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# SWIFT BOAT CAPTAINS OF INDUSTRY FOR TRUTH: *CITIZENS UNITED* AND THE ILLOGIC OF THE NATURAL PERSON THEORY OF CORPORATE PERSONHOOD

MATTHEW J. ALLMAN*



## I. INTRODUCTION

In the 2004 presidential election, a group known as Swift Boat Veterans for Truth released a series of television advertisements calling into question the military service of Democratic candidate John Kerry. These advertisements disputed the honesty and patriotism of Senator Kerry and even challenged the legitimacy of the medals he earned during his service in the Vietnam War.[1] The claims made in these advertisements were eventually exposed to be false or misleading, and they were criticized by Democratic and Republican leadership alike.[2] Indeed, this attack on Senator Kerry's patriotism is one of the most reviled examples of dishonest partisanship in the modern electoral era. Nonetheless, the Swift Boat advertisements are widely thought to have affected the outcome of the election.[3]

Swift Boat Veterans for Truth is a political organization chartered under section 527 of the U.S. Tax Code. These groups are funded by contributions from individual citizens and can spend unlimited amounts of money on campaign advertisements, so long as they do not expressly advocate the election or defeat of specific candidates.[4]

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1. The advertisements produced by Swift Boat Veterans for Truth can be found at the organization's website. *See TV Ads and Videos*, SWIFT VETS AND POWS FOR TRUTH, http://horse.he.net/~swiftpow/index.php?topic=Ads (last visited Mar. 18, 2011).

2. *See*, *e.g.*, Kate Zernike & Jim Rutenberg, *Friendly Fire: The Birth of an Anti-Kerry Ad*, N.Y. TIMES, Aug. 20, 2004, http://www.nytimes.com/2004/08/20/politics/campaign/20swift.html (noting that "on close examination, the accounts of Swift Boat Veterans for Truth prove to be riddled with inconsistencies").

3. *See*, *e.g.*, Kelley Beaucar Vlahos, *Conservatives Laud Swift Boat Veterans*, FOX NEWS.COM (Feb. 16, 2005), http://www.foxnews.com/story/0,2933,147728,00.html.

4. *See* 26 U.S.C. § 527 (2006).

In the 2004 election cycle, Swift Boat Veterans for Truth raised $27 million worth of individual contributions, of which they spent $24 million.[5]

While the Swift Boat Veterans were allowed to raise and spend these vast amounts of money on their attack ads, federal law had long prohibited corporations and unions from doing the same. Specifically, the Federal Election Campaign Act prohibited corporations from using their general treasury funds to expressly advocate the election or defeat of a candidate, contribute directly to a candidate's campaign fund, or release "electioneering communications"—advertisements that discuss candidates for federal office but do not expressly advocate their election or defeat.[6] These restrictions on corporate spending ability were upheld by the U.S. Supreme Court on numerous occasions.[7]

This body of campaign finance law was recently turned on its head by the Court's decision in *Citizens United v. Federal Election Commission* (FEC).[8] In this landmark case, the Court struck down the prohibitions against using corporate funds for electioneering communications and express advocacy.[9] To reach this outcome, the Court equated the legal and actual identity of corporations and natural persons under the First Amendment.[10] In so doing, the Court paid homage to a theory of corporate personhood known as the "natural person theory," which sees the existence of human beings and corporations as legally and factually indistinguishable.[11] The Court's reliance on the natural person theory is misplaced for three major reasons: first, the theory is divorced from observable reality; second, the theory is logically incoherent; and third, the theory is inconsistent with the meaning and purpose of the Constitution.

While it is too early to discern the full impact of the *Citizens United* decision, there is much cause for concern. The potential torrent of corporate funding that may now enter the electoral system could reduce our leaders' accountability to the larger public and undermine the government's ability to hold elections free of corruption and improper influence. As previously mentioned, Swift Boat Veterans for

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5. Scott Helman, *'Soft Money' Battle Brewing: Millions Raised; Attack Ads Set*, BOSTON GLOBE (Apr. 6, 2008), http://www.boston.com/news/nation/articles/2008/04/06/soft_money_battle_brewing/

6. *See* 2 U.S.C. § 441b (2006).

7. For examples, see, e.g., McConnell v. FEC, 540 U.S. 93 (2003) and Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990), discussed in Part III *infra*.

8. 130 S. Ct. 876 (2010).

9. *See id.* at 917.

10. *Id.* at 900.

11. This model is also referred to as the "natural entity" or "real entity" theory. Phillip I. Blumberg, *The Corporate Entity in an Era of Multinational Corporations*, 15 DEL. J. CORP. L. 283, 295 (1990).

Truth spent roughly $24 million on a series of advertisements that arguably affected the outcome of the election. In 2007 alone, ExxonMobil reported profits of over $40 billion.[12] What will happen if companies of this size divert portions of their massive war chests to electioneering efforts? It is not difficult to envision the voices of average Americans being hopelessly drowned out.

Furthermore, there is no telling what other kinds of socially useful legislation will now be invalidated under the principle that corporations and persons have equivalent First Amendment speech rights. The further the *Citizens United* principle is extended, the more the federal and state governments will cede the power to regulate for the public good. Armed with the *Citizens United* precedent, industry leaders are now in a position to do some "swiftboating" of their own, and the American people are just along for the ride.

Part II of this Note will examine the three major legal theories of corporate personhood and provide examples of their use in the Court's jurisprudence. Part III will examine the use of these theories in the Court's campaign finance decisions. This section will attempt to demonstrate that the bulk of the Court's campaign finance jurisprudence adheres to the artificial person theory, a model that sees corporations and people as legally distinct and supports state regulatory powers.[13] Part IV will examine the *Citizens United* decision itself as well as the Court's implicit reliance on the more antiregulatory natural person theory. Part V of the article will expose the realistic, logical, and historical flaws of the natural person theory and argue that *Citizens United* was wrongly decided. Finally, Part VI will explore the potential impacts of *Citizens United*.

## II. LEGAL THEORIES OF CORPORATE PERSONHOOD

Throughout its jurisprudence, the U.S. Supreme Court has utilized three general theories of corporate personhood: the artificial person theory, the aggregate person theory, and the natural person theory. These three theories cover a wide range of ideology on the topic of corporate personhood. At one end of the spectrum is the artificial person theory, which posits that corporations are not really persons at all, but rather inanimate creatures of the law.[14] At the opposite end of the continuum is the natural person theory, which treats corporations as actual persons.[15] Often, the Court's use of these theories is confused or intermixed. A good example of this phenomenon is the

12. David Ellis, *Exxon Shatters Profit Records*, CNNMONEY.COM (Feb. 1, 2008, 2:26 PM), http://money.cnn.com/2008/02/01/news/companies/exxon_earnings/.

13. *See* Blumberg, *supra* note 11, at 292-93.

14. *See id.*

15. *Id.* at 295.

Court's holding in *Hale v. Henkel*.[16] In one portion of the majority opinion, the Court held that corporations are not persons under the meaning of the Fifth Amendment privilege against self-incrimination, noting that "the corporation is a creature of the state. . . . presumed to be incorporated for the benefit of the public."[17] Elsewhere in the opinion, the Court used the aggregate person theory[18] to decide that corporations are people for purposes of the Fourth Amendment protection from unreasonable searches, stating that "[a] corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity."[19] Despite this occasional confusion, however, the Court's view on corporate personhood usually can be traced to one of the three major theories.

### *A. Artificial Person Theory*

The artificial person theory (also known as the concession theory) is premised on the notion that corporations are fictional entities dependant on the state for their existence.[20] Under this model, corporations are not really people at all. Instead, their occasional classification as people is merely a tool of economic and judicial convenience. The artificial person theory thus recognizes a stark distinction between tangible natural citizens and intangible business entities. Under this view, a corporation is "an artificial creation of human beings and the law . . . . [given] personhood status solely as a legal fiction to facilitate commerce."[21]

A second, and perhaps more important, aspect of the artificial person theory is its view of the relationship between the corporation and the state. Under this model, the corporation has no existence outside of the law; without the law's consent, the corporation simply does not exist (hence the term "concession theory").[22] The artificial person theory characterizes corporations as "the creation of the legislature, owing [their] existence to state action, rather than to the acts of [their] shareholder-incorporators."[23] The logical extension of this view is that corporate rights are limited to those granted in corporate charters, rather than those possessed by natural persons.[24]

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16. 201 U.S. 43 (1906).
17. *Id*. at 74.
18. *See* Blumberg, *supra* note 11, at 293-94.
19. *Hale*, 201 U.S. at 76.
20. Susanna K. Ripken, *Corporations Are People Too: A Multi-Dimensional Approach to the Corporate Personhood Puzzle*, 15 FORDHAM J. CORP. & FIN. L. 97, 106-07 (2009).
21. *Id*. at 106.
22. *Id*. at 107.
23. *See* Blumberg, *supra* note 11, at 292.
24. Ripken, *supra* note 20, at 108 (claiming that, under the artificial person theory, "[w]hat the state can give, the state can take away"); *see also* Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 587 (1839) (noting that "[t]he only rights [a corporation] can claim are

The artificial person theory was the prevailing mode of legal analysis in the period between the ratification of the Constitution and the mid-to-late nineteenth century.[25] The Court's jurisprudence during this era reflected uneasiness about corporations and their ability to amass wealth. As such, many of the Court's early decisions recognize sharp distinctions between the rights of corporations and natural persons and uphold broad congressional and state regulatory powers.[26]

The most prominent example of the artificial person theory in the entirety of the Court's jurisprudence comes from the 1819 decision of *Trustees of Dartmouth College v. Woodward*.[27] In this case, the Court considered the legal status of the charter of Dartmouth College. In a now famous passage, Chief Justice Marshall paid homage to the artificial person theory, stating that "[a] corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. . . . [that] possesses only those properties which the charter of its creation confers upon it."[28] Through this statement, the Court made clear that corporations stand on a different legal footing than natural citizens; they are neither "Citizens" nor part of "We the People" as described in the Constitution.[29]

This understanding of corporate status was also reinforced by the Court's early Article III jurisprudence. In this line of cases, the Court was tasked with determining how corporations would be allowed standing to sue (and be sued) on behalf of their members, given that Article III refers only to "Citizens."[30] In *Marshall v. Baltimore and Ohio Railroad Company*,[31] the Court once again answered this question using the artificial person theory, holding that a corporation is not a "citizen" but rather a legal fiction designed for jurisdictional purposes. Specifically, the Court held that the notion of corporate personhood (with respect to standing) was developed merely to prevent corporations from avoiding diversity jurisdiction by placing shareholders in every state; instead, a corporation would be treated

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the rights which are given to it in that character, and not the rights which belong to its members as citizens of a state").

25. *See* Blumberg, *supra* note 11, at 292-93.

26. *See, e.g.*, Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420, 546 (1837) ("[I]n grants by the public, nothing passes by implication. . . . '[A] corporation is strictly limited to the exercise of those powers which are specifically conferred on it . . . . The exercise of the corporate franchise being restrictive of individual rights, cannot be extended beyond the letter and spirit of the act of incorporation.' " (quoting Beaty v. Lessee of Knowler, 29 U.S. (4 Pet.) 152, 168 (1830))).

27. 17 U.S. (4 Wheat.) 518 (1819).

28. *Id*. at 636.

29. David H. Gans & Douglas T. Kendall, "A Capitalist Joker": Corporations, Corporate Personhood, and the Constitution 4-8 (Dec. 3, 2009) (unpublished manuscript), http://www.theusconstitution.org/upload/fck/file/File_storage/CAC-Corporations-Narrative-12-3-09-draft.pdf.

30. U.S. CONST. art. III, § 2.

31. 57 U.S. (16 How.) 314 (1853).

as a separate person with a single state of residence for the purposes of jurisdiction.[32] This limited justification for corporate personhood "would be the one place in which corporations were treated as citizens under the Constitution" in the jurisprudence of the early Court and would lay the foundation for many of the Court's subsequent decisions.[33]

Although the artificial entity theory fell out of favor between the late nineteenth century and the end of the now-reviled Lochner Era, it would reemerge to instruct the Court's thinking during the New Deal. Struggling through the hardships of the Great Depression, a Court with four members appointed by Franklin Delano Roosevelt attempted to roll back the vagaries of the Lochner Era and reassert state regulatory power over corporate affairs. A good example of the Court's renewed adherence to the artificial person theory is *National Labor Relations Board v. Jones & Laughlin Steel Corp.*,[34] a case that upheld Congress's power to regulate corporate affairs under the commerce clause.[35] Numerous other decisions during this period scaled back the constitutional rights of corporations. For example, the New Deal Court ruled that corporate rights are necessarily less than those enjoyed by natural persons with regard to the self-incrimination clause of the Fifth Amendment[36] and the Fourth Amendment protection against unreasonable searches and seizures.[37]

As will be discussed, the artificial person theory would also influence much of the Court's campaign finance jurisprudence prior to *Citizens United*.

### *B. Aggregate Person Theory*

A second theory of corporate personhood, the aggregate person theory, became popular with the advent of general incorporation statutes in the mid-to-late nineteenth century.[38] This theory blurs the distinction between corporations and natural persons, arguing that corporations are best viewed as collections of individuals, rather than singular, fictional entities.[39] In fact, the aggregate person theory pos-

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32. *Id*. at 328.
33. *See* Gans & Kendall, *supra* note 29, at 9.
34. 301 U.S. 1 (1937).
35. *See id.* at 37, 49.
36. United States v. White, 322 U.S. 694, 698 (1944) ("The constitutional privilege against self-incrimination is essentially a personal one, applying only to natural individuals.").
37. United States v. Morton Salt Co., 338 U.S. 632, 652 (1950) ("[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." (citation omitted)).
38. *See* Ripken, *supra* note 20, at 109-10.
39. *Id.* at 110.

its that corporations have no existence separate from that of their members.[40] Under this theory, a corporation:

> could not be formed without the action and agreement of human beings. In fact, no corporate acts would ever occur without the human persons who made up the corporate entity. Therefore, the corporation was seen more as a collection, or aggregate, of individuals who contracted with each other to utilize the corporation for their mutual benefit.[41]

Unlike the artificial person theory, the aggregate person theory views the corporation "not [as] a creature of the state but of individual initiative and enterprise."[42]

Under this model, the legal rights of corporations are equated to the individual rights of corporate shareholders, rather than limited to those conceded by the legislature.[43] The aggregate person theory argues that corporate property is nothing more than the collective property of the company's shareholders, investors, and personnel. Following this logic, corporations should be regulated under the same property laws that govern the individuals who compose them.[44] The aggregate person theory also posits that corporations exist for private (rather than public) purposes. Thus, the role of the law under this theory is to support corporate shareholders and to avoid interfering with their private actions.[45] Like the natural person theory, to be discussed *infra*, the aggregate person theory is a fundamentally antiregulatory model.

The aggregate person theory became popular in the mid-to-late nineteenth century, a period characterized by popular frustration with the perceived legislative favoritism surrounding the award of corporate charters.[46] During this era, "[s]pecial incorporations for businesses were regarded as the corrupt result of legislative bribery,

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40. *Id.*

41. *Id.*

42. Morton J. Horwitz, Santa Clara *Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 185 (1985).

43. 1 VICTOR MORAWETZ, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS 3 (Boston, Little, Brown, & Co., 2d ed. 1886) ("[I]t is essential . . . to bear in mind distinctly, that the existence of a corporation independently of its shareholders is a fiction; and that the rights and duties of an incorporated association are in reality the rights and duties of the persons who compose it, and not of an imaginary being.").

44. *See* Ripken, *supra* note 20, at 110.

45. *See* David Millon, *The Ambiguous Significance of Corporate Personhood* 5 (Washington & Lee Pub. Law & Legal Theory Research Paper Series, Working Paper No. 01-6, 2001), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=264141 ("By appealing to the individual property rights of the shareholders, the aggregate idea offered a potentially useful theoretical justification for shielding big business from public supervision.").

46. *See* Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593, 1634 (1988); Ripken, *supra* note 20, at 109.

political favoritism, and monopolistic practices."[47] As such, the second half of the nineteenth century witnessed the spread of general incorporation statutes designed to allow corporations to form without the express consent of state legislatures.[48] The Court's jurisprudence shifted along with these popular sentiments, eventually adopting the aggregate person theory to curtail legislative regulatory authority.[49]

One of the most famous judicial expositions of the aggregate person theory actually comes from a district court opinion written by Justice Field. In the *Railroad Tax Cases*, a consolidation of several challenges to state taxation schemes, the district court held that "[t]o deprive the corporation of its property . . . is, in fact, to deprive the corporators of their property," and, as such, corporations were to be treated as persons under the Fourteenth Amendment.[50] Interestingly, the *Railroad Tax* decision was concerned less with the inherent rights of the corporation and more with the need to protect individual rights manifested in the corporate form. According to Justice Field:

> It would be a most singular result if a constitutional provision intended for the protection of every person against partial and discriminating legislation by the states, should cease to exert such protection the moment the person becomes a member of a corporation. . . . [T]he courts will always look beyond the name of the artificial being to the individuals whom it represents.[51]

According to several legal scholars, this aggregated view of corporate personhood also informed the U.S. Supreme Court's decision in *Santa Clara County v. Southern Pacific Railroad Company*,[52] which held that corporate property could not be taxed differently than that of individual citizens.[53] While *Santa Clara* did not ultimately explore the issue of whether corporations are persons under the Fourteenth Amendment, it did clearly state that they should be treated as such in a footnote.[54] Although this declaration could be viewed as an expo-

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47. Ripken, *supra* note 20, at 109.

48. CHRISTOPHER D. STONE, WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR 20-21 (1975).

49. *See* Ripken, *supra* note 20, at 110.

50. The Railroad Tax Cases, 13 F. 722, 747 (C.C.D. Cal. 1882).

51. *Id*. at 744.

52. 118 U.S. 394 (1886).

53. *See*, *e.g.*, Hovenkamp, *supra* note 46, at 1642 ("*Santa Clara* does not represent the Supreme Court's rejection of older 'associational' or 'fictional' theories of the corporation in favor of an 'entity' theory that imputed a great deal of personhood to the corporation itself. On the contrary, the Court relied explicitly on the idea that a corporation is an association of individuals. Its interests are identical to those of its shareholders. As a result, it should receive the same protections granted to any partnership or sole proprietorship." (footnotes omitted)); *see also* Horwitz, *supra* note 42, at 223.

54. The *Santa Clara* decision is the subject of much scholarship and debate, as the Court never truly reached the question of whether corporations are to be treated as persons under the law. Instead, the court reporter, himself a former corporate executive, included in the transcript of the case the statement: "MR. CHIEF JUSTICE WAITE said: The court

sition of the natural person theory of corporate personhood, Professor Horwitz explains that this theory did not emerge until several years after *Santa Clara*.[55] Logically, then, the Court must have employed the aggregate person reasoning of the *Railroad Tax Cases*.

As corporations continued to grow in size and number, the aggregate person theory began to lose vitality in the Court's jurisprudence. Because corporations took on so many shareholders, it became difficult to think of them as groups of homogenous, aligned individuals.[56] As such, a new theory of corporate personhood would appear by the beginning of the twentieth century.

### *C. Natural Person Theory*

The legal theory of corporate personhood that emerged at the beginning of the twentieth century viewed corporations as actual persons, dependant neither on state law nor individual shareholders for their existence.[57] This model, known as "natural person theory" or "natural entity theory," proposes that the existence of a corporation is no different than that of a natural-born person.[58] Under the natural person theory, a corporation "is a full-fledged, living reality that exists as an objective fact and has a real personality in society."[59] Professor Ripken uses the analogy of childbirth to explain the theory, noting that the creation of a corporation is the same as the birth of a natural person.[60] As with a newborn baby, the state plays no part in birthing a corporation; rather, the state's only role in its creation is to memorialize the event with a charter of incorporation (or birth certificate, as it were).[61] Under the natural person theory, a corporation is not the product of legislative consent but "simply a natural outgrowth of the economic tendency toward business combination."[62] As such, the corporation is not an artificial entity but rather a naturally existing person "which has compelled the law to grant it official rec-

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does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution . . . applies to these corporations. We are all of opinion that it does." *Santa Clara*, 118 U.S. at 396. Many wonder whether this statement was ever made at oral argument, or if it was part of a larger "conspiracy" to smuggle the notion of corporate personhood into constitutional dialogue. For more reading on this subject, see Howard Jay Graham, *The "Conspiracy Theory" of the Fourteenth Amendment*, 47 YALE L.J. 371 (1938) [hereinafter Graham, *The Conspiracy Theory I*]; Howard Jay Graham, *The "Conspiracy Theory" of the Fourteenth Amendment: 2*, 48 YALE L.J. 171 (1938).

55. Horwitz, *supra* note 42, at 183.
56. Ripken, *supra* note 20, at 111-12.
57. *Id.* at 112.
58. *Id.*
59. *Id.*
60. *Id.* at 112-13.
61. *Id.*
62. *Id.* at 113.

ognition."[63] The natural person theory diverges from the aggregate person theory with respect to its view of the relationship between corporation and shareholder. Under the natural person theory, corporations exist separately from the lives of their shareholders and not because of them. In other words, the natural entity theory argues that corporations *actually are* persons—not just that they should be treated as such to protect the rights of their shareholders. Natural entity theorists are quick to point out that corporations have perpetual lives that outlast those of individual shareholders and that corporate actions cannot be said to be the product of any one person.[64] As such, corporations are persons as much as you and I, and have "the same legal, social, and moral responsibilities that natural persons carry, as well as the same rights and protections."[65]

The natural person theory gained popularity in the early twentieth century and was the primary mode of analysis in the now infamous Lochner Era. This period of legal history is characterized by the Court's adherence to a laissez-faire economic philosophy anchored by the "liberty of contract," a concept with almost no constitutional mooring.[66] Fearful of the "present assault upon capital," an increasingly conservative and business-friendly Court began using the notion of corporate personhood to infuse businesses with the individual rights necessary to challenge state and federal regulations.[67] The Court's decision in *Gulf, Colorado & Santa Fe Railway Co. v. Ellis*[68] provides a useful example. This case concerned a state law requiring railroad companies to pay their opponents' legal fees, an obligation not placed on natural citizens or other types of businesses.[69] In determining that this restriction violated the Equal Protection Clause, the Court essentially declared it unconstitutional for the legislature to differentiate between corporations and persons. Citing the infamous *Santa Clara* footnote, the Court held that "corporations are persons within the provisions of the Fourteenth Amendment . . . . A State has no more power to deny to corporations the equal protection of the law than it has to individual citizens."[70] The language of this holding is telling. The Court did not hold that corporations should

63. W. Jethro Brown, *The Personality of the Corporation and the State*, 21 L.Q. REV. 365, 370 (1905).

64. *See id*. at 366-72.

65. Ripken, *supra* note 20, at 102; *see also* Julie Marie Baworowsky, Note, *From Public Square to Market Square: Theoretical Foundations of First and Fourteenth Amendment Protection of Corporate Religious Speech*, 83 NOTRE DAME L. REV. 1713, 1738 (2008) (describing the natural entity theory as inherently antiregulatory).

66. *See, e.g.,* Lochner v. New York, 198 U.S. 45 (1905).

67. Gans & Kendall, *supra* note 29, at 24 (quoting Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 607 (1895) (Field, J., concurring)).

68. 165 U.S. 150 (1897).

69. *Id*. at 152-53.

70. *Id*. at 154.

enjoy constitutional protections to vindicate the rights of their shareholders but instead determined that corporations are individuals in and of themselves. This is arguably the most lucid exposition of the natural person theory in all of the Court's jurisprudence.

Subsequent Lochner Era decisions further undermined legislatures' ability to distinguish between the existence of corporations and natural persons. In *Adkins v. Children's Hospital*, for example, the Court struck down a minimum wage law,[71] noting that a corporation such as the petitioner hospital has a constitutional right to "obtain . . . the best terms . . . as the result of private bargaining,"[72] and, implicitly, that the constitutional right to such "liberty of contract" is the same for both natural persons and corporations.[73]

While this extreme adherence to the natural person theory would meet its demise with the end of the Lochner Era, it still occasionally finds its way into the Court's opinions. As will be discussed, this theory has risen again to inform the Court's decision in *Citizens United*.

## III. CORPORATE PERSONHOOD IN THE COURT'S CAMPAIGN FINANCE JURISPRUDENCE

The Court's corporate personhood jurisprudence, with respect to questions of free speech and campaign spending, largely adheres to the artificial person theory. With one exception, the Court's decisions prior to *Citizens United* recognize both a distinction between the First Amendment rights of corporations and persons as well as the need for legislative regulation of corporate spending abilities.[74] Before examining the relevant precedent, however, a word about the Court's decision in *Buckley v. Valeo*[75] is necessary.

The Court's landmark decision in *Buckley v. Valeo* established the basic framework upon which all of the Court's subsequent campaign finance jurisprudence is based. In this case, the Court was tasked with reviewing the constitutionality of the Federal Election Campaign Act (FECA).[76] In order to curb the influence of private spending on elections and political accountability, this act established limits on both direct campaign contributions as well as independent campaign-related expenditures.[77] Before reaching the constitutionality of the act, however, the Court was first faced with an even more fundamental question: is spending money a form of speech protected by the

71. 261 U.S. 525, 539, 562 (1923).
72. *Id.* at 545.
73. Gans & Kendall, *supra* note 29, at 28.
74. The exception being *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), discussed *infra* notes 98-104 and accompanying text.
75. 424 U.S. 1 (1976).
76. *Id.* at 6.
77. *See id.* at 7.

First Amendment? The Court answered in the affirmative, holding that the expenditure of money is essential to "the ability of candidates, citizens, and associations to engage in protected political expression."[78] As such, the spending limitations of FECA were subjected to strict scrutiny review.[79] The direct contribution limits established in FECA withstood this review; the Court recognized a compelling state interest in curtailing the potential corruption that might be caused by limitless donations to a candidate's election fund.[80] The independent expenditure limits, conversely, were held to be unconstitutional.[81] The Court reasoned that this restriction was too attenuated from the problem of improper influence that FECA was designed to curtail.[82] It is important to note, however, that *Buckley* only considered restrictions placed on natural citizens. Federal law after *Buckley* maintained similar expenditure limitations on corporations, and until *Citizens United*, these restrictions were upheld.[83]

The limitations placed on corporate spending ability were upheld largely because the modern Court has generally adhered to the artificial person theory of corporate personhood. With the exception of *First National Bank of Boston v. Bellotti*,[84] the Court's campaign finance decisions recognize that "the special characteristics of the corporate structure require particularly careful regulation" to circumvent the potential for corruption and improper influence in the electoral system.[85] In repeatedly upholding the power of Congress to regulate corporate election spending, the Court clearly delineated between the legal identities of corporations and persons, as such restrictions would not otherwise be permissible under *Buckley*.

One of the premier examples of the artificial person theory in the Court's campaign finance decisions comes from *Austin v. Michigan State Chamber of Commerce*.[86] This case considered the constitutionality of a state law prohibiting corporations from using their general treasury funds to advocate the election or defeat of a candidate within a certain timeframe.[87] The Court recognized a compelling government interest in preventing corporate dominance of the electoral process and thus upheld the restriction.[88] The seminal statement

78. *Id*. at 59.
79. *Id.* at 44-45.
80. *Id*. at 23-38, 58-59.
81. *Id.* at 58-59.
82. *Id*. at 45-51.
83. *See* 2 U.S.C. § 441b (2006).
84. *See* discussion *infra* notes 98-104 and accompanying text.
85. Fed. Election Comm'n v. Nat'l Right to Work Comm., 459 U.S. 197, 209-210 (1982).
86. 494 U.S. 652 (1990).
87. *Id*. at 654-55.
88. *Id*. at 659 ("[T]he compelling governmental interest in preventing corruption support[s] the restriction of the influence of political war chests funneled through the corpo-

from the case belies the Court's adherence to the artificial person theory:

> 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 . . . . 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."[89]

It was apparent to the *Austin* Court that corporations could not hope to enjoy these special state-created privileges as well as the constitutional protections afforded to natural-born citizens. The opposite result would allow the "corrosive and distorting effects of immense aggregations of wealth" to play an unfair role in the electoral process.[90]

The *Austin* "anti-distortion" rationale was subsequently upheld in *McConnell v. FEC*,[91] a case that directly considered the constitutionality of the federal Bipartisan Campaign Reform Act (BCRA) at issue in *Citizens United*.[92] Congress passed BCRA in response to concerns about the amount of corporate spending on independent attack ads that escaped the restrictions of FECA.[93] BCRA attempted to close the FECA loophole by outlawing the use of corporate funds on "electioneering communications," a form of campaign advertising that does not expressly advocate the election or defeat of a candidate for office.[94] Recognizing the "unusually important interests [that] underlie the regulation of corporations' campaign-related speech,"[95] the Court again approved the law's distinction between the First Amendment rights of corporations and natural persons.[96] This holding is consistent with the artificial person theory; if the Court considered corporations as persons (or even as aggregate persons) the spending restriction would constitute an impermissible restriction on speech rights under *Buckley*. This congressional power to distinguish between hu-

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rate form." (quoting Fed. Election Comm'n v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 500-01 (1985))).

89. *Id.* at 658-59 (quoting Fed. Election Comm'n v. Mass. Citizens for Life, Inc., 479 U.S. 238, 257 (1986)).

90. *Id.* at 660.

91. 540 U.S. 93 (2003).

92. *Id.* at 93.

93. *See id.* at 207.

94. *See id.* at 93-94.

95. *Id.* at 206 n.88.

96. *See id.* at 207.

man beings and corporations for purposes of campaign spending was upheld as recently as 2007.[97]

The major exception to the Court's recognition of the artificial person theory is *First National Bank of Boston v. Bellotti*.[98] This case concerned a state limitation on a corporation's ability to spend money on advertisements related to ballot referendums.[99] Here, the *Bellotti* Court rejected any distinction between corporations and persons and instead held that corporations have a First Amendment right to spend money on advertisements that advocate the passage or defeat of referenda.[100] The major premise of *Bellotti*—one that would underlie the Court's decision in *Citizens United*—is that the First Amendment does not tolerate discrimination among speakers, at least with respect to political speech.[101] Interestingly, the Court stopped short of fully adopting free speech rights for corporations. This is largely because the Court's precedents in this field do not provide much support for that position. Instead, the Court focused on the First Amendment rights of the listener, rather than those of the speaker. As Justice Powell explained, "[t]he 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 . . . or individual."[102]

*Bellotti* is distinct from much of the Court's campaign finance jurisprudence because it relies partially on the natural person theory. In holding that the First Amendment does not tolerate speaker discrimination based on corporate status, the Court implied that the corporate identity is no different than that of a natural-born citizen. Further, the *Bellotti* Court curtailed congressional regulatory powers in the name of corporate personhood. Clearly, this holding is in line with the antiregulatory natural person theory.

The *Bellotti* majority took care to distinguish its decision from other pertinent precedent, noting that spending restrictions are attenuated from the goal of preventing electoral corruption in the case

97. *See* Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 457 (2007). Declining to overturn *Austin* or *McConnell*, the *Right to Life* Court held that corporations could not use general treasury funds to release political advertisements "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id*. at 470. While this decision weakened the regulatory authority of Congress in the area of corporate campaign finance, it did not eliminate it.

98. 435 U.S. 765 (1978).

99. *Id.* at 768-69.

100. *Id*. at 786-92.

101. *Id*. at 784-85. ("In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue.").

102. *Id*. at 777.

of ballot referenda.[103] Indeed, the notion of improper corporate purchase of political influence does not seem relevant to the case of an inanimate ballot initiative which cannot become indebted to any one candidate. This explains why *Bellotti* was not overruled by the subsequent decisions in *Austin* or *McConnell*; the antidistortion rationale espoused in *Austin* applied only to elections for representative office. Thus, the logic of *Bellotti* was not meant to extend beyond its narrow context, and until *Citizens United*, it was not.[104]

## IV. *CITIZENS UNITED* AND CORPORATE PERSONHOOD

*Citizens United v. FEC*[105] concerned the application of federal campaign finance law to a film entitled *Hillary: The Movie* (hereinafter *Hillary*). Citizens United, a private nonprofit corporation, attempted to release the film through video-on-demand within thirty days of a 2008 Democratic Party primary election, potentially in contravention of 2 U.S.C. § 441b, which governs corporate electoral spending.[106] As such, Citizens United sought declaratory and injunctive relief against the FEC, preventing application of the law to its video.[107]

Prior to the Bipartisan Campaign Reform Act (BCRA), corporations were barred under § 441b from using their general treasury funds to make direct contributions to candidates or to finance independent materials that expressly advocated the election or defeat of a candidate.[108] BCRA section 203 added to these restrictions, preventing corporations from using their general funds to support "electioneering communication[s]."[109] Electioneering communications are defined as "any broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal office" and is made within thirty days of a primary or sixty days of a general election.[110] In order to ameliorate the harshness of these restrictions, § 441b includes a provision allowing corporations to engage in express advocacy and electioneering communication through "Political Action Committees."[111] These bodies, funded solely through "donations from

103. *See id*. at 787-92; *see also id*. at 790 ("Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue." (citations omitted)).

104. Adam Winkler, *Corporate Personhood and the Rights of Corporate Speech*, 30 SEATTLE U. L. REV. 863, 869 (2007) ("Indeed, in each subsequent case *Bellotti* was not treated as a landmark but relegated to a footnote, distinguished away and limited to its particular facts.").

105. 130 S. Ct. 876 (2010).

106. *Id*. at 887.

107. *Id*. at 888.

108. 2 U.S.C. § 441b (2006).

109. *Citizens United*, 130 S. Ct. at 887.

110. 2 U.S.C. § 434(f)(3)(A) (2006).

111. § 441b.

stockholders and employees of the corporation," are segregated funds exempted from the aforementioned spending restrictions.[112]

*Hillary* ostensibly fell under the purview of § 441b.[113] Citizens United attempted to release the video using its general corporate funds within the prohibited thirty-day window described by the statute.[114] Furthermore, the movie specifically referred to then-Senator Hillary Clinton, potentially triggering the prohibition against electioneering communications, although it was not initially clear that materials released through video-on-demand would qualify as such.[115]

In an attempt to defeat application of this statute to *Hillary*, Citizens United brought a series of as-applied challenges to § 441b. For example, Citizens United argued that *Hillary* did not qualify as an electioneering communication[116] and that it did not constitute express advocacy.[117] Despite the fact that Citizens United waived its facial constitutional challenge to § 441b, the Court decided to consider it *sua sponte*, noting that "the Court cannot resolve this case on a narrower ground without chilling political speech."[118]

Using *Bellotti* as its ammunition, the *Citizens United* Court struck down § 441b, *Austin*, and *McConnell*.[119] In so doing, it set forth one of the most lucid expositions of the natural person theory of corporate personhood since the Lochner Era. The Court's opinion is replete with statements that equate the legal and actual identity of corporations and natural persons. The Court's oft-repeated mantra is that "the Government cannot restrict political speech based on the speaker's corporate identity" under the strictures of the First Amendment.[120] The implication of this statement is clear: the identity of a corporation is no different than that of a natural person for purposes of the First Amendment. Citing *Bellotti*, a case not meant to apply outside the context of voter referenda, the majority claimed that "[t]he Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natu-

112. *Citizens United*, 130 S. Ct. at 888.
113. *See id.* at 890.
114. *Id.* at 888.
115. *Id.* at 887-88. For instance, the Code of Federal Regulations describes electioneering communications as "publicly distributed" materials that "[c]an be received by 50,000 or more persons." 11 C.F.R. § 100.29(b)(3)(ii) (2010). It is not clear that video-on-demand, which can be viewed only upon purchase or request of the viewer, fits this definition.
116. *Citizens United*, 130 S. Ct. at 888-89.
117. *Id.* at 889-90.
118. *Id.* at 892.
119. *See id.* at 913.
120. *Id.* at 902; *see also, e.g., id.* at 898 ("Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others."); *id.* at 899 ("[T]he Government may commit a constitutional wrong when by law it identifies certain preferred speakers.").

ral persons.' "[121] These statements demonstrate the Court's adherence to the natural person theory. By refusing to recognize a distinction between the identities of corporations and persons, the Court is clearly focused on the speech rights of the corporation itself, rather than the aggregated speech rights of corporate shareholders.[122] According to the *Citizens United* Court, the corporation should be treated as a person because it actually is one.

## V. THE ILLOGIC OF *CITIZENS UNITED* AND THE NATURAL ENTITY THEORY

As previously discussed, the *Citizens United* Court reached its decision using a mode of analysis consistent with the natural person theory, which recognizes no distinction between corporation and person and posits that both are entitled to identical constitutional rights. This Court's reliance on this theory is misplaced for a number of reasons. Specifically, the natural person theory contravenes observable reality, logic, and our nation's legal history.

To begin with, the natural person theory contradicts plainly observable realities. Simply put, corporations are not people.[123] They have no physical form. They do not walk, talk, breathe, or engage in any number of human activities. They have no feelings or thoughts. "As a non-human entity, a corporation lacks the expressive interests related to self-actualization and freedom that human beings possess by virtue of being human."[124] Having a conversation with a corporation would be akin to having a conversation with a wall, as neither possesses the hands to write, the vocal chords to speak, the limbs to gesture, or the mind to engage in independent, expressive thought. As Justice Rehnquist put it, "[t]o ascribe to such artificial entities an 'intellect' or 'mind' for freedom of conscience purposes is to confuse metaphor with reality."[125] The natural person theory ignores this most essential distinction between corporations and persons and is thus fundamentally flawed.

Even aside from its obvious realistic deficiencies, the natural person theory is logically incoherent. The theory posits that corporate

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121. *Id*. at 900 (citing First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978)).

122. It is worth noting that the opinion does not include much, if any, language defending the corporate right to political speech on grounds of the aggregate person theory. The only statement which does seem to reflect the thinking of the aggregate person theory complains that, under § 441b, "certain disfavored associations of citizens—those that have taken on the corporate form—are penalized for engaging in . . . political speech." *Id.* at 908.

123. *See, e.g.*, Tamara R. Piety, *Against Freedom of Commercial Expression*, 29 CARDOZO L. REV. 2583, 2668 (2008) ("Corporations are not human beings. They only have the qualities and the rights given to them by law, no more, no less.").

124. *Id*. at 2646.

125. Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal., 475 U.S. 1, 33 (1986) (Rehnquist, J., dissenting).

existence depends neither upon state law nor upon the collective efforts of shareholders; instead corporations have lives of their own and are merely the product of the natural tendency toward business association.[126] This too is clearly false. Corporations still depend upon incorporation statutes for their recognition and the conferred benefits they enjoy. Natural person theorists often claim that the perpetual life of corporations evidences their separate existence as natural persons.[127] This argument, however, misses a larger point—corporations would not be entitled to benefits such as perpetual life but for state law. Thus, state legislatures, which can always amend incorporation statutes, have the final word as to how and when corporations form and what benefits they receive. So too are corporations dependent on the individuals who comprise them. While it may be true that incorporation is a natural tendency in a free market, to suggest that corporations have identities separate from those of their makers is ludicrous. Without actual people to associate, pool resources, develop business models, and file necessary paperwork, corporations would never exist; without Bill Gates, there would be no Microsoft. Taken to its logical extreme, the natural person theory might suggest that corporations have no need of such officers or employees, since they are actual persons themselves, capable of making decisions and speaking their minds. This is clearly as unrealistic as it is illogical.

The natural person theory also runs afoul of our nation's legal history. The framers of the Constitution would almost certainly reject the notion that corporations are among "We the People" for whom the Constitution was written.[128] The Founders saw corporations as dangerous entities to be tightly regulated by the state and granted only those rights listed in their chartering documents, rather than those enumerated in the Constitution.[129] This notion is reinforced by the language of the Constitution itself, which protects rights that apply awkwardly to the corporate context. Indeed, it is difficult to envision corporations engaging in the "freedom of speech," enjoying the right to "peaceably . . . assemble," practicing the "free exercise" of religion,[130] or "keep[ing] and bear[ing] Arms."[131] These are fundamentally human rights, and to apply them to the corporate setting is to misread the Constitution.

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126. *See supra* Part II.C.

127. *See supra* note 64 and accompanying text.

128. *See*, *e.g.*, 1 ANNALS OF CONG. 1949 (3d sess. 1791) (Joseph Gales ed., 1834) (statement of Rep. James Madison), *available at* http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=002/llac002.db&recNum=278 ("[A] charter of incorporation . . . creates an artificial person previously not existing in law. It confers important civil rights and attributes, which could not otherwise be claimed.").

129. Gans & Kendall, *supra* note 29, at 4-8.

130. U.S. CONST. amend. I.

131. U.S. CONST. amend. II.

Even the Fourteenth Amendment, the hook upon which the notion of corporate personhood would eventually hang, was not intended to apply to corporations. Instead, this amendment, adopted after the Civil War, was designed to safeguard the expanded grant of citizenship to freed slaves.[132] Like the Bill of Rights, the language of the Fourteenth Amendment suggests a narrow applicability to living persons. The citizenship clause of the amendment, for example, refers to "persons born or naturalized in the United States."[133] Of course, a corporation cannot be born or naturalized, so a plain reading of the Fourteenth Amendment suggests that it was not intended to include artificial entities within its scope. The debates over the Fourteenth Amendment further reinforce this conclusion; in fact, these debates are devoid of even a single reference to the protection of corporations.[134] Representative John Bingham, the amendment's primary author, explained that the purpose of the amendment was to ensure that "no man, no matter what his color, no matter beneath what sky he may have been born . . . shall be deprived of life or liberty or property without due process of law."[135] Clearly, the drafters of our Constitution had little trouble distinguishing between the rights of corporations and those of natural persons, unlike those who would support the natural person theory. Indeed, the notion that corporations are people under the Constitution did not become a part of our country's legal tradition until the infamous *Santa Clara* footnote, and thus entered constitutional dialogue "without argument, without justification, without explanation, and without dissent."[136]

The Court's opinion in *Citizens United* employs a theory of corporate personhood that is divorced from reality, logic, and the intent of the framers. Considerations of stare decisis aside,[137] the Court ar-

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132. *See* Gans & Kendall, *supra* note 29, at 12-15; *see also* Winkler, *supra* note 104, at 865 ("Although corporations were widespread and well known at [the time of the Fourteenth Amendment's drafting], the Framers of the Fourteenth Amendment did not intend to grant corporations these rights." (footnote omitted)).

133. U.S. CONST. amend. XIV, § 1.

134. *See* Graham*, The Conspiracy Theory I, supra* note 54, at 385-92 (analyzing the text of the congressional debates regarding the Fourteenth Amendment).

135. CONG. GLOBE, 39TH CONG., 1ST SESS. 1094 (1866), *available at* http://memory.loc.gov/ammem/amlaw/lwcglink.html#anchor39. This interpretation of the Fourteenth Amendment was likewise recognized by the Court, which held that "[t]he term citizens . . . 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." Paul v. Virginia, 75 U.S. (8 Wall.) 168, 177 (1868).

136. Winkler, *supra* note 104, at 865.

137. Justice Stevens' dissenting opinion lambastes the majority for its purportedly improper treatment of stare decisis. Stevens claims that the constitutional issue was not properly before the court and that, even assuming it was, the case could have been resolved on a number of narrower grounds, obviating the need to reach the constitutional question. According to Stevens, "[t]he only thing preventing the majority from affirming the District Court, or adopting a narrower ground that would retain *Austin*, is its disdain for *Austin*." Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 938 (2010) (Stevens, J., dissent-

rived at the wrong conclusion in equating the First Amendment rights of corporations and natural beings.

## VI. THE IMPACT OF *CITIZENS UNITED*

At first glance, there is some reason to believe that the practical impact of *Citizens United* may be somewhat limited. To begin with, the now invalidated sections of § 441b pertaining to electioneering communications were somewhat limited in scope. Although the majority opinion attempted to characterize § 441b as a complete ban,[138] the reality is that the restrictions on electioneering materials operated only during a relatively short period immediately preceding elections. Corporations were already free to use their general treasury funds to support electioneering materials outside of that window. Furthermore, corporate PACs were completely exempt from this prohibition and could release electioneering materials at any time of their choosing. Many of these PACs are almost as well-funded and capable as the corporations themselves. Justice Stevens notes in his dissent that PACs raised nearly a billion dollars in the 2008 election cycle.[139] Thus, the limited nature of § 441b suggests that corporations may not have gained much through its invalidation.

Even aside from these considerations, there is some support for the position that corporate campaign spending is relatively slight in our elections. A 2003 study that examined corporate PAC spending found that individual donor expenditures still constitute the vast majority of campaign spending.[140] The study notes that individual citizen expenditures in the 2000 presidential election totaled nearly $2.4 billion, compared to only $380 million worth of corporate general treasury expenditures.[141] The study also concludes that there is little statistical correlation between corporate campaign expenditures and favorable voting behavior in Congress.[142] Still other studies claim that corporate expenditures are actually correlated with negative economic returns, a phenomenon which, if true, may dissuade corporations from making large election expenditures altogether.[143] Taken

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ing). "The only relevant thing that has changed since *Austin* and *McConnell* is the composition of this Court." *Id*. at 942. Stevens also criticizes the majority's extensive reliance on *Bellotti*, a case easily distinguished from *Citizens United*. *See id*. at 958-61.

138. *See id*. at 911.

139. *Id*. at 942 (Stevens, J., dissenting).

140. Stephen Ansolabehere, John M. de Figueiredo & James M. Snyder, Jr., *Why Is There So Little Money in U.S. Politics?*, 17 J. ECON. PERSP. 105, 108 (2003).

141. *Id*.

142. *Id*. at 112-17.

143. *See* Rajesh K. Aggarwal, Felix Meschke & Tracy Wang, *Corporate Political Contributions: Investment or Agency?* (EFA 2008 Athens Meetings Paper, 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=972670.

together, these facts suggest that the impact of *Citizens United* may be less sweeping than some fear.

While it is true that corporations have spent relatively little through their PACs, this ultimately should not be of much consolation to the concerned citizen. *Citizens United* has drastically altered the face of campaign finance law and has created some uncertainty about corporate behavior moving forward. Now that large corporations do not have to bother establishing PACs or navigating FEC regulations, it is highly plausible that they will engage in more spending.[144] Furthermore, large corporations possess tremendous wealth that can be easily mobilized; even the best-funded PACs could not truly hope to reach such levels of funding. As previously mentioned, Exxon Mobil generated profits of over $40 billion in 2008 alone.[145] With even a marginal investment of some of these proceeds, it could easily outspend the entire Obama campaign, itself historic for shattering previous funding records by raising $750 million.[146] The aforementioned studies which discuss the dearth of corporate PAC spending in American elections may become irrelevant in this new age where corporations do not need to establish segregated funds for their campaign spending efforts.

Should corporate money enter the electoral system in such volumes, it may become impossible for natural citizens to influence the course of political debate. How could an advocacy group like Swift Boat Veterans for Truth or Moveon.org, let alone an individual citizen, possibly hope to influence thought about political issues if forced to compete with the vast resources of corporate titans? "[W]hen corporations grab up the prime broadcasting slots on the eve of an election, they can flood the market with advocacy that bears 'little or no correlation' to the ideas of natural persons or to any broader notion of the public good . . . ." [147] This reality poses a threat not only to the value of First Amendment rights possessed by actual persons but also to democratic participation itself, as average citizens may feel discouraged from engaging in a system dominated by corporate interests. "Take away Congress' authority to regulate the appearance of

144. This Note was written several months before the 2010 midterm elections. Now that those elections have occurred, it is possible to begin evaluating this prediction. Campaign spending did indeed rise dramatically in the 2010 midterms; the Center for Responsive Politics reports that independent expenditures and electioneering communication spending more than quadrupled from the 2006 midterms, rising to roughly $294 million from approximately $68 million. Center for Responsible Politics, *Outside Spending*, http://www.opensecrets.org/outsidespending/index.php (last visited Mar. 18, 2011).

145. Ellis, *supra* note 12.

146. Tahman Bradley, *Final Fundraising Figure: Obama's $750M*, ABC NEWS (Dec. 5, 2008), http://abcnews.go.com/Politics/Vote2008/story?id=6397572

147. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 974 (2010) (Stevens, J., dissenting) (quoting Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 660 (1990)) (citation omitted).

undue influence and 'the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.' "[148]

A related concern is democratic responsiveness: how will the leadership and decisions of our elected officials be affected by this potential new influx of campaign money? Presumably, our representatives will feel more indebted to the corporation that spends $500 million on favorable electioneering material than they will to the middle-class parent who donates $50. The evidence amassed by Congress in considering the adoption of BCRA section 203 suggests that this is indeed a real problem. The congressional record indicates that corporate sponsors of favorable issue ads "were routinely granted special access [to elected officials] after the campaign was over."[149] One former Senator candidly admitted this reality, noting that "[c]andidates whose campaigns benefit from [phony "issue ads"] greatly appreciate the help of these groups. In fact, members will also be favorably disposed to those who finance these groups when they later seek access to discuss pending litigation."[150] This phenomenon becomes even more troubling when one considers the broad language used in the majority opinion, which could be employed by foreign corporations to gain access to our electoral system. As Justice Stevens explains:

> If taken seriously, [the majority's] assumption that the identity of a speaker has *no* relevance to the Government's ability to regulate political speech would lead to some remarkable conclusions. Such an assumption would have accorded the propaganda broadcasts to our troops by "Tokyo Rose" during World War II the same protection as speech by Allied commanders. More pertinently, it would appear to afford the same protection to multinational corporations controlled by foreigners as to individual Americans . . . .[151]

Such an application of *Citizens United* would dramatically undermine the ability of natural-born Americans to be heard and the willingness of elected representatives to listen.

A potentially larger danger of *Citizens United* is simply the precedent it sets. Simply put, constitutional rights are extremely difficult to retract once granted: "Having once named the corporate form as a 'person,' it may be difficult to turn back."[152] We do not know how many other useful state and federal laws will now be invalidated based on the holding of *Citizens United*. The Court's decision to

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148. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 144 (2003) (quoting Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 390 (2000)).

149. *Citizens United*, 130 S. Ct. at 965 (Stevens, J., dissenting).

150. McConnell v. Fed. Election Comm'n, 251 F. Supp. 2d 176, 556 (D.D.C. 2003) (quoting testimony of former Senator Dale Bumpers).

151. *Citizens United*, 130 S. Ct. at 947-48 (Stevens, J., dissenting).

152. Piety, *supra* note 123, at 2683.

equate the identity of corporations and persons "may have serious implications for the government's ability to regulate in the public interest, which may in turn have negative social consequences for health, safety, and general welfare."[153] For example, a state law prohibiting out-of-state corporations from spending money on domestic elections, a seemingly reasonable restriction, may now be invalid under the holding of *Citizens United*. What effect might *Citizens United* have on judicial elections or judicial independence more generally? In recent years, judicial elections have become inappropriately heated and partisan affairs.[154] *Citizens United* could operate to undermine state laws designed to limit the impact of campaign spending on judicial elections. Worse yet, "the likely explosion of special-interest spending in . . . judicial races threatens to further erode the judiciary's independence."[155]

While the full impact of *Citizens United* may not be understood for some time, there is much reason to be concerned. This is a decision that could undermine the individual's practical ability to engage in speech. Furthermore, this precedent jeopardizes the political accountability of our elected representatives and threatens the independence of our judiciary. *Citizens United* could also be used to strike down scores of other valuable regulations on corporate behavior.

## VII. CONCLUSION

A national poll conducted shortly after the Court's decision in *Citizens United* demonstrated that an overwhelming majority of citizens—both liberals and conservatives alike—disagree with the outcome of the case.[156] Perhaps those polled recognize what the *Citizens United* Court did not: corporate spending power poses a major threat to the electoral process, and corporations are not among those protected by the First Amendment. Indeed, both sentiments are accurate. In reaching its decision, the *Citizens United* court relied on a theory of corporate personhood that is divorced from reality, logic, and constitutional history. Its holding that the First Amendment protects the political speech of corporations and persons equally is simply wrong, as the Constitution was written to guarantee the rights of

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153. *Id*. at 2587.

154. David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 267-69 (2008).

155. Adam Skaggs, *Judging for Dollars*, THE NEW REPUBLIC (Apr. 3, 2010, 12:00 AM), http://www.tnr.com/article/politics/judging-dollars.

156. Michael B. Keegan, *Poll: Liberals* and *Conservatives Strongly Disagree with "Citizens United"—Americans Want Limits on Corporate Cash in Elections*, HUFFINGTON POST (Feb. 19, 2010, 1:35 PM), http://www.huffingtonpost.com/michael-b-keegan/poll-liberals-iandi-conse_b_469160.html ("Specifically, our poll found that: 78% believe that corporations should be limited in how much they can spend to influence elections, and 70% believe they already have too much influence over elections . . . .").

living persons. While the effects of *Citizens United* are not yet discernable, there is much reason to believe that its holding will result in significantly increased corporate campaign spending and severely decreased political responsiveness. Furthermore, there is no telling what other laws will now be invalidated in the name of corporate personhood. We know not where the Swift Boat of corporate electoral spending will take us, but it is likely that our destination will not be a pleasant one.