial Revolution gathered pace, the Court maintained with clarity that “[t]he only rights [a corporation] 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. . . .”<sup>38</sup> The Court did not examine the Constitution to determine rights “given to it in that character” because the Constitution does not create corporate rights. In upholding corporate contracts outside the place of incorporation, *Bank of Augusta* declined to rest on any constitutional provision, instead applying the law that created the corporation, the law of the state where the corporation wished to enforce a contract, and “comity.”<sup>39</sup>

While the increasingly dominant role of corporations in the American economy did not go unnoticed by the Court, most Justices did not see any grounds for infusing that development with constitutional significance.<sup>40</sup> By 1868, corporations had “multiplied to an almost indefinite extent. There is scarcely a business pursued requiring the expenditure of large capital, or the union of large numbers, that is not carried on by corporations. It is not too much to say that the wealth and business of the country are to a great extent controlled by them.”<sup>41</sup> Despite this recognition, the Court denied the claim of corporations to the privileges and immunities of citizenship, as a corporation is “a mere creation of local law.”<sup>42</sup>

The Supreme Court – with exceptions during the substantive due process era characterized by *Lochner v. New York*<sup>43</sup> – continued through most of the 20th century to distinguish between the rights of people and corporations. In *Asbury Hospital v. Cass County*, for example, the Court, citing numerous cases and without dissent, rejected a constitutional

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<sup>35</sup> *Bank of Augusta v. Earle*, 38 U.S. 519 (1839).

<sup>36</sup> *Paul v. Virginia*, 75 U.S. 168 (1868) (overruled in unrelated part by *United States v. South-Eastern Underwriters Ass’n*, 322 U.S. 533 (1944)).

<sup>37</sup> *Paul*, 75 U.S. at 177 (“The term citizens as there used applies only to natural persons, members of the body politic, owing allegiance to the State, not to artificial persons created by the legislature, and possessing only the attributes which the legislature has prescribed.”); *Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania*, 125 U.S. 181, 187 (1888) (“Corporations are not citizens within the meaning of that [privileges and immunities] clause. This was expressly held in *Paul v. Virginia*.”); *Asbury Hosp. v. Cass County*, 326 U.S. 207, 210-11 (1945) (corporation is “neither a citizen of a state nor of the United States within the protection of the privileges and immunities clauses of Article IV, § 2 of the Constitution and the Fourteenth Amendment.”).

<sup>38</sup> *Bank of Augusta*, 38 U.S. at 587.

<sup>39</sup> *Id.* at 586-90.

<sup>40</sup> *But see* *McConnell v. FEC*, 540 U.S. 93, 257-58 (2003) (Scalia, J. dissenting). *Compare* *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 548 (1933) (Brandeis, J., dissenting) (“The prevalence of the corporation in America has led men of this generation to act, at times, as if the privilege of doing business in corporate form were inherent in the citizen; and has led them to accept the evils attendant upon the free and unrestricted use of the corporate mechanism as if these evils were the inescapable price of civilized life, and, hence, to be borne with resignation.”)

<sup>41</sup> *Paul*, 75 U.S. at 181-82.

<sup>42</sup> *Id.* at 181.

<sup>43</sup> *Lochner v. New York*, 198 U.S. 45 (1905) (overruled by *Day-Brite Lighting Inc. v. Missouri*, 342 U.S. 421 (1952)).

challenge to a state law requiring corporations holding land suitable for farming to sell the land within ten years.<sup>44</sup> Five years later, the Court again emphasized the “public attributes” of corporations in turning aside corporate privacy claims:

[C]orporations can claim no equality with individuals in the enjoyment of a right to privacy. They are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities.<sup>45</sup>

The Court has recognized, in a limited fashion, assertions of corporate rights, such as those under the Fourth Amendment.<sup>46</sup> As the Court has observed, however, a corporation has lesser Fourth Amendment rights because:

Congress may exercise wide investigative power over them, analogous to the visitorial power of the incorporating state, when their activities take place within or affect interstate commerce. Correspondingly it has been settled that corporations are not entitled to all of the constitutional protections which private individuals have in these and related matters.<sup>47</sup>

Accordingly, “it cannot be disputed that the mere creation of a corporation does not invest it with all the liberties enjoyed by natural persons. . . .”<sup>48</sup>

A decade after the Supreme Court’s controversial, 5-4 invalidation of Massachusetts’s restrictions on corporate expenditures in certain state referenda in *First National Bank of Boston v. Bellotti*,<sup>49</sup> the Court stepped back from its disregard of the statutory nature of the corporate entity, and rejected a Commerce Clause challenge to an anti-takeover statute.<sup>50</sup> Quoting *Dartmouth College* and noting Justice Rehnquist’s dissent in *Bellotti*, the Court concluded: “It thus is an accepted part of the business landscape in this country for States to create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares.”<sup>51</sup> The First Amendment and the Commerce Clause obviously implicate different constitutional interests but the Court’s insight in *CTS Corporation v. Dynamics Corporation of America* is correct. Nothing in the First Amendment requires that states, Congress, and the Court ignore the capacity of the “speaker” when that very capacity exists as a result of government policy.

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<sup>44</sup> *Asbury Hosp. v. Cass County*, 326 U.S. 207 (1945).

<sup>45</sup> *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (citations omitted).

<sup>46</sup> *See GM Leasing Corp. v. United States*, 429 U.S. 338, 353 (1977) (corporations have “some Fourth Amendment rights”); Carl Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577, 664-67 (1990).

<sup>47</sup> *Oklahoma Press Publ’g Co. v. Walling*, 327 U.S. 186, 204-05 (1946) (footnotes omitted).

<sup>48</sup> *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 823 (1978) (citing *United States v. White*, 322 U.S. 694, 698-701 (1944)). *See also* *Northwestern Nat. Life Ins. Co. v. Riggs*, 203 U.S. 243, 255 (1906) (“The liberty referred to in that [Fourteenth] Amendment is the liberty of natural, not artificial, persons.”)

<sup>49</sup> *Bellotti*, 435 U.S. 765.

<sup>50</sup> *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69 (1987).

<sup>51</sup> *Id.* at 89-91.

### III. THE ERRONEOUS CORPORATE RIGHTS DOCTRINE: FIRST AMENDMENT CORPORATE “SPEECH” AND FOURTEENTH AMENDMENT “PERSONS”

While *CTS Corporation*, *Austin*, *McConnell*, and other campaign finance cases have suggested that the Supreme Court might remain focused on essential differences between corporations and people for purposes of constitutional rights, as *Bellotti* shows, the Court has hardly been consistent in its reaction to corporate demands upon the Court’s extraordinary power to invalidate democratic enactments. The most notorious examples of the Court’s responsiveness to such demands may be the substantive due process era that followed the Court’s declaration at the turn of the 20th century that corporations are “persons” under the Fourteenth Amendment’s protection of the life, liberty, and property of persons. The path to *Citizens United*, however, follows less from the discredited substantive due process era at the beginning of the 20th century and more from the fabrication beginning in the late 1970s of a corporate rights/commercial speech doctrine under the First Amendment. The next sections of this Issue Brief examine in turn the Court’s creation of corporate rights under the First and Fourteenth Amendments.

#### A. The First Amendment

The development by a divided Supreme Court of unprecedented First Amendment protections for “commercial speech” and, increasingly, of corporate political participation, are the newest and least supportable ventures toward a corporate rights doctrine unhinged from the meaning and history of the Constitution.<sup>52</sup> For 200 years, the First Amendment did not require the invalidation of state and federal laws that a majority of the Court deemed too restrictive of corporate marketing strategies, nor did the First Amendment prevent restrictions on corporate expenditures to influence elections. In the mid-1970s, however, the Supreme Court began to develop an unprecedented “commercial speech” doctrine. First, the Court invalidated a state prohibition on abortion advertising in *Bigelow v. Virginia*.<sup>53</sup> As a result, the Court decided that “the notion of unprotected ‘commercial speech’ all but passed from the scene,” and invalidated a state law regulating pharmaceutical price advertising.<sup>54</sup> Justice Rehnquist dissented, stating that “nothing in the United States Constitution . . . requires the Virginia Legislature to hew to the teachings of Adam Smith. . . .”<sup>55</sup>

Until *Bellotti*, the First Amendment had never barred regulation of corporate political activity. Following the decision in *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council*, however, corporations began aggressively to push for the creation of corporate rights, consistent with a strategy advocated by Lewis Powell as a private attorney advising the Chamber of Commerce before his appointment to the Court.<sup>56</sup> In 1978, several large corporations challenged a Massachusetts prohibition on corporate expenditures to influence ballot questions,

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<sup>52</sup> The First Amendment provides “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I.

<sup>53</sup> *Bigelow v. Virginia*, 421 U.S. 809 (1975).

<sup>54</sup> *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 759 (1976).

<sup>55</sup> *Id.* at 784.

<sup>56</sup> The background of the 1971 Lewis Powell memorandum and the text of the memorandum itself are available at [http://www.reclaimdemocracy.org/corporate\\_accountability/powell\\_memo\\_lewis.html](http://www.reclaimdemocracy.org/corporate_accountability/powell_memo_lewis.html).

except questions “materially affecting any of the property, business or assets of the corporation.”<sup>57</sup> Mindful of *Virginia Pharmacy* and of the Court’s holding in *Buckley v. Valeo*<sup>58</sup> that equated spending money in elections with speech, the Massachusetts Supreme Judicial Court nevertheless rejected the challenge, making the uncontroversial observation that “a corporation does not have the same First Amendment rights to free speech as those of a natural person. . . .”<sup>59</sup>

In an opinion authored by the now-Justice Powell, the Court reversed. Citing First Amendment cases that happened to involve parties that were corporations, the Court labeled the Massachusetts arguments “extreme” and “an artificial mode of analysis.”<sup>60</sup> Justice Rehnquist disagreed with that assessment:

A State grants to a business corporation the blessings of potentially perpetual life and limited liability to enhance its efficiency as an economic entity. It might reasonably be concluded that those properties, so beneficial in the economic sphere, pose special dangers in the political sphere.<sup>61</sup>

Justice Rehnquist continued to dissent in subsequent “corporate speech” cases. Nevertheless, the Supreme Court and lower courts, with monotonous regularity, increasing aggressiveness, and an undisguised hostility to legislative and regulatory judgments, used this newly-minted corporate rights doctrine to strike down democratically enacted state and federal laws and regulations. Even a partial list shows the range of regulations falling to the new corporate rights doctrine, from those concerning clean and fair elections; to environmental protection and energy; to tobacco, alcohol, pharmaceuticals, and health care; to consumer protection, lottery, and gambling; to race relations, and much more.<sup>62</sup>

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<sup>57</sup> *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

<sup>58</sup> *Buckley v. Valeo*, 424 U.S. 1, 14 (1976).

<sup>59</sup> *First Nat’l Bank of Boston v. Attorney General*, 359 N.E. 2d 1262, 1270 (1977).

<sup>60</sup> *Bellotti*, 435 U.S. at 778-79 & n.14.

<sup>61</sup> *Id.* at 825-26.

<sup>62</sup> *See Bellotti*, 435 U.S. 765; *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) (as applied to issue advocacy advertisements of non-profit corporation, BCRA held to violate First Amendment); *Thompson v. Western States Med. Ctr.*, 535 U.S. 357 (2002) (federal restriction on advertising of compounded drugs invalidated); *Lorillard v. Reilly*, 533 U.S. 525 (2001) (Massachusetts regulations of tobacco advertising targeting children invalidated); *Greater New Orleans Broad. Ass’n, Inc. v. United States*, 527 U.S. 173 (1999) (federal restriction on advertising of gambling and casinos held unconstitutional); *44 LiquorMart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (Rhode Island law restricting alcohol price advertising invalidated); *Robert E. Rubin, Secretary of the Treasury v. Coors Brewing Co.*, 514 U.S. 476 (1995) (federal restriction on advertising alcohol level in beer invalidated); *City of Cincinnati v. Discovery Network Inc.*, 507 U.S. 410 (1993) (municipal application of handbill restriction to ban news racks for advertising circulars on public property held unconstitutional); *Pacific Gas & Elec. Co. v. Pub. Util. Comm’n of California*, 475 U.S. 1 (1986) (invalidating California rule that utility corporation must make bill envelopes, which are property of ratepayers, available for other points of view besides that of the corporation); *Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557 (1980) (New York rule restricting advertising that promotes energy consumption invalidated); *Bellsouth Telecomm., Inc. v. Farris*, 542 F.3d 499 (6th Cir. 2008) (Kentucky may prohibit collection of tax on telecommunication corporation from customers may not prohibit corporation’s representation of tax on customers’ bills); *Allstate Ins. Co. v. Abbott*, 495 F.3d 151 (5th Cir. 2007) (Texas law regulating advertising of auto body shops tied to auto insurers invalidated); *This That & the Other Gift & Tobacco, Inc. v. Cobb County, Georgia*, 439 F.3d 1275 (11th Cir. 2006) (Georgia ban on advertisements of sexual devices invalidated); *Passions Video, Inc. v. Nixon*, 458 F.3d 887 (8th Cir. 2006)

Moving well beyond the unsoundness of including “commercial speech” in the First Amendment, the Court’s current venture to the precipice of full corporate First Amendment rights in *Citizens United* disregards a fundamental distinction between a “corporate regulation case” and a “speech case.” State requirements that corporations file annual registration papers and fees, or that public corporations comply with SEC filing and statement requirements, along with many more examples of corporate regulations, do not implicate First Amendment interests. Rather, these regulations reflect what seems obvious: legislatures may apply rules to the use of the corporate form itself where the legislature decides such rules advance the policy goals sought to be achieved by the legislature in permitting the corporate form in the first place.

In *Bellotti*, the Massachusetts legislature determined that corporations would unfairly taint a fair vote in a people’s referendum about whether the state would enact personal, not corporate, income taxes, and thus prohibited the use of corporate treasuries to influence such a referendum. This applied only to corporations as corporations, and it did not apply to any person, whether a shareholder, officer, director, or any other person. In contrast, not one of the First Amendment “speech” cases cited in *Bellotti* involved a regulation directed at problems found by a legislature to arise from the corporate form itself.<sup>63</sup> None concerned a law distinguishing between corporations and people. The speech cases cited in *Bellotti* happened to involve corporate parties but they concerned speech restrictions that had nothing to do with whether the speech was promoted by a corporation.<sup>64</sup>

Justice Powell’s majority opinion in *Bellotti* argued that “the inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union or individual.”<sup>65</sup> Legislative action directed at

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(Missouri statute restricting advertisements of sexually explicit businesses invalidated); *Bad Frog Brewery v. N.Y. State Liquor Auth.*, 134 F.3d 87, 91 & n.1 (2d Cir. 1998) (New York regulation barring beer bottle label with gesture described by the Court as “acknowledged by Bad Frog to convey, among other things, the message ‘fuck you’” held unconstitutional); *Int’l Dairy Foods Assoc. v. Amestoy*, 92 F.3d 67 (2d Cir. 1996) (Vermont law requiring disclosure on label of dairy products containing milk from cows treated with bovine growth hormones invalidated); *New York State Ass’n of Realtors, Inc. v. Shaffer*, 27 F.3d 834 (2d Cir. 1994) (invalidating New York law authorizing the Secretary of State to declare “non solicitation” zones for real estate brokers); *Sambo’s Rest., Inc. v. City of Ann Arbor*, 663 F.2d 686 (6th Cir. 1981) (First Amendment allows corporation to break agreement with City and use name found to be deeply offensive and carry prejudicial meaning to African Americans); *John Donnelly & Sons v. Campbell*, 639 F.2d 6 (1st Cir. 1980) (invalidating Maine law restricting billboard pollution, even though law allowed (and paid for) commercial signs put up by state of uniform size at exits and visitors centers); *Washington Legal Found. v. Friedman*, 13 F. Supp. 2d 51 (D.D.C. 1998) (invalidating federal law regulating drug manufacturers’ use of journal reprints and drug corporation-sponsored educational seminars to promote off-label uses for prescription drugs); *Equifax Services Inc. v. Cohen*, 420 A. 2d. 189 (Me. 1980) (invalidating portions of Maine credit reporting statute as First Amendment violation). Many more such cases may be found in the state and federal reports.

<sup>63</sup> See *Bellotti*, 435 U.S. at 778 & n.14.

<sup>64</sup> Ironic perhaps is the kindest word to apply to the *Bellotti* Court’s citation of *National Assoc. of Colored People, Inc. v. Button*, 372 U.S. 415 (1963), to support the creation of corporate rights to influence elections. *NAACP* was an extraordinary case inseparable from the Court’s effort to protect not only the civil rights of African Americans but also the very authority of the Court itself. See *NAACP*, 372 U.S. at 436 & n.16 (nearly a decade after *Brown v. Board of Education*, 347 U.S. 483 (1954), and despite the intense school desegregation efforts of the NAACP, “only 1/2 of 1% of Virginia’s Negro public school pupils attend school with whites). In other words, in *NAACP*, the Court sought to protect an oppressed minority and to vindicate the core purpose of the Fourteenth Amendment, not to create First Amendment rights for corporations.

<sup>65</sup> *Bellotti*, 435 U.S. at 777.

corporations, however, has nothing to do with the worth of particular speech but rather with a particular statutory capacity through which certain people wish to promote their speech. Where that capacity exists only as a result of government policy, even-handed regulation based on “what” (not “who”) speaks rather than on what the speaker is saying, is appropriate and even commonplace.

For example, municipal corporations – which are “persons” for some purposes – have no First Amendment right to spend municipal funds to support candidates, oppose perceived enemies, or influence ballot questions.<sup>66</sup> The Hatch Act restricts the political activity of certain government employees.<sup>67</sup> Our Armed Forces accept the obligations of political neutrality without complaint.<sup>68</sup> Corporate capacity, as with other government-created capacities, may carry statutory restrictions on political activity.

Finally, some point out that unlike the Fourteenth Amendment, the First Amendment does not refer to persons but prohibits Congressional infringement of the freedom of speech and of “the press.” While true, that is beside the point. The First Amendment would clearly prevent suppression of “the press,” whether a corporation or not. Regardless of whether the *New York Times*, PBS, and other media are operated by people using the corporate form, the media are “press” under the First Amendment, and are not subject to restriction of expression or press activities.

One must distinguish, however, between even-handed government regulation of the use of the corporate form itself and government restriction of speech or the press. Corporations that meet the constitutional definition of press are not relieved of the duty to comply with laws regulating corporations. It is not an infringement on the freedom of the press to make the New York Times Company, a publicly-listed corporation, file its SEC statements or comply with securities “black-out” rules about public statements. Both legislatures and the Court are perfectly capable of distinguishing between corporate-funded campaign electioneering communications and the content, whether political or not, of the press and media. With the quickly evolving nature of the media, journalism, and news, defining “press” is increasingly complicated, but that does not require legislatures and courts to pretend that all corporations become “press” whenever their executives want to influence the outcome of our elections.

## B. The Fourteenth Amendment

No question thought to be settled is as unsettled as the assumption that a corporation can be a person under the Fourteenth Amendment.<sup>69</sup> Despite frequent mis-citation, even by the

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<sup>66</sup> See *Creek v. Village of Westhaven*, 80 F.3d 186, 192-93 (7th Cir. 1996); *Anderson v. City of Boston*, 380 N.E.2d 628 (Mass. 1978).

<sup>67</sup> 5 U.S.C. §§ 7321-7326; 5 U.S.C. §§ 1501-1508.

<sup>68</sup> See Dep’t of Defense Directive 1344.10, *Political Activities By Members of the Armed Forces*, Feb. 19, 2008, [www.dtic.mil/whs/directives/corres/pdf/134410p.pdf](http://www.dtic.mil/whs/directives/corres/pdf/134410p.pdf), accessed 2009-7-24.

<sup>69</sup> Section 1 of the Fourteenth Amendment provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor

Supreme Court on numerous occasions, *Santa Clara County v. Southern Pacific Railroad Co.*<sup>70</sup> did not decide or even reach that question. Indeed, *Santa Clara* did not decide *any* federal constitutional question. As Justice Harlan’s unanimous opinion for the Court made unmistakably clear, the Court decided the case based on California state law concerning the tax assessment at issue. Despite Justice Field’s eagerness to reach the issue while sitting as a member of the Circuit Court that considered the case below, the Supreme Court explicitly and repeatedly declined to decide that Fourteenth Amendment question in *Santa Clara*:

It results that the court below might have given judgment in each case for the defendant upon the ground that the assessment, which was the foundation of the action, included property of material value, which the State Board was without jurisdiction to assess, and the tax levied upon which cannot, from the record, be separated from that imposed upon other property embraced in the same assessment. *As the judgment can be sustained upon this ground it is not necessary to consider any other questions raised by the pleadings and the facts found by the court.*<sup>71</sup>

Following *Santa Clara*, in five opinions authored by Justice Field between 1888 and 1892, the Supreme Court simply asserted the proposition, without explanation, that the Fourteenth Amendment applied to corporations. In none of the cases did the Court actually find any Fourteenth Amendment violation, and in each case rejected the claims of the corporations. The *complete* analysis of the Fourteenth Amendment “person” issue from all of these cases combined is as follows:

- “Under the designation of ‘person’ there is no doubt that a private corporation is included. Such corporations are merely associations of individuals united for a special purpose, and permitted to do business under a particular name, and have a succession of members without dissolution. As said by Chief Justice Marshall: ‘The great object of a corporation is to bestow the character and properties of individuality on a collective and changing body of men.’ *Bank v. Billings*, 4 Pet. 514, 562.”<sup>72</sup>

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shall any State deprive any person or life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV. *Citizens United* concerns BCRA, a *federal* statute. Overruling *Austin*, however, effectively would invalidate laws restricting corporate political expenditures in 24 states, and would raise significant Fourteenth Amendment and federalism issues. *Bellotti*, 435 U.S. at 826 & n.6 (Rehnquist, J., dissenting).

<sup>70</sup> *Santa Clara County v. Southern Pac. R.R. Co.*, 118 U.S. 394 (1886).

<sup>71</sup> *Id.* at 416 (emphasis added); *see also id.* at 410 (“These questions belong to a class which this court should not decide, unless their determination is essential to the disposal of the case in which they arise.”).

<sup>72</sup> *Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania*, 125 U. S. 181, 188-89 (1888) (holding that Pennsylvania law assessing tax on Pennsylvania office of Colorado corporation *did not* violate the Commerce Clause, the Privileges and Immunities Clause, or the Due Process or Equal Protection Clauses of the Fourteenth Amendment).

- “It is conceded that corporations are persons within the meaning of the amendment. *Santa Clara Co. v. Railroad Co.*, 118 U.S. 394, 6 Sup. Ct. Rep. 1132; *Milling Co. v. Pennsylvania*, ante, 737.”<sup>73</sup>
- “It is contended by counsel as the basis of his argument, and we admit the soundness of his position, that corporations are persons within the meaning of the clause in question. It was so held in *Santa Clara Co. v. Railroad Co.*, 118 U.S. 394, 396, 6 S. Sup. Ct. Rep. 1132, and the doctrine was reasserted in *Mining Co. v. Pennsylvania*, 125 U.S. 181, 189, 8 S. Sup. Ct. Rep. 737. We admit also, as contended by him, that corporations can invoke the benefits of provisions of the constitution and laws which guaranty to persons the enjoyment of property, or afford to them the means for its protection, or prohibit legislation injuriously affecting it.”<sup>74</sup>
- “Private corporations are persons, within the meaning of the amendment. It has been so held in several cases by this court. *Santa Clara Co. v. Railroad Co.*, 118 U.S. 394, 6 Sup. Ct. Rep. 1132; *Mining Co. v. Pennsylvania*, 125 U.S. 181, 189, 8 Sup. Ct. Rep. 737; *Railroad Co. v. Beckwith*, 129 U.S. 26, 9 Sup. Ct. Rep. 207.”<sup>75</sup>

In several cases later involving corporate claims of due process rights, the Court simply stated, again without explanation, that corporations were entitled to make Fourteenth Amendment claims that by the wording of the amendment are reserved to “persons.”<sup>76</sup> A bold but doubtful constitutional stretch thus passed from hotly contested outside the Supreme Court to “settled” with virtually no explanation.<sup>77</sup>

Not until 1938 would an opinion, albeit a dissenting opinion, thoroughly review the issue. Justice Hugo Black’s dissent in *Connecticut Life Insurance Co. v. Johnson*<sup>78</sup> might today be

<sup>73</sup> *Missouri Pac. Ry. Co. v. Mackey*, 127 U.S. 205, 209-10 (1888) (holding that Kansas workplace injury liability law *did not* violate the Due Process or Equal Protection Clauses); *see also* companion case, *Minneapolis & St. Louis Ry. Co. v. Herrick*, 127 U.S. 210 (1888) (same result).

<sup>74</sup> *Minneapolis & St. Louis Ry. Co. v. Beckwith*, 129 U.S. 26, 28 (1889) (holding that Iowa law providing for payment of damages where animals killed by train passing where railroad failed to fence *did not* violate the Equal Protection Clause and is a valid exercise of the police power of the state).

<sup>75</sup> *Charlotte C & A Ry. Co. v. Gibbes*, 142 U.S. 386 (1892) (holding that South Carolina law assessing railroad corporations in order to pay for Railroad Commission *did not* violate the Fourteenth Amendment and was within the state’s regulatory power).

<sup>76</sup> *See Kentucky Fin. Corp. v. Paramount Auto Exch. Corp.*, 262 U.S. 544 (1923) (Kentucky Finance Corporation “was a ‘person’ within the meaning of both the due process clause and the equal protection clause of the Fourteenth Amendment.”) (Van Devanter, J., for the Court; Brandeis, J., joined by Holmes, J., dissented on grounds that the hearings prior to the judge’s application of a reasonable discovery mechanism satisfied due process); *Gulf C & S.F. Ry. Co. v. Ellis*, 165 U.S. 150 (1897) (“It is well settled that corporations are persons within the provisions of the fourteenth amendment of the constitution of the United States.”); *Covington & Lexington Tpk. Rd. Co. v. Sandford*, 164 U.S. 578 (1896) (“It is now settled that corporations are persons, within the meaning of the constitutional provisions forbidding the deprivation of property without due process of law, as well as a denial of the equal protection of the laws.”).

<sup>77</sup> *Cf. First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 822-23 (1978) (Rehnquist, J., dissenting) (“This Court decided at an early date, with neither argument nor discussion, that a business corporation is a “person” entitled to the protection of the Equal Protection Clause of the Fourteenth Amendment.”)

<sup>78</sup> *Connecticut Life Ins. Co. v. Johnson*, 303 U.S. 77 (1938).

considered an “originalist” approach to examining whether, in fact, a corporation is a “person” within the meaning of the Due Process and Equal Protection Clauses.<sup>79</sup> Justice Black’s dissent carefully reviewed the words, context, and history of the Fourteenth Amendment, and concluded there is no basis to view a corporation as a person entitled to protections of the Due Process and Equal Protection Clauses. Justice Black concluded, “this Court should now overrule previous decisions which interpreted the Fourteenth Amendment to include corporations.”<sup>80</sup>

The notion that the Fourteenth Amendment can be interpreted to include corporations within the Amendment’s references to “persons” does not stand up to examination.<sup>81</sup> Indeed, if the Roberts Court is determined to maintain its activist approach and rejection of *stare decisis*, one is tempted to suggest that the justices would find the Fourteenth Amendment “person” issue to offer far more fertile ground for restoration of original constitutional principle than seeking to reverse a long-held and sound constitutional consensus, grounded in history and the words of the document, that Congress and the States may, if they choose to do so, restrict corporate expenditures directed at influencing the outcome of elections.

#### IV. CONCLUSION

As the public alarm about the possibility of overruling *McConnell* and *Austin* and the historical American concern about corporate corruption of the democratic process illustrate, it is unlikely that the American people will accept with equanimity a decision in *Citizens United* that would immunize corporations from democratic control. Over time, a new judicial willingness to examine the fundamental underlying question of the nature of a corporation may yet emerge. In the September 2009 re-argument of *Citizens United*, Justices Stevens, Ginsberg, and Breyer all suggested a questioning of the assumption that a corporation as a corporation has full fundamental rights, and in her first appearance on the Court, Justice Sotomayor stated:

Going back to the question of *stare decisis*, the one thing that is very interesting about this area of law for the last 100 years is the active involvement of both State and Federal legislatures in trying to find that balance between the interest of protecting in their views how the electoral process should proceed and the interests of the First Amendment. And so my question to you is, once we say they can’t, except on the basis of a compelling government interest narrowly tailored, are we cutting off or would we be cutting off that future democratic process? *Because what you are suggesting is that the courts who created corporations as persons, gave birth*

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<sup>79</sup> Justice Scalia maintains that he and Justice Thomas are “originalists” and that on the Court, “Originalism is in the game, even if it does not always prevail.” To Justice Scalia, originalism focuses on “what the text was thought to mean when the people adopted it” and is hostile to “constitutional evolutionism [that] has, so to speak, metastasized, infecting courts around the world.” ORIGINALISM: A QUARTER CENTURY OF DEBATE 43-45, (Steven G. Calabresi, ed., Foreword by Antonin Scalia, Regnery 2007).

<sup>80</sup> *Connecticut Life Ins. Co.*, 303 U.S. at 85.

<sup>81</sup> *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 581 (1949) (Douglas, J. dissenting); *Connecticut Life Ins. Co.*, 303 U.S. at 85-86 (Black, J., dissenting) (“Neither the history nor the language of the Fourteenth Amendment justifies the belief that corporations are included within its protections.”); *Slaughter-House Cases*, 83 U.S. 36 (1872); MORTON J. HOROWITZ, *THE TRANSFORMATION OF AMERICAN LAW (1870-1960)* (Oxford Univ. Press, Inc. 1992); Mayer, *supra*, note 46.

*to corporations as persons, and there could be an argument made that that was the Court's error to start with, not Austin or McConnell, but the fact that the Court imbued a creature of State law with human characteristics.*<sup>82</sup>

Considering that Americans have amended the Constitution repeatedly since the Civil War to expand rather than dilute democratic participation of people in elections, and considering the increasing challenges to concepts of corporate rights, it is likely that no matter how *Citizens United* is decided, many will seek, whether through amendment or judicial correction, to end the misuse of the First Amendment by corporations to evade and invalidate democratically enacted reforms and public welfare measures. By ending corporate misuse of the First Amendment, the First Amendment would be restored to its meaning and intent for two centuries: to ensure that all people have the most robust freedom of conscience, speech, and debate and that a vibrant, diverse press remains free and unfettered, thus strengthening, rather than weakening, democracy.

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<sup>82</sup> Official Transcript, *Citizens United v. FEC* (08-205), Sept. 8, 2009, at 33 (emphasis added).