

Fall 2012

Prece-Don't: Corporations and the Rise of the Modern Judicial Dictatorship

Justin Levitt

Follow this and additional works at: <http://commons.law.famu.edu/famulawreview>

 Part of the [Business Organizations Law Commons](#), [Constitutional Law Commons](#), and the [First Amendment Commons](#)

Recommended Citation

Justin Levitt, *Prece-Don't: Corporations and the Rise of the Modern Judicial Dictatorship*, 8 Fla. A&M U. L. Rev. (2012).
Available at: <http://commons.law.famu.edu/famulawreview/vol8/iss1/10>

This Note is brought to you for free and open access by Scholarly Commons @ FAMU Law. It has been accepted for inclusion in Florida A & M University Law Review by an authorized administrator of Scholarly Commons @ FAMU Law. For more information, please contact linda.barrette@fam.u.edu.

PRECE-DON'T: CORPORATIONS AND THE RISE OF THE MODERN JUDICIAL DICTATORSHIP

Justin Levitt*

“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.”¹

CONTENTS

INTRODUCTION	158
I. FALSE ORIGINS OF CORPORATE PERSONHOOD	162
A. <i>Hale v. Henkel – Personal Rights Versus Safeguarding Property Interests</i>	164
B. <i>Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary Acknowledges The Property Interests of Private Businesses</i>	165
C. <i>Bellotti – Protecting Speech Regardless of Who is Speaking</i>	166
II. CITIZENS UNITED	167
A. <i>Austin’s Compelling Interest and a New Definition of Corruption</i>	168
B. <i>Judicial Activism and the Facial Challenge That Never Was</i>	169
C. <i>The De Minimis Exception for Non-Profits – An Acceptable Ruling on The Merits</i>	171
D. <i>“Judicial Responsibility” Trumps Objectivity</i>	172
E. <i>Conservative Corporate Bias</i>	174
III. MULTI-NATIONAL CORPORATIONS AND DOMESTIC POLITICS .	175
A. <i>A Century of Campaign Finance Regulations</i>	177

* Justin Levitt received his J.D. from Florida A&M University College of Law in May 2013. He plans to practice in Florida and would like to continue researching and writing. The author would like to thank Professor Barbra Bernier for all of her help and direction in editing and putting this paper together. Her course on the Fourteenth Amendment and Corporations was revealing and helped to cultivate my interest in the subject. Lastly, I would be remiss not to mention Stephen Colbert, Trevor Potter, and the entire Colbert Report production team. By highlighting the absurdity of the Court’s holding through comedic sketches, they have helped to inform and motivate the public into action. At the very least, they inspired this author to seek out the truth and to find out for himself what the Court was really doing and what’s at stake.

1. Transcript of Oral Argument at 7, *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010) (No. 08-205).

1. The Tillman Act and Taft-Hartley	177
2. FARA and FECA	178
3. 1974 FECA Amendments	179
4. McCain-Feingold	180
B. <i>Foreign Owned Corporations and Their U.S. Subsidiaries</i>	180
C. <i>The United States Chamber of Commerce</i>	182
IV. SECOND AMENDMENT — A BRIEF ACADEMIC EXERCISE	183
V. APPLYING CITIZENS UNITED	185
VI. CONCLUSION	187

INTRODUCTION

In 2010, the Supreme Court decision, *Citizens United v. Federal Election Commission*,² declared unconstitutional any law forbidding corporations and unions from using general treasury funds for “electioneering communication,” or political advocacy transmitted by broadcast, cable, or satellite communication in the period leading up to a federal election.³ In so doing, the Supreme Court overruled its prior decision in *Austin v. Michigan Chamber of Commerce*⁴ and parts of a later case, *McConnell v. Federal Election Commission*.⁵ Non-profit organizations like Citizens United, as well as unions and for-profit corporations, now have the freedom to spend money from their general treasuries on electioneering communications with no fear of criminal penalties.⁶ On its face, the case seems to be a victory for freedom of speech and a bulwark against oppressive government censorship.⁷ “If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in

2. 558 U.S. 310 (2010).

3. *Id.* at 886.

4. 494 U.S. 652 (1990) (upholding provisions of the Michigan Campaign Finance Act, which prohibited corporations from using their general treasury funds on independent expenditures in support of or in opposition to any candidate running for any state office), *overruled by* *Citizens United, v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

5. 540 U.S. 93 (2003) (upholding provisions of the Bipartisan Campaign Reform Act of 2002, which made it a felony for a political party or corporation to use soft money in issue ads, similar in effect to the Michigan Campaign Finance Act), *overruled by* *Citizens United, v. Fed. Election Comm’n*, 130 S. Ct. 876 (2010).

6. 2 U.S.C. § 434(f)(3)(A) (West) (defining electioneering communications as “any broadcast, cable, or satellite communication” that “refers to a clearly identified candidate for Federal office” and is made within 30 days of a primary or 60 days of a general election).

7. CITIZENS UNITED, www.citizensunited.org (last visited Mar. 10, 2012) (describing the non-profit group’s battle against the government as “David v. Goliath”).

political speech.”⁸ Justice Kennedy’s interpretation should be reassuring to the American people, at least to the numerous associations of people, like corporations, but in most circles it has had the opposite effect, stirring suspicions of foul play and rousing fears of a new wave of unchecked corruption in American politics.

By upholding a state statute prohibiting corporate independent expenditures, the *Austin* Court had, according to Justice Kennedy’s logic, put millions of corporations in jeopardy of being silenced by oppressive government censorship.⁹ The *Austin* Court’s justification for such a restriction on speech, that “corporate wealth can unfairly influence elections” even in the form of independent expenditures¹⁰ was the compelling government interest at the foundation of the McCain-Feingold Act.¹¹ By striking down *Austin*’s ban on corporate independent expenditures the *Citizens* Court effectively saved the open “market place of ideas,” which the First Amendment was designed to protect.¹² Now corporations can spend unlimited money buying airspace for a variety of political advertisements and electioneering communications, thus keeping the open market place of ideas robust and informative. In the twenty years between *Austin* and *Citizens*, the open market place of ideas had ostensibly suffered because corporations could no longer use their immense accumulations of wealth to flood the airwaves with political ads.

As David Bossie, the CEO of Citizens said in a recent interview, the majority “[was] trying to right a wrong that they felt was on the books.”¹³ Employing some “results oriented” jurisprudence, the *Citizens United* majority reinstated two recently established principles that *Austin* had allegedly overlooked, that money is functionally equivalent to speech¹⁴ and that First Amendment protection does not

8. *Citizens United*, 558 U.S. 310.

9. *Id.* (the majority uses the phrase “associations of citizens” interchangeably with corporations).

10. *Id.*

11. Bipartisan Campaign Reform Act of 2002, 2 U.S.C.A. § 431 (2002) (*see infra* part IV.A for further discussion).

12. *Citizens United*, 558 U.S. 310.

13. See C-SPAN, interview on Super PACs and the 2012 Campaign, (Feb. 12, 2010), <http://www.c-spanvideo.org/program/Csan>.

14. *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (“A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today’s mass society requires the expenditure of money.”).

depend on the identity of the speech's source.¹⁵ The result effectively prevents a hostile government from suppressing the political dialogue preceding an election.¹⁶

With the unelected guardians of our constitutional rights hard at work, why has there been so much controversy surrounding the decision? In his scathing dissent, Justice Stevens condemned the majority and expressed deep concern with their approach and its potential deleterious effect on the integrity of the court.¹⁷ Aware of the clarity and depth that would be required to rebut the majority's, at times, convoluted argument, Justice Stevens began with, "I regret the length of what follows, but the importance and novelty of the Court's opinion require a full response. . . I emphatically dissent from its principal holding."¹⁸ The dissent then explicated in great detail three fundamental issues with the majority's approach: their "procedural dereliction," their disregard for *stare decisis* and their ruling, or lack of thereof, on the merits.¹⁹ President Obama also expressed concern in his 2010 state of the union address, eight days after the decision came out, when he said, "The Supreme Court reversed a century of law that I believe will open the floodgates for special interests, including foreign corporations to spend without limit in our elections."²⁰ Each of these concerns will be explored in detail below, but first it is interesting to note the direction of the public discourse in the aftermath of *Citizens United* and to point out where it misses the point.

Citizens United and all of its 'corporate money-corrupting-politics' implications have fascinated a segment of popular culture. One notable and boisterous personality is Stephen Colbert, host, writer and

15. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978) ("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.").

16. *Citizens United*, 558 U.S. 310.

17. *Id.* at 931 (Stevens, J., dissenting) ("The Court's ruling threatens to undermine the integrity of elected institutions across the Nation. The path it has taken to reach its outcome will, I fear, do damage to this institution. Before turning to the question whether to overrule *Austin* and part of *McConnell*, it is important to explain why the Court should not be deciding that question.").

18. *Id.*

19. *Id.* at 942 (Stevens, J., dissenting) ("The novelty of the Court's procedural dereliction and its approach to *stare decisis* is matched by the novelty of its ruling on the merits.").

20. Mary Hall, *State of the Union: Obama Walking in the Footsteps of FDR*, HUFFINGTON POST (Feb. 3, 2010), http://www.huffingtonpost.com/mary-hall/state-of-the-union-obama_b_447056.html (last visited Mar. 5, 2012); *See also* Alito Caught Reacting to Obama Remarks? (ABC Television News Broadcast), available at <http://www.youtube.com/watch?v=NfCDme-Z9Fc&feature=fvsr> (Showing the majority democratic congress erupt in standing ovation in response to the President, while Justice Alito visibly reacts).

producer of the Colbert Report.²¹ In the wake of *Citizens United*, Stephen Colbert has aired dozens of episodes satirizing its implications, including one which aired on January 27, 2010, lampooning Chief Justice John Roberts for his blatant disregard of precedent.²² The show has also aired numerous segments on Super Political Action Committees (hereinafter “Super PACs”)²³ and has documented Stephen Colbert’s journey in the formation of his own Super PAC.²⁴

A recurring theme in many of these segments is that corporations are now equal to natural persons under the constitution and are therefore entitled to the same protections under the law as natural persons.²⁵ The community of legal scholars seems to be fixated on this idea of corporate personhood as well. A cursory search in Westlaw Next reveals over 800 law review articles written in just the two years since *Citizens United* was decided.²⁶ The topics are diverse and wide rang-

21. See Deborah Solomon, *Questions for Stephen Colbert, Funny About the News*, N. Y. Times (Sept. 25, 2005), available at <http://www.nytimes.com/2005/09/25/magazine/25questions.html> (last visited Mar. 5, 2012) (Stephen Colbert describes his character as a “well intentioned, poorly informed, high status idiot.”). See also www.colbertnation.com).

22. <http://www.colbertnation.com/the-colbert-report-videos/262612/january-27-2010/the-word---prece-don-t> (last visited Apr. 17, 2012) (In a segment entitled “Prece-don’t” Colbert is thankful that, “Chief Justice John Roberts has a brilliant legal strategy to get around following precedent—not following precedent!”).

23. See <http://www.opensecrets.org/pacs/superpacs.php?cycle=2012> (last visited Feb 19, 2012) (Super PAC, also known as an independent expenditure-only committees, can raise unlimited amounts of money from corporations, individuals, and other associations of individuals to spend on overt advocacy ads. They must report their donors to the FEC on other a quarterly or monthly basis and are prohibited from donating money directly to candidates). (See e.g., *SpeechNow.org v. Fed. Election Comm’n*, 599 F.3d 686, 698 (D.C. Cir. 2010) cert. denied).

24. Searching “Super PAC” or “Trevor Potter” (Stephen Colbert’s attorney and former FEC chairmen) on www.colbertnation.com revealed 19 episodes making some reference to Super PACs. See e.g. <http://www.colbertnation.com/the-colbert-report-videos/379369/march-30-2011/colbert-pac---trevor-potter> (last visited Feb. 17, 2012) (Stephen Colbert discusses starting his own Super PAC with his attorney); See also <http://www.colbertsuperpac.com/> for general information relating to Colbert’s Super PAC.

25. See e.g. <http://www.colbertsuperpac.com/episodeiv-anewhope/index.php> (last visited Feb. 18, 2012) (A commercial put out by the Colbert Super PAC advocating against Mitt Romney for president asserted that because Romney believes corporations are people and because he has been responsible for some companies going bankrupt he is a serial killer; See also <http://www.colbertnation.com/the-colbert-report-videos/406409/january-19-2012/colbert-super-pac---john-paul-stevens>, (last visited Feb 18, 2012) (During an interview with retired Supreme Court Justice Stevens, Colbert said, “We all know it is long established law that corporations are people. . .” to which Justice Stevens responded, “For some purposes corporations are persons.” The retired Justice’s point is essentially the thesis of part I).

26. Using Westlaw Next’s advanced search feature, with the date parameter set to “after 1-1-2010” and the exact phrase “citizens united.” (last visited Feb 18, 2012) (compared to only 62 law review articles written in the same interval of time after *Roe v. Wade*, 410 U.S. 113 (1973)).

ing, but one topic seems to come up more than others, corporate personhood, with at least sixty articles addressing the issue from some angle.²⁷ The public discourse regarding the constitutional rights of corporations has been primed, and debate is flourishing across the country. Citizen advocacy groups have created websites pushing for an amendment to the constitution removing corporate personhood.²⁸ This is, without a doubt, a step in the right direction. Considering how ill-informed and apathetic the average citizen is, any conversation bringing attention to such a controversial issue is good. However, the focus on eliminating corporate personhood is a distraction and unlikely to effectuate any real change.

This note will examine the implications of the *Citizens United* decision and will argue that the future of First Amendment protection of corporate speech does not turn on any notion of corporate personhood. It will explore exactly how the Court has applied the equal protection clause of the Fourteenth Amendment to corporations. It will re-examine the infamous *Santa Clara* headnote and the genesis of the legal community's flawed perception of corporate personhood. Part II will break down the *Citizens* Court's approach and will show how the majority could have reached the same result without overturning perfectly good law. Part II will also illustrate the majority's pro-business bias and its role in their analysis. Part III will discuss the implications of the decision on campaign finance laws as they relate to corporations owned by foreign nationals. It will explore how the various campaign finance laws, starting with Tillman Act of 1907 through the McCain-Feingold amendments of 2002, have treated multinational corporations and how *Citizens* may change everything. As an academic exercise, Part IV will briefly extend the *Citizen* Court's logic to second amendment protection of a corporation's right to bear arms. The note will conclude with a warning, echoing Justice Stevens' concerns regarding the lack of judicial restraint and the future of the Court.

I. FALSE ORIGINS OF CORPORATE PERSONHOOD

A corporation is and should be considered a person under the law for some purposes. Examining early Supreme Court jurisprudence on corporate personhood reveals that the constitutional protections,

27. Same search parameters as above, with the additional phrase "corporate personhood."

28. See, e.g., <http://www.citizen.org/pressroom/pressroomredirect.cfm?ID=3264> (last visited Feb. 19, 2012); See also <http://reclaimdemocracy.org/personhood> (last visited Feb. 19, 2012) (containing a draft for a proposed amendment).

which corporations have come to enjoy, originated from a property rights framework.²⁹ It is often claimed that *Santa Clara County v. Southern Pacific Railroad Co.*³⁰ was the first case to grant corporations Fourteenth Amendment protection and therefore was the genesis of corporate personhood.³¹ However, this is a misguided read of *Santa Clara*. Deciding the case on narrower grounds, the Court never ruled on the constitutional issue of whether corporations were persons or not.³² Unable to rely on any rationale supporting the conclusion that corporations are indeed people under the Fourteenth Amendment (since none was proffered), creative corporate attorneys have clung to Justice Waite's declaration from the bench that,

The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does.³³

Most legal scholars agree that this proposition is not the law since the Court made no mention of corporate personhood again.³⁴

While it is true that Justice Waite's statement cannot be the law, it is not necessarily wrong. Proper context is required. In *The Railroad Tax Cases*,³⁵ decided four years before *Santa Clara County*, Justice Field said:

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. . . On the contrary, we think that it is well established. . . that whenever a provision of the constitution, or of a law, guaranties to

29. Daniel Lipton, *Corporate Capacity for Crime and Politics: Defining Corporate Personhood at the Turn of the Twentieth Century*, 96 VA. L. REV. 1911, 1940 (2010) (The article asserts that, "instead of rooting corporate personhood in abstract concepts of group personality or artificial theory, the courts grounded the corporate entity in the familiar category of property.").

30. 118 U.S. 394 (1886) (This case involved a tax dispute between the railroad and Santa Clara County. The railroad company conceded that taxes were owed but argued the State Board was without jurisdiction to assess the tax.).

31. Lipton, *supra* note 30, at 1941.

32. *Santa Clara*, 118 U.S. at 416 (The Court accepted the railroad's argument that the board lacked jurisdiction to assess the tax and declared, "As the judgment can be sustained upon this ground, it is not necessary to consider any other questions. . .").

33. *Id.* at 396.

34. See, e.g., THOM HARTMANN, *UNEQUAL PROTECTION: HOW CORPORATIONS BECAME "PEOPLE"—AND HOW YOU CAN FIGHT BACK* 25-32 (2 ed. 2010). (See generally discussion in Chapter 1, p. 25-32).

35. 13 F. 722 (1882) (C.C.D. Cal. 1882) (another tax dispute).

persons *the enjoyment of property*, or affords to them means for *its [the property's] protection*, or prohibits legislation injuriously affecting it [*property*], the benefits of the provision extend to corporations. . .³⁶

Justice Field's unambiguous elucidation on the role of the Fourteenth Amendment in protecting a corporation's property interests implicitly introduced the notion of corporate personhood for the first time, albeit in an extremely limited context. It is logical to assume that Justice Waite was actually relying on the analytical framework that "corporate property was to be treated no differently than individual [property]"³⁷ just recently established by his colleague.

A. *Hale v. Henkel – Personal Rights Versus Safeguarding Property Interests*

In *Hale v Henkel*,³⁸ twenty years after *Santa Clara*, the majority had another opportunity to explicitly declare corporations people, but chose not to do so. The Court held that the individual witness, in his capacity as corporate officer, could not assert the Fifth Amendment's protection against self-incrimination on behalf of the corporation because the right against self-incrimination was "purely a personal privilege of the witness [and] never intended to permit him to" assert that some third party or corporation, "might be incriminated by his testimony."³⁹ However, the Court did find that the Fourth Amendment protects a corporation's property interests against unreasonable searches and seizures. The Court reasoned:

A corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity. In organizing itself as a collective body it waives no constitutional immunities *appropriate to such body*. *Its property* cannot be taken without compensation. It can only be proceeded against by due process of law, and is protected, under the 14th Amendment, against unlawful discrimination.⁴⁰

36. *Id.* at 744 (emphasis added).

37. Daniel Lipton, *Corporate Capacity for Crime and Politics: Defining Corporate Personhood at the Turn of the Twentieth Century*, 96 VA. L. REV. 1911, 1942 (2010).

38. 201 U.S. 43 (1906) (a corporate officer tried to assert Fourth Amendment protections against unreasonable search and seizure and Fifth Amendment protection against self-incrimination on behalf of the corporation).

39. *Hale*, 201 U.S. at 69.

40. *Id.* at 76 (emphasis added).

Hale is a textbook example of Justice Field's framework laid out in the *Railroad Tax Case*.⁴¹ Twenty years after *Santa Clara*, the Court had yet to entertain any explicit notions of corporations as natural persons. Instead, corporations were extended limited constitutional protections appropriate only to safeguard their perpetual property interests. This protection makes sense, considering the primary purpose of a corporation is to aggregate wealth and property in order to further some capitalistic endeavor.⁴²

B. *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary Acknowledges The Property Interests of Private Businesses*

Another opportunity where the Court could have unequivocally declared corporations to be people, but instead continued to use property rights to justify the application of the Fourteenth Amendment, came twenty years after *Hale*, in *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*.⁴³ Discussed in every first year constitutional law class, this case is known for declaring that a parent's right to choose how to educate their child is a fundamental right protected by the due process clause.⁴⁴ In *Pierce v. Society of the Sisters*, the appellees were private educational institutions organized as corporations under the law. In addition to alleging that compulsory education violated the rights of parents to choose how their children were educated, the institutions argued that compulsory education also violated "the

41. 13 F. 722 (1882) (C.C.D. Cal. 1882).

42. See generally *Austin* at 658-9; See also *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 636, 4 L. Ed. 629 (1819) ("A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties, by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property, without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities, that corporations were invented, and are in use. By these means, a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being.")

43. 268 U.S. 510, 535 (1925).

44. *Id.* at 534 (discusses "the liberty of parents and guardians to direct the upbringing and education of children under their control." Here the Court applied the doctrine of *Meyer v. Nebraska*, 262 U.S. 390 (1923), which held the right of parents to control the upbringing of their children was protected by substantive due process).

right of schools and teachers therein to engage in a useful business.”⁴⁵
The Court agreed concluding:

Appellees are corporations, and therefore, it is said, they cannot claim for themselves the liberty which the Fourteenth Amendment guarantees. Accepted in the proper sense, this is true. *Northwestern Life Ins. Co. v. Riggs*, 203 U. S. 243, 255, 27 S. Ct. 126, 51 L. Ed. 168, 7 Ann. Cas. 1104; *Western Turf Association v. Greenberg*, 204 U. S. 359, 363, 27 S. Ct. 384, 51 L. Ed. 520. But they have business and property for which they claim protection. These are threatened with destruction through the unwarranted compulsion which appellants are exercising over present and prospective patrons of their schools. And this court has gone very far to protect against loss threatened by such action.⁴⁶

C. Bellotti – Protecting Speech Regardless of Who is Speaking

The *Society of Sisters* case makes clear that the Court did not use corporate personhood as explicit justification for extending Fourteenth Amendment protections to corporations, and *Citizens United*⁴⁷ did not suddenly change this paradigm. For another fifty years, the Court continued extending Fourth Amendment protections to corporations under a property rights analysis until its 1976 decision in *First National Bank of Boston v. Bellotti*.⁴⁸ For the first time in history, the *Bellotti* Court extended First Amendment protections to corporations based on the inherent nature of the speech itself rather than on any identifiable property interest.⁴⁹

Rejecting the notion that corporations could expend general treasury funds only on those matters that materially affected their business interests, the real question according to the Court, was whether the statute abridged the type of expression in which the First Amendment was meant to protect, not whether corporations shared the same first amendment protections as natural persons.⁵⁰ In fact the

45. *Society of the Sisters of the Holy Names*, 268 U.S. at 532.

46. *Id.* at 535 (see, e.g. *Truax v. Raich*, 239 U. S. 33, 36 (1915); *Truax v. Corrigan*, 257 U. S. 312 (1921); *Terrace v. Thompson*, 263 U. S. 197 (1975)).

47. *Citizens United v. Fed. Election Comm.* 558 U.S. 310 (2010).

48. 435 U.S. 765, 767 (1978) (the banking plaintiffs challenged a Massachusetts statute which prohibited corporations from expending funds to publicize their views on a referendum matter unless the referendum matter ‘materially affect[ted]’ a corporation’s ‘property, business or assets.’). See *First Nat. Bank of Boston v. Attorney Gen.*, 371 Mass. 773, 359 N.E. 2d 1262 (1977) *rev’d sub nom.* See also *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S. Ct. 1407, 55 L.Ed. 2d 707 (1978).

49. *Id.* at 776.

50. *Id.* at 778.

court declined to address this issue,⁵¹ reasoning that certain constitutional protections were purely personal in nature and therefore unavailable to corporations because the historic function of the constitutional right had been limited to the individual.⁵² Determining whether a particular protection is purely personal or unavailable to the corporation because of some other reason depends on the nature, history and purpose of the particular constitutional protection.⁵³ Since the nature, history, and purpose of the First Amendment was to protect the free flow of information in an open market place, it is not purely personal in nature.⁵⁴

II. CITIZENS UNITED

“The conceit that corporations must be treated identically to natural persons in the political sphere is not only inaccurate but also inadequate to justify the Court’s disposition of this case.”⁵⁵ No case has ever declared that corporations are entitled the same rights as natural persons. It is clear from the jurisprudence on the subject that focusing on corporate personhood loses sight of the real issues: results oriented jurisprudence and judicial activism. So what did *Citizens United* do if it did not declare that corporations are people for the purpose of First and Fourteenth Amendment protections? *Citizens United* held that, “the Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether.”⁵⁶ In reality, by overturning *Austin*,⁵⁷ the Court struck down section 441(b) of the Bipartisan Campaign Reform Act of 2002⁵⁸ which prohibited corporations from funneling unlimited money from their general treasury through a “segregated fund established by

51. The fact that the court explicitly acknowledged its refusal to address the issue clearly indicates that the question has yet to be fully settled.

52. *Bellotti*, 435 U.S. at 778.

53. *Id.*

54. *Id.* at 783.

55. *Citizens United v. Fed. Election Comm.*, 558 U.S. 310 (2010) (Stevens, J., dissenting).

56. *Id.* at 886 (This is quite an overstatement, as Justice Stevens pointed out in his dissent, “Neither *Citizens United*’s nor any other corporation’s speech has been ‘banned,’ ante, at 886. All that the parties dispute is whether *Citizens United* had a right to use the funds in its general treasury to pay for broadcasts during the 30-day period.” *Id.* at 929 (Stevens, J., dissenting)).

57. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 666 (1990).

58. More commonly referred to as McCain-Feingold.

a corporation,⁵⁹ or SuperPAC,⁶⁰ in direct advocacy for or against a candidate for federal office.⁶¹

A. *Austin's Compelling Interest and a New Definition of Corruption*

Austin provided the underlying justification, the government's compelling interest, at the foundation of future prohibitions against corporate expenditures.⁶² Its principal holding was that the government has a compelling interest in "eliminating from the political process the corrosive effect of political 'war chests' amassed with the aid of the legal advantages given to corporations."⁶³ The *Austin* Court recognized that, although money was speech, there was a legitimate justification for regulating corporate spending. Preventing corruption, or even the appearance thereof, in order to maintain the citizenry's confidence in the democratic process, was compelling enough to warrant this slight restriction of a corporation's speech rights. Viewed with this in mind *Citizens* did more to modify the definition of corruption than to revolutionize notions of corporate personhood.⁶⁴

The importance of the *Austin* holding cannot be overstated. With its definition of corruption eviscerated, most of McCain-Feingold no longer had a leg to stand on. While the practical implications of this outcome may be troubling, what is more concerning is how the court reached this conclusion. As David Bossie said, "they [the majority] were trying to right a wrong they felt was on the books."⁶⁵ In so doing, the Court encroached into the purview of Congress, and instead of in-

59. 2 U.S.C. § 441(b)(4)(A)(i) (West 2012).

60. See *supra* text accompanying note 24.

61. § 441(b)(4)(A)(i).

62. See generally *Citizens United* at 922-923 (Roberts, C.J., concurring) ("It should not be surprising then, that Members of the Court have relied on *Austin's* expansive logic to justify greater incursions on the First Amendment, even outside the original context of corporate advocacy on behalf of candidates running for office.") See, e.g., *Davis v. Federal Election Comm'n*, 128 S.Ct. 2759, 2780 (2008) (STEVENS, J., concurring in part and dissenting in part) (used *Austin* to justify restrictions on campaign spending by individual candidates); See also *McConnell* at 203-209 (extended *Austin* to cover both the "functional equivalent" of express advocacy by corporations and also electioneering speech conducted by labor unions).

63. *Austin*, 494 U.S. at 666.

64. See *Citizens United v. Fed. Election Comm.*, 558 U.S. 310 (2010) ("This Court now concludes that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption. That speakers may have influence over or access to elected officials does not mean that those officials are corrupt.").

65. See CSPAN interview, *supra* note 14.

interpreting the constitution it substituted its definition of corruption for that of the peoples', through their elected representatives.⁶⁶

B. *Judicial Activism And The Facial Challenge That Never Was*

What led the majority to this flawed decision? Clearly committed ahead of time to overturning *Austin*, the Court took it upon itself to tackle the broader constitutional question, which had not been raised on appeal. This approach marked a significant departure from recent case law which proclaimed, "partial rather than facial invalidation is the required course."⁶⁷ In fact Justice Kennedy himself affirmed this practice in *Gonzales v. Carhart*, decided just three years earlier.⁶⁸ Writing for the same conservative majority which decided *Citizens*, he explained, "it is neither our obligation nor within our traditional role to resolve questions of constitutionality with respect to each potential situation that might develop. . . for this reason as-applied challenges are the basic building blocks of constitutional adjudication."⁶⁹ In *Citizens*, however, Justice Kennedy viewed these "basic building blocks of constitutional adjudication" as either insignificant or he forgot about them outright. There he explained that "the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control. . ." ⁷⁰ The real question is whether this is an example of biased judicial advocacy or just an innocent illustration of how malleable the law can often be.⁷¹

66. See generally *Citizens United* at 908-11 ("A single footnote in *Bellotti* purported to leave open the possibility that corporate independent expenditures could be shown to cause corruption. 435 U.S., at 788, n. 26, 98 S.Ct. 1407. For the reasons explained above, we now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption."); See also *Citizens United* at 928 (Scalia J., concurring)("In passing, the dissent also claims that the Court's conception of corruption is unhistorical . . . Moreover, if speech can be prohibited because, in the view of the Government, it leads to 'moral decay' or does not serve 'public ends,' then there is no limit to the Government's censorship power.").

67. *Citizens United*, 558 U.S. 310 (quoting *Brockett v. Spokane arcades, Inc.*, 472 U.S. 291, 504 (1985)).

68. 550 U.S. 124, 127 (2007).

69. *Id.* at 168 (quoting Richard Fallon, *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, at 1328 (2000)).

70. *Citizens United*, 558 U.S. 310 (it is interesting to note that Justice Kennedy relies on Fallon, *supra* note 63, to diminish the authority of his previous exposition on the basic building blocks of constitutional adjudication) ("Once a case is brought, no general categorical line bars a court from making broader pronouncements of invalidity in properly 'as-applied' cases") (quoting Fallon, at 1327, 1328).

71. See, e.g., *Florence v. Bd. of Chosen Freeholder* 557 U.S. 132 S. Ct. 1510 (2012); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2559 (2011).

The results oriented sentiment becomes more obvious by Chief Justice Robert's declaration in his concurrence that, "If there were a valid basis for deciding this statutory claim *in Citizens United's favor* (and thereby avoiding constitutional adjudication), it would be proper to do so. . ."72 This certainly does not sound like words from an objective arbiter charged with impartially administering justice. If the majority was so insistent on ruling in favor of the nonprofit company the case could have been decided as narrowly as possible and on the merits of a claim properly brought before the court.

Eager to overturn *Austin* and in the process, strike down section 441(b) of the Bipartisan Campaign Reform Act of 2002, Justice Kennedy and the majority glossed over *Citizen United's* narrower arguments and chose to tackle the question of the statute's facial constitutionality, which had been dropped two years ago at the district court level. Justice Stevens was quick to point out that, "It is only in exceptional cases. . .that questions not pressed or passed upon below are reviewed."⁷³ Neither the appellant nor the majority identified an exceptional circumstance warranting such a procedural deviation.⁷⁴ Chief Justice Roberts attempted to justify this *sua sponte* facial challenge by stating that:

Given the nature of that claim. . .it makes no difference of any substance whether this case is resolved by invalidating the statute on its face or only as applied to *Citizens United*. Even if considered in as-applied terms, a holding in this case that the Act may not be applied to *Citizens United*-because corporations as well as individuals enjoy the pertinent First Amendment rights-would mean that any other corporation raising the same challenge would also win.⁷⁵

But the Chief Justice's analysis misconstrues *Citizens United's* 'as-applied' challenge to the statute. One of its principle arguments was that there should be an exception to subsection 441(b)'s ban on independent expenditures for communication by nonprofits funded predominately by individuals.⁷⁶ Essentially, the statute, as applied to a nonprofit company like *Citizens United*, should fail. So any holding based on this as-applied challenge should not and would not turn on whether corporations enjoyed the same first amendment rights as individuals, like the

72. *Citizens United*, 558 U.S. 310 (Roberts, C. J., concurring) (emphasis added) (writing separately to specifically "address important principles of judicial restraint and *stare decisis* implicated in this case." *Id.* at 917).

73. *Citizens United*, 558 U.S. 310 (quoting *Duignan v. United States*, 274 U.S. 195, 200 (1927)).

74. *Id.* at 919.

75. *Id.*

76. *Id.* at 891.

Chief Justice claimed. A holding that the Act may not be applied to Citizens would mean only that other nonprofit corporations would also win, not that all other corporations would also win.

C. *The De Minimis Exception for Non-Profits – An Acceptable Ruling On The Merits*

The majority could have stopped there, but simply finding in favor of Citizens United was not the desired result. Overruling *Austin's* holding that the government can restrict corporate independent expenditures in to order to fight corruption was the ultimate goal. Justice Kennedy reasoned that since Citizens United received a *de minimis* amount of donations from for-profit corporations it did not qualify for the nonprofit exception carved out in a prior case.⁷⁷ It is interesting that the record was never cited showing just how much of the documentary *Hilary* was funded from for-profit donations. Even a negligible contribution from a single for-profit company, the majority pointed out, would still allow for-profit treasury funds to be spent in support of a candidate, however minimal.⁷⁸

Justice Kennedy used this rigid, self-serving logic to support the notion that the restriction on corporate independent expenditures itself, at issue in *Austin* and addressed by McCain-Feingold, ties the Court's hand in carving out a specific exception for nonprofits. Avoiding this *de minimis* standard, according to the majority, is necessary to avoid "intricate case-by-case determinations" of whether too much money has been received from for profit organizations, thus rendering the particular corporate political speech illegal.⁷⁹ This draconian formalism appears to be an excuse rather than an impartial exercise in statutory construction.

Creating an exception for *de minimis* donations from for-profit corporations was well within the Court's authority. It is a matter of settled law, that an element with only the slightest influence can be

77. *Id.* (citing Fed. Election Comm'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 at 263-264 (1986) ("Our conclusion is that § 441(b)'s restriction of independent spending is unconstitutional as applied to MCFL, for it infringes protected speech without a compelling justification for such infringement. We acknowledge the legitimacy of Congress' concern that organizations that amass great wealth in the economic marketplace not gain unfair advantage in the political marketplace." The Court recognizes that a nonprofit organization is not as likely to gain the same "unfair advantage in the political marketplace" by "amass[ing] great wealth" as a for profit corporation may).

78. *Id.*

79. *Id.* at 892.

overlooked, especially in the name of judicial restraint.⁸⁰ But instead of overlooking such a minimal influence the Court went out of its way to emphasize it. Instead of developing the newly created exception⁸¹ to its logical end, the court declined “to adopt an interpretation that requires intricate case-by-case determinations to verify whether political speech is banned, especially if *we are convinced that, in the end, this corporation has a constitutional right to speak on this subject.*”⁸² This statement clearly illustrates how the majority’s predisposition for a certain outcome, regardless of the convoluted legal maneuvering required, misses the point. It was never argued that corporations do not have a right to speak on certain subjects, only that the government does have a compelling interest in regulating that speech especially in the months leading up to a federal election.

Having concluded that Citizens United’s narrower arguments could not be reconciled with a fair interpretation of the statute, the Court could have exercised judicial restraint by affirming the district court’s decision. Instead, in the name of “judicial responsibility,” the majority struck down 441(b) and overruled *Austin*, fearing that “any other course of decision would prolong the *substantial nation-wide chilling effect* caused by 441(b). . .”⁸³ Again, it seems as if the majority had decided ahead of time that the statute was unconstitutional before even beginning the constitutional analysis. So naturally, it should not be surprising that this analysis was dubious at best.

D. “Judicial Responsibility” Trumps Objectivity

The majority claimed that *Austin* conflicted with the precedent set by *Bellotti* and that *stare decisis* actually commanded overturning it.⁸⁴ *Austin* allegedly failed to follow *Bellotti*’s holding that political

80. For a brief history on the *de minimis* maxim’s first use in the English civil law see e.g., Andrew Inesi, *A Theory of De Minimis and A Proposal for Its Application in Copyright*, 21 BERKELEY TECH. L.J. 945, 949 (2006); See also *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982)(city employee forced to take leave of absence while running for office alleged first amendment violations; as to the leave of absence requirement Justice Posner noted a *de minimis* exception, “The impairment of free speech brought about by the leave-of-absence requirement is indirect and probably very slight; the benefits in preserving order, discipline, and efficiency in public employment strike us as much greater than the cost to First Amendment interests).

81. See *Fed. Election Comm’n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (this case created a limited exception for certain non-profit corporations).

82. *Citizens United v. Fed. Election Comm.*, 558 U.S. 310 (2010).

83. *Id.* at 894 (emphasis added).

84. *Id.* at 912.

speech could not be prohibited based on the speaker's identity.⁸⁵ Here again, the majority misconstrues what *Austin* was all about. It seems unfair to say that *Austin* "contravened this Court's earlier precedents in *Buckley* and *Bellotti*"⁸⁶ when the Court in *Austin* explicitly acknowledged the rule from *Bellotti*.⁸⁷ The *Citizens* majority was either ignorant of the *Austin*'s Court's respect for precedent or deliberate in mischaracterizing *Austin* in order to manipulate the law towards the result they wanted—classic judicial activism. Either way, this should be troubling and should trump any concern over corporate personhood, as that discussion is a mere distraction.

No one in *Austin* suggested that speech from a corporation falls entirely outside the protection of the First Amendment.⁸⁸ In fact, Justice Stevens pointed out in his dissent that, "indeed, all six Members of the *Austin* majority had been on the Court at the time of *Bellotti*, and none so much as hinted in *Austin* that they saw any tension between the decisions."⁸⁹ The *Austin* Court did not reject First Amendment protection for corporate political speech introduced by the *Bellotti* Court as the majority purports. Both cases are consistent with First Amendment jurisprudence. "When a statutory provision burdens First Amendment rights, it must be justified by a compelling state interest."⁹⁰ The difference is that *Bellotti* did not find the State's interest in regulating independent corporate expenditures on referenda issues compelling enough to burden the corporation's speech rights.⁹¹ The *Austin* Court, on the other hand, found a compelling interest in "regulating independent corporate expenditures on candidate elections."⁹² *Austin*'s anti-distortion rationale was compelling because of the danger that "corporate political expenditures will undermine the integrity of the political process. . ."⁹³ While it is true that political speech is clearly

85. *See id.* at 912-13.

86. *Id.* at 912.

87. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 657 (1990) (Justice Marshall agreed with *Bellotti* that "the mere fact that the Chamber is a corporation does not remove its speech from the ambit of the First Amendment.") *overruled by* *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010); *See* *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978).

88. *Citizens United*, 558 U.S. 310 (Stevens, J., dissenting) (Justice Stevens accused the majority of "grasp[ing] a quotational straw from *Bellotti*").

89. *Id.*

90. *Fed. Election Comm'n v. Massachusetts Citizens for Life*, 479 U.S. 238 at 256 (1986). *See, e.g., Williams v. Rhodes*, 393 U.S. 31; *NAACP v. Button*, 371 U.S. 415, 438 (1963).

91. *Bellotti*, 435 U.S. at 787-792.

92. *Citizens United*, 558 U.S. 310.

93. *Austin*, 494 U.S. at 668.

“indispensable to decision making in a democracy,”⁹⁴ it is equally true that a functioning democracy requires the citizenry to “have faith that [their] representatives owe their positions to the people, not to the corporations with the deepest pockets.”⁹⁵

E. Conservative Corporate Bias

So what was really going on? The *Citizens* Court addressed a broad constitutional question without being moved to do so and, in so doing, overruled prior cases which in no way contradicted prior precedent. The real story is that the make-up of the court has changed significantly in the twenty years between *Austin* and *Citizens*, gradually becoming more conservative.⁹⁶ Over the last forty years, conservative presidents have picked eleven out of fourteen justices.⁹⁷ After George W. Bush appointed John Roberts and Samuel Alito in 2006, replacing Justice Rehnquist and the moderate Justice O'Connor, the conservative domination of the court began.⁹⁸ Though difficult to quantify, this ideological shift brought a markedly pro-corporate bias to the court.

One way to see this pro-corporate shift is to look at the relationship between the pro-business rulings of the *Roberts* Court and the U.S. Chamber of Commerce. The stated mission of the Chamber is to take the voice of its members to Washington.⁹⁹ Formed in 1912, President Taft called on the chamber’s “assistance in carrying on the government in reference to those matters that affect the business and business welfare of the country.”¹⁰⁰ A study conducted by Lee Epstein, William Landes, and Judge Richard Posner,¹⁰¹ found that the Roberts

94. *Bellotti*, 435 U.S. at 777 (footnote omitted).

95. *Citizens United*, 558 U.S. 310 (Stevens, J., dissenting).

96. See generally www.oyez.org for Justice profiles, interesting statistics, and various other resources.

97. See Nan Aron, *Roberts Court Protects the Powerful*, Politico (May 5, 2010), http://www.politico.com/news/stories/0510/36755_Page2.html.

98. See *Corporations and the Court: America's Supreme Court Is The Most Business-Friendly For Decades*, THE ECONOMIST (July 23, 2011), <http://www.economist.com/node/18866873>.

99. U. S. Chamber of Commerce, <http://www.uschamber.com/about> (last visited Mar. 10, 2012) (According to its official website, “The U.S. Chamber of Commerce is the world’s largest business organization; representing the interests of more than 3 million businesses of all sizes. . .”).

100. *Id.* (President Taft went on to say, “We do not wish to limit your discretion in that matter. We wish that your advice should be as free and unrestricted as possible.”).

101. Judge for the United States Court of Appeals for the Seventh Circuit in Chicago.

Court ruled pro-business in sixty-one percent of its cases over five terms.¹⁰²

So what are the implications of the trend? If the judiciary is the “most important instrument for social, economic and political change,” as Justice Powell once said, what is wrong with judicial advocacy?¹⁰³ It is arguable that without Chief Justice Earl Warren’s judicial advocacy in the fifties and sixties, the civil rights movement would not have been as successful.¹⁰⁴ The problem with the Roberts brand of conservative judicial advocacy is instead of strengthening the rights and constitutional protections of the individual, it favors the business interest. The effects of this paradigm have yet to be fully realized but considering that Chief Justice John Roberts is the youngest Chief Justice since John Marshall over 200 years ago,¹⁰⁵ the potential ramifications of his influence will persist for many years to come.

III. MULTI-NATIONAL CORPORATIONS AND DOMESTIC POLITICS

While the effect of *Citizens United* has allowed corporate money to influence the political discussion like never before, leaving the future of campaign finance forever changed the implications of the decision are vast and misunderstood. Is President Obama’s concern that the Court has opened the floodgates for multinational corporations with foreign shareholders to influence domestic politics a legitimate concern or mere political rhetoric? As discussed above, *Citizens United* did very little to expand corporate political speech rights and, on its face, did nothing to change the current law regulating the participation of multinational corporations in domestic politics. Fundamentally, all that changed after *Citizens United* is that a corporation can now use its general treasury funds to finance both “issue ads” and

102. See *Corporations and The Court*, *supra* note 78, (noting fifty-one percent pro-business rulings under Chief Justice Rehnquist and Forty-seven percent under Chief Justice Earl Warren); See, e.g., Adam Liptak, *Justices Offer Receptive Ear to Business Interests*, N. Y. TIMES, Dec. 18, 2010, available at <http://www.nytimes.com/2010/12/19/us/19roberts.html>; Stephanie Mencimer, *Alito: The Chamber of Commerce’s Supreme Court Ringer?*, Mother Jones.com, (July 9, 2010), available at <http://motherjones.com/mojo/2010/06/alito-chambers-high-court-ringer> (last visited Mar. 10, 2012) (noting that the most reliable supporter of the Chamber was Justice Alito who never voted against the Chamber in the most contested cases).

103. Liptak, *supra* note 93.

104. See New York Times obituary for Chief Justice Earl Warren, available at <http://www.nytimes.com/learning/general/onthisday/bday/0319.html> (last visited Mar. 14, 2013) (the obituary reflects on some of the Chief Justice’s most famous rulings and his impact on civil rights).

105. OYEZ, http://www.oyez.org/justices/john_g_roberts_jr (last visited Apr. 10, 2012).

ads expressly advocating for the election of a specific candidate, whereas before corporations could only finance “issue ads.”¹⁰⁶ In fact, the Court explicitly declined to answer the question of whether preventing foreign corporations from influencing the domestic political process was a compelling government interest.¹⁰⁷

Federal campaign finance law currently prohibits a “foreign national” from making independent expenditures,¹⁰⁸ which includes, among other things, a corporation “organized under the laws of or having its principal place of business in a foreign country.”¹⁰⁹ *Citizens United* leaves this scheme untouched, but with one caveat; the statutory definition does not include the U.S. subsidiary of a foreign corporation, effectively creating a loophole for foreign companies to participate in the political arena through PACS (and now super PACS) created and administered solely by their U.S. subsidiaries.¹¹⁰ Since the 1970’s,¹¹¹ numerous Federal Election Commission (FEC) advisory opinions¹¹² have further crystallized this interpretation leaving no doubt foreign corporations can, at the very least, participate and influence domestic politics in a roundabout way.¹¹³ President Obama’s and Justice Stevens’ concerns appear to be more legitimate, instead of rhetoric, but not for the reasons that one might expect. It is this loophole that lends credence to their fears, not some cataclysmic abdication of

106. See Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1, 19 (2012) (noting “that before *Citizens United*, a corporation or union could sponsor ads with its treasury funds that said ‘Tell Congressman Smith to stop destroying America.’ After *Citizens United*, they can add at the end, ‘and, by the way, don’t vote for him.’” [internal quotations omitted]).

107. *Citizens United*, 558 U.S. 310 (Justice Kennedy noted, “Section 441b is not limited to corporations or associations that were created in foreign countries or funded predominately by foreign shareholders. Section 441b therefore would be overbroad even if we assumed, arguendo, that the Government has a compelling interest in limiting foreign influence over our political process.”).

108. 2 U.S.C. § 441e (2012).

109. 22 U.S.C. § 611(b)(3) (2006).

110. See Jeffrey K. Powell, *Prohibitions on Campaign Contributions from Foreign Sources: Questioning Their Justification in A Global Interdependent Economy*, 17 U. PA. J. INT’L ECON. L. 957, 964 (1996).

111. Since 1975 the FEC has issued over 568 pages of regulations, 1,278 pages of explanations for those regulations, and 1,771 advisory opinions. *Citizens United*, 130 S. Ct. at 895.

112. The passage of Federal Election Campaign Act (FECA) in 1971, as will be discussed *infra*, marked the modern era of campaign finance regulations.

113. See 29 Op. Fed. Election Comm’n 2-3 (1989) (a subsidiary of a foreign corporation, organized under U.S. laws was exempt from the ban on foreigners and could create a PAC for contribution purposes, so long as its foreign owners did not fund or participate in the administration of the PAC). *But see* 29 Op. Fed. Election Comm’n Dissent 5-6 (arguing that the Commission’s separation of the domestic subsidiary from its foreign parent, thus creating two “separate” entities was an error).

all prior prohibitions against foreign nationals making independent expenditures.

A. *A Century Of Campaign Finance Regulations*

As will be illustrated in more detail below, the impetus for campaign finance law has, to varying degrees, always been based on concerns over corruption and the ability of the modern corporation to engage in expensive electioneering communications. Laws dating as far back as 1907, including the passage of the Tillman Act, have targeted independent expenditures by domestic corporations.¹¹⁴ Congressional concern over the influence of foreign agents begins to surface in the 1930's with the passage of the Foreign Agent Registration Act ("FARA") and becomes clear with the Federal Election Campaign Act of 1971 ("FECA"). The next subsection will trace the development of corporate political speech regulation, especially as it relates to multinational corporations, from the Tillman Act through the passage of the McCain-Feingold Act, which still regulates campaign finance today, albeit in a severely diminished way after *Citizens United*. The discussion will illuminate the ever-widening loophole over the last century at the crux of the issue.

1. The Tillman Act and Taft-Hartley

To understand the potential impact of *Citizens United* requires a brief understanding of the history of campaign finance regulations. In response to the rising political influence of corporations through direct contributions to candidates, Congress passed the Tillman Act of 1907¹¹⁵ which was the first significant federal campaign finance law enacted in response to concerns over modern corporate wealth.¹¹⁶ Forty years later, in response to the rising political influence of unions, Congress passed the Labor Management Relations Act ("Taft-Hartley").¹¹⁷ Fearing potential corruption, these Acts prohibited all direct contributions by domestic corporations and unions to any federal or

114. See discussion *infra* III.A.

115. Tillman Act of 1907, Pub. L. No. 59-36, 34 Stat. 864. (See also Theodore Roosevelt, Speech, State of the Union Address, (D.C., Dec. 3, 1906), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=29547> (last visited April 12, 2011).

116. The legislative history suggests two rationales for the Act: "preventing corrupt practices acts" and preventing directors from using shareholders' money without consent. See H.R. REP. NO. 59-6397, at 1-2 (1907).

117. See Labor Management Relations Act of 1947, ch. 120, 61 Stat. 136 (1947). Informally known as the Taft-Hartley Act, the law was first codified at 18 U.S.C. § 610 (1946) and then later, as amended, at 29 U.S.C. §§ 151-166 (2006).

state election. Taft-Hartley, however, placed no limits on a union's ability to spend money out of a separate segregated fund, or PAC.¹¹⁸ While these acts set the stage for modern campaign finance regulations, they addressed only domestic corporations including unions and were concerned only with preventing quid-pro-quo corruption.

2. FARA and FECA

The first legislative enactment addressing concerns over foreign entities manipulating U.S. policy was the Foreign Agent Registration Act ("FARA") passed in 1938. FARA in no way limited speech by foreign principals but instead required all "agents of foreign principals" located within the United States to register with the government.¹¹⁹ Essentially, FARA introduced disclosure requirements for political expression by foreign principals, in an attempt to curb the influx of Axis propaganda during World War II. It was not until 1966 that Congress targeted foreign "political speech"¹²⁰ by making it a felony for a foreign principal to make campaign contributions through its agent.¹²¹ This language, however, was easily exploitable, as the foreign principal could bypass its local agent and contribute directly to a candidate.

As will become clear through the remainder of this paper, it is these exploitations and ambiguities that have plagued campaign finance regulation since its inception, which *Citizens United* most significantly impacts. In an attempt to clarify the existing law, Congress enacted the Federal Election Campaign Act ("FECA") in 1971.¹²² FECA prohibited all political contributions and expenditures made from a corporate or union PAC in an attempt to diminish the loophole left open by Taft-Hartley.¹²³ In *Pipefitters Local Union 562 v. U.S.*, de-

118. Fed. Election Comm'n v. Wisconsin Right to Life, Inc., 551 U.S. 449, 511-512 (2007).

119. 22 U.S.C. § 611(c)(1) (West).

120. Recall that the *Buckley* court later equated speech with money, *supra* note 15, at 2.

121. 22 U.S.C. § 611(c) (West) (corresponds to 80 Stat. 244, 244 (2006)) (defining the "agent of a foreign principal" as any person who acts "under the direction or control, of a foreign principal or of a person. . . directly or indirectly supervised, directed, controlled, financed, or subsidized in whole or in major part by a foreign principal." Business associations that are organized in the U.S. are not classified as foreign principals. 22 U.S.C. § 611(b)(2)).

122. *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 399 (1972).

123. Under Taft-Hartley, unions could circumvent this restriction on direct contributions by contributing unlimited funds from their general treasury. *See, e.g.*, Sean Saval, *Corporations United: Reassessing Citizens United v. Federal Election Commission to Propose That Political Speech Regulations of for-Profit Corporations Should Be Given the Same Reduced Judicial Scrutiny As Commercial Speech*, 41 STETSON L. REV. 175, 181-83 (2011).

cided a year later, the court held that Taft-Hartley “does not apply to union contributions and expenditures from political funds financed in some sense by the *voluntary donations* of employees.”¹²⁴ Before 1972, it was unclear whether unions could use their general treasury funds to contribute to their PACs, but after FECA and *Pipefitters*, it became clear that union political contributions or expenditures were only lawful if employees or union members freely and knowingly donated money to the PAC.¹²⁵ This does nothing to close the loophole and instead, as Justice Powell opined in his dissent in *Pipefitters*, “[t]he opinion of the Court provides a blueprint for compliance [with the statute]. . . which will be welcomed by every corporation and union which wishes to take advantage of. . . [the] opportunity to influence elections. . . .”¹²⁶

3. 1974 FECA Amendments

Congress next amended FECA in 1974, after the Watergate scandal revealed how foreign principals exploited the gaping loophole left open by FARA.¹²⁷ The 1974 Amendments placed limits on individual campaign contributions and expenditures¹²⁸ and eventually led to the creation of the FEC.¹²⁹ Most importantly, for the purposes of the current discussion, the amendments explicitly prohibited foreign nationals from making any campaign contributions in any election for the first time.¹³⁰ Eventually re-codified as 2 U.S.C. § 441(e), this provision currently retains the same prohibitions under what remains of the McCain-Feingold regime, as the original enactment in 1974.

124. *Pipefitters*, 407 U.S. at 409 [emphasis added].

125. *Id.* at 444 (Powell, J., dissenting).

126. *Id.* at 448-449 (Powell, J., dissenting).

127. Matt A. Vega, *The First Amendment Lost in Translation: Preventing Foreign Influence in U.S. Elections After Citizens United v. FEC*, 44 LOY. L.A. L. REV. 951, 972 (2011); See, e.g., *Id.* at n. 129 for further discussion regarding secret donations allegedly made to President Nixon by various foreign entities, including Amerada Hess and the Shah of Iran as well as other Arab interests.

128. *Buckley v. Valeo*, 424 U.S. 1,7 (1976) (Capping individual donations at “\$1,000 to any single candidate per election, with an overall annual limitation of \$25,000 by any contributor. . .”).

129. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974). The Amendment passed unanimously, 89-0. 120 Cong. Rec. 8786. It was not until the 1976 Amendments, however, that enforcement of the ban fell under the jurisdiction of the FEC.

130. Federal Election Campaign Act Amendments of 1974 88 Stat. 1263; See Vega, *supra* at n. 116.

4. McCain-Feingold

The McCain-Feingold Act¹³¹ currently regulates corporate campaign financing and was intended to eliminate any remaining loopholes. Passed partially in response to the Enron scandal, this enactment was the largest overhaul to campaign finance regulation since Watergate.¹³² As discussed above, however, *Citizens United* substantially gutted the act by invalidating its primary provision prohibiting corporations and unions from making independent expenditures expressly advocating for the election or defeat of an identifiable candidate.¹³³ The Court also struck down the provision prohibiting electioneering communications during a specified blackout period. The only significant provisions that remain are the century's old ban on direct campaign contributions made from general corporate treasury funds, the maximum limits on direct contributions, and various disclosure requirements.

B. Foreign Owned Corporations And Their U.S. Subsidiaries

Citizens United did not expand or extend any new First Amendment rights to foreign entities or multinational corporations, nor did it overturn current regulations regarding multinational corporations' independent expenditures. The danger of foreign influence, however, is still conceivable and stems from the Court ripping open the loopholes McCain-Feingold was meant to close. Though 441(e)'s prohibition on a foreign national's contribution to any domestic election remains intact, subsequent interpretations by the FEC have cemented the exemptions available to foreign-controlled or -owned domestic corporations.¹³⁴ Before *Citizens*, a corporation, including a foreign corporation's U.S. subsidiary, could spend unlimited funds only on nonpartisan activities like "get-out-the-vote" drives or general issue ads.¹³⁵ After *Citizens*, a corporation, including a foreign corporation's U.S. subsidiary, can now

131. Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, § 203, 116 Stat. 81 (2002).

132. Alison Mitchell, *Enron's Woe's Revive Debate on Campaigns*, N.Y. TIMES, Jan. 22, 2002, <http://www.nytimes.com/2002/01/22/us/enron-s-woes-revive-debate-on-campaigns.html>.

133. See Kang, *supra* note 103 for more information on the issue of ads versus express advocacy ads.

134. See *supra* note 110 ("... a corporation organized under the law [of] any state within the United States whose principal place of business is within the United States is not a foreign principal and, accordingly, would not be a foreign national under 2 U.S.C. §441e."); See, e.g., Vega, *supra* note 116, at 976-977.

135. See e.g., Kang, *supra* note 103.

make unlimited independent expenditures for a greater number of partisan-based reasons, including express advocacy ads and electioneering communications. The real unsettling outcome of *Citizens United* is this: the disintegration of thirty-six years of prohibitions on independent expenditures by foreign corporations, first introduced through the 1974 FECA amendments. Leaving no spending limits in place and no regulations of independent expenditures generally speaking, any domestic corporation or U.S. subsidiary of a foreign corporation can now maximize its exploitation of the loophole Congress has been trying to close for over a hundred years.

While the true extent of the multinational corporation's influence on domestic politics since 2010 has yet to be seen, there are recent examples of how powerful such an influence was pre-*Citizen*, which counsels caution as the campaign finance reform saga continues into the post-*Citizens* world. Take British Petroleum ("BP") and its influence in 2009, the year before the Deepwater Horizon oilrig exploded. This foreign company, through its U.S. subsidiary's PAC, donated over \$1 million dollars to U.S. political candidates and causes.¹³⁶ A report to the President discussing the cause of the disaster concluded that "pockets of corruption" likely played a role in the lax enforcement by the Minerals Management Services.¹³⁷ Since the McCain Feingold regime was in full effect at the time of the apparent corruption, it is incongruous to assume that after *Citizens* corruption will suddenly be any more (or less) rampant than before. Corruption, by its nature, is amorphous and unlikely to go away even with well-crafted, and well intentioned, legislative pronouncements.

According to OpenSecrets.org, a website which attempts to keep track of how money flows through U. S. politics, contributions from BP's PAC were lower in 2010 than during previous years.¹³⁸ During the 2012 election cycle, the first full election cycle after *Citizens United*, BP's PAC received about the same amount of contributions but spent almost \$200,000 more on contributions and independent expenditures.¹³⁹ . While correlation does not imply causation, the almost 66% rise in PAC money spent on the 2012 election cycle also shows, at a

136. See Vega, *supra* note 123, at 957 (this total does not conclude the \$16 million spent lobbying Congress, which is beyond the scope of this discussion).

137. *Id.* See also Nat'l Comm'n on the BP Deepwater Horizon Oil Spill & Offshore Drilling, *Deep Water: The Gulf Oil Disaster and the Future of Offshore Drilling* (2011), available at http://www.oilspillcommission.gov/sites/default/files/documents/DEEPWATER_ReporttothePresident_FINAL.pdf (last visited Apr. 20, 2012).

138. See <http://www.opensecrets.org/pacs/lookup2.php?strID=C00060103> (last visited Apr. 15, 2012).

139. *Id.*

minimum, how the BP PAC likely took advantage of the post *Citizens* freedom to spend as much money as desired on independent expenditures of various kinds. Does this correlate to a rise in corruption? Maybe not, as according to a blog on OpenSecrets.org, many politicians seeking to distance themselves from the company actually refused contributions from the PAC in 2010, but only time will tell.¹⁴⁰ Maybe the people's perception of corruption, and their disdain for it, is enough to prevent bribery and greed from high jacking the system and all that is needed is an angry and active citizenry. Although it is difficult to draw any concrete conclusions from this example, it illustrates at least one thing: the ability of a foreign corporation to assert some kind of influence on domestic political affairs through its U. S. subsidiary. The extent of that influence, whether real or perceived, dangerous or innocuous, is a question for another day.

C. *The United States Chamber of Commerce*

For an example post *Citizens*, one need only look to the 2010 midterm elections and the United States Chamber of Commerce. The Chamber ran attack ads targeting individual candidates, funded in part by contributions from foreign corporations.¹⁴¹ Like *Citizens United*, the Chamber of Commerce is organized as a nonprofit, so before the *Citizens* Court struck down most of McCain-Feingold, use of its general treasury funds on independent expenditures like these advocacy ads would have been illegal, regardless of where the contributions came from. Now, however, the Chamber is free to run any kind of ad its supporters so desire. The Chamber has also stepped-up its fundraising efforts, receiving donations from multiple countries, including Saudia Arabia and the Kingdom of Bahrain, as well as from some multinational corporations including BP.¹⁴² In a post-*Citizens* world it would seem that the U.S. Chamber of Commerce could become an increasingly vociferous advocate for foreign business interests.

The history of campaign finance reveals a long running concern over both the influence of corporations and of foreign nationals in do-

140. Michael Beckel, Federal Contributions from Political Action Committee of Beleaguered Oil Giant BP Slow to a Trickle, accessible at <http://www.opensecrets.org/news/2010/07/federal-contributions-from-politica.html> (last visited Mar. 19, 2013).

141. See Lee Fang, *Exclusive: Foreign-Funded 'U.S.' Chamber of Commerce Running Partisan Attack Ads*, THINK PROGRESS (Oct. 5, 2010), <http://thinkprogress.org/2010/10/05/foreign-chamber-commerce/> (divulging the Chamber of Commerce's pledge to spend seventy-five million dollars to defeat select congressional candidates during the 2010 midterm election cycle).

142. *Id.*

mestic politics. Starting with the Tillman Act, Congress has attempted to regulate direct contributions from large corporate coffers; however, corporations, union, and foreign nationals continued to exploit loopholes in the law. First, they used money from their general treasuries to make independent expenditures through their PACs.¹⁴³ Later, foreign nationals continued to bypass their local agents, contributing directly to candidates they supported until Watergate illuminated this blatant loophole.¹⁴⁴ Finally in the 1970s, laws imposed disclosure requirements, limits on spending, and prohibitions against independent expenditures for electioneering communications and express advocacy ads. Other restrictions made it illegal for foreign nationals to contribute to domestic political campaigns; however, a glaring loophole still allowed U.S. subsidiaries of foreign-owned or -controlled corporations to contribute to the political discussion through their PAC. Ultimately, *Citizens United* removed such restrictions on independent expenditures, thereby rendering the distinction between issue ads and express advocacy moot. To be sure, this opened door for all domestic corporations or U.S. subsidiaries of foreign corporations to make unlimited independent expenditures on any kind of political speech through their PAC. While the extent of foreign corruption and corporate influence in the future is uncertain, in light of the Deepwater Horizon accident and the U.S. Chamber of Commerce's actions in the 2010-midterm elections, it is clear the danger is very real.

IV. SECOND AMENDMENT — A BRIEF ACADEMIC EXERCISE

The 2009 term, beginning with the controversial *Citizens United*, ended with *McDonald v. City of Chicago*, which held that the Second Amendment right to bear arms is incorporated within the concept of the Due Process clause of the Fourteenth Amendment.¹⁴⁵ Taken together, these two cases imply that a corporation has some, if not all, Second Amendment rights.

The purpose of the two amendments is essentially the same: to advance self-determination and liberty. The First Amendment protection of free speech is “premised on mistrust of governmental power”¹⁴⁶ and serves as an important check on government power. There is a

143. See *supra* note 127.

144. See *supra* note 127.

145. *McDonald v. City of Chicago*, 561 U.S. 3025, 3040 (2010).

146. *Citizens United v. Fed. Election Comm.*, 558 U.S. 310 (2010) (the Court goes on to note that, “the First Amendment stands against attempts to disfavor certain subjects. . . or allowing speech by some but not others.”).

logical parallel in the Second Amendment that is fundamentally about self-defense.¹⁴⁷ The *McDonald* Court was fearful that tyranny would thrive if the government had “a monopoly on the tools (if not also the legitimacy) of violence.”¹⁴⁸ The *Citizens* Court was concerned that prohibitions on speech based upon the speaker’s corporate identity would give the government a monopoly over the political conversation and the open market place of ideas.¹⁴⁹ If subsection 441(b) were applied to individuals most would agree that it would be an impermissible ban on speech.¹⁵⁰ Considering that the *Citizens* Court focused solely on the purpose of the right and not on the identity of the person asserting the right so as to avoid government control of content,¹⁵¹ it follows that the distinction between a corporate person and a natural purpose would also not be relevant in the context of the Second Amendment.

Before concluding that Second Amendment protections extend to corporate persons in the same manner as natural persons, consideration of Justice Powell’s test from *Bellotti*¹⁵² is necessary. By focusing the question on what speech is covered by the First Amendment and not on what speaker is protected, the *Citizens* Court implicitly recognized that the right was not “purely personal” and was therefore consistent with precedent. Whether the Second Amendment right is, “purely personal” or “unavailable to corporations for some other reason,” depends on the nature, history and purpose” of the right to bear arms.¹⁵³

147. *McDonald*, 561 U.S. 3025 (discussing the Second Amendment as a fundamental right to self-defense).

148. Darrell A.H. Miller, *Guns, Inc.: Citizens United, McDonald, and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. Rev. 887, 904-05 (2011); accord *District of Columbia v. Heller*, 554 U.S. 570, 598 (2008) (“[W]hen the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny.”); see also *McDonald*, 130 S. Ct. at 3043 (discussing the concern during Reconstruction that the only persons able to possess weapons were police and militia forces).

149. *Citizens United*, 558 U.S. 310.

150. *Id.* at 898.

151. *Id.* (“Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints.”); See, e.g., *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000) (striking down content-based restriction); Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others; See *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978) (“As instruments to censor, these categories are interrelated: Speech restrictions based on the identity of the speaker are all too often simply a means to control content.”).

152. *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 778-79, n. 14 (1978).

153. *Id.*

The fact that the fundamental purpose of the right to keep and bear arms was for self-defense, and is therefore by its very nature, personal is not dispositive. A simple textual analysis reveals the Second Amendment contemplates both a personal and collective character.¹⁵⁴ The framers intense fear of tyranny also reinforces the collective nature of the right. Self-defense can be collective in the sense that the people maintain the right to keep and bear arms as a safeguard against a “tyrannical government.”¹⁵⁵ Communal protection, just as the ability to amplify political speech through an association of people, is thus at the core of the Second Amendment protections, and therefore the right is not purely personal. In order to prevent governmental domination of the political discourse, speech cannot be prohibited based on the speaker’s corporate identity. Accordingly, it makes sense that the right to keep and bear arms cannot be limited based on the corporate identity of the ‘person’ (or more accurately, the association of persons) asserting the Second Amendment right, in order to prevent governmental domination over the “tools of violence.” It is this notion of self-determination that empowers the citizenry to restrain unmitigated governmental power that lies at the foundation of both the First and Second Amendments. This purpose is realized to the same extent whether manifest in the aggregate or individually.

V. APPLYING CITIZENS UNITED

In December of 2011, three Montana corporations sued in district court seeking a declaration that Montana’s 100 year old law regulating campaign finance in state politics was no longer constitutional in light of *Citizens United*.¹⁵⁶ Like the provisions at issue in *Citizens*, the Wisconsin statute also prohibited corporate independent expenditures in connection with any candidate or political party.¹⁵⁷ Mechanically applying the rule from *Citizens* that first amendment protections extend to corporations, the district court invalidated the Montana law without analyzing whether a compelling interest existed

154. U.S. CONST. amend. II.

155. *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008); *See also McDonald v. City of Chicago*, 130 S. Ct. 3020, 3036 (2010) (referring to self-defense as the “central component” of the Second Amendment).

156. *W. Tradition P’ship, Inc. v. Attorney Gen. of State*, 363 Mont. 220, 226, 271 P.3d 1, 5 cert. granted, judgment rev’d sub nom. *Am. Tradition P’ship, Inc. v. Bullock*, 132 S.Ct. 1307 (2012).

157. *Id.*

on the facts of that case.¹⁵⁸ The Montana Supreme Court, however, reversed the district court, noting some crucial distinctions.

The Montana Supreme Court observed that the government in *Citizens United* had never claimed “that corporate expenditures had actually corrupted the political process and it was because of this lack of evidence that the *Citizens* Court concluded that ‘independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.’”¹⁵⁹ Without actual evidence of corruption the proffered justification for the federal restrictions on corporate speech could not stand. The burden to prove whether a compelling interest exists rests with the government, and in *Citizens* the government failed to meet its burden.¹⁶⁰ In the case of *Western Tradition Partnership*, however, the Montana State Supreme Court held that the state had fully met its burden in proving the existence of corruption, and thus found an interest compelling enough to justify the ban on “corporate speech” through independent expenditures.¹⁶¹

The *Western Tradition Partnership* Court emphasized that *Citizens United* did not disturb traditional first amendment jurisprudence requiring a strict scrutiny analysis for any law that burdens political speech.¹⁶² Justice Kennedy even acknowledged in *Citizens* that if “elected officials do succumb to improper influences from independent expenditures ‘then surely there is cause for concern.’”¹⁶³ After the state presented evidence of systemic political corruption as a result of large concentrations of corporate wealth, the Montana Supreme Court concluded that where evidence of actual corruption was lacking in *Citizens United*, it was overwhelming in the current case.

In a single paragraph, *per curiam* opinion, the Supreme Court of the United States flatly rejected the Montana Supreme Court’s analysis.¹⁶⁴ While the factual distinctions explicated by *Western Tradition Partnership* may not be quite as compelling as that court reasoned,¹⁶⁵

158. *Id.* at 226.

159. *Id.* at 227 (quoting *Citizens United*, 558 U.S. 310).

160. *Id.*

161. *Id.* at 229-40.

162. *Id.* at 227.

163. *Id.* (quoting *Citizens United* at 348).

164. *Am. Tradition P’ship, Inc. v. Bullock*, 132 S.Ct. 1307 (2012).

165. *W. Tradition P’ship, Inc. v. Attorney Gen. of State*, 363 Mont. 220, 229-40 271 P.3d (the evidence of political corruption seems more akin to the quid pro corruption rampant across most states in the early 1900’s; one example of corruption is that of a wealthy industrialist with his sights on the United States Senate. “In 1899, in the wake of a large number of suddenly affluent members, the Montana Legislature elected Clark to the U.S.

there is a sense that the conservative majority has again stood its ground in refusing to thoroughly and objectively scrutinize the *Western Tradition Partnership* Court's logic. Though a *per curiam* opinion is one given "by the court" anonymously it is not necessarily unanimous. Justice Breyer's dissent, in *American Tradition Partnership* joined by Justices Ginsburg, Sotomayor and Kagan clearly implicates who authored the holding, that same corporately biased majority responsible for *Citizens United*.¹⁶⁶

While Justice Kennedy's proclamation that "an outright ban on corporate political speech during the critical pre-election period is not a permissible remedy"¹⁶⁷ may be difficult to overcome in future challenges, it might not be impossible. By not unequivocally refuting the Montana Supreme Court's traditional First Amendment analysis there is one thing to be gleaned from *Western Tradition Partnership*: it may still be possible to place limits or outright bans on independent corporate expenditures if there is clear evidence of actual corruption directly caused by the independent expenditures. Until the Supreme Court thoroughly analyzes how a lower court may apply *Citizens United* to different factual circumstances¹⁶⁸ it is impossible to predict just how far reaching this decision may be. And that is not likely to happen unless the makeup of the Court changes or the conservative majority abandons its predispositions and returns to its duty to safeguard the rights of every individual.

VI. CONCLUSION

Part I explored the genesis of the popular notion of corporate personhood and concluded that corporations should be given Fourteenth Amendment protections when it comes to safeguarding their property rights. This is well reasoned, considering that corporations exist merely to aggregate wealth, which is essentially property. Corporate personhood, however, was not controlling in *Citizens United*. Part II broke down the majority's approach, revealing where it went wrong. The majority, *sua sponte*, broadened the constitutional question by

Senate. Clark admitted to spending \$272,000 in the effort . . . Complaints of Clark's bribery of the Montana Legislature led to an investigation by the U.S. Senate in 1900. The Senate investigating committee concluded that Clark had won his seat through bribery and unseated him. The Senate committee 'expressed horror at the amount of money which had been poured into politics in Montana elections . . . and expressed its concern with respect to the general aura of corruption in Montana.'" *Id.* at 231).

166. *Am. Tradition P'ship, Inc. v. Bullock*, 132 S.Ct. 1307 (2012).

167. *Citizens United*, *supra* note 1, at 348.

168. *Id.*

turning Citizens United's contention from an applied challenge into a facial challenge. The majority then rejected Citizens' narrower arguments, including a legitimate argument that Citizens United qualified for a nonprofit exception. In the process, the Court struck down *Austin's* rationale that corporate independent expenditures could give rise to corruption and held unconstitutional section 441(b) of McCain-Feingold's prohibition on independent expenditures for electioneering communications and express advocacy advertisements. Part II also explored the conservative bias of the majority of the court and their reckless use of judicial activism to obtain a result they desired, disregarding sound and longstanding constitutional principles of judicial restraint. Part III traced the origins of modern campaign finance law to show how *Citizens United* enlarged a longstanding loophole in campaign finance law—that U.S. subsidiaries of foreign corporations could contribute through funds maintained in a separate fund, or PAC.

The real danger is not the *Citizens* Court's degradation of the entire campaign finance regime, as unsettling as that may be, but it is in the conservative justices' approach. It is important to note that Justice Ginsburg will be eighty-three years old by the end of the 2013 presidential term.¹⁶⁹ She has served for over eighteen years,¹⁷⁰ and considering the average length of a Supreme Court Justice's tenure is sixteen years,¹⁷¹ it is likely that President Obama will have the honor of appointing a new Justice. The integrity of the Court is at stake. If the next appointee has a history of corporate bias and is willing to manipulate the law, distorting truth, at the whim of his or her corporate allegiance, the very foundation of our form of government will crumble. If a student of Chief Justice Roberts and Justice Alito is appointed, the conservative domination of the court will threaten to destroy the concept of separation of powers.

This new judicial dictatorship will answer only to their corporate masters. They will move according to their own biased passions and not as objective guardians of the people's most sacred rights. There will be nothing left to check the power of the modern corporation as individual rights and liberties guaranteed to the people by the Constitution are transferred to the "corptocracy." Corporations with their vast coffers will eventually drown out the people's voice, the cres-

169. Ruth Bader Ginsburg, The Oyez Project at IIT Chicago-Kent College of Law, http://www.oyez.org/justices/ruth_bader_ginsburg (last visited April 26, 2012) (Justice Ginsburg was born March 15, 1933, so in January of 2017 she will be just shy of 84).

170. *Id.* (Justice Ginsburg was sworn in on August 9, 1993).

171. SUPREME COURT JUSTICES OF THE UNITED STATES, http://www.supremecourt.gov/faq_justices.aspx (last visited Apr. 26, 2012).

endo rendering any meaningful participation in the open market place of ideas by an individual futile. Eventually there will be no America, no democracy, only GM, and BP, and Wal-Mart, and other nationless business conglomerates.

FLORIDA A & M UNIVERSITY LAW REVIEW

VOLUME 8

SPRING 2013

NUMBER 2



Florida A&M University College of Law
Originally Established—1949 (Tallahassee, Florida)
Reopened—Fall 2002 (Orlando, Florida)

To contact the Florida A&M University Law Review, or to order subscriptions:

FAMU Law Review
Attention: Editor-in-Chief
Florida A&M University College of Law
201 Beggs Avenue, Room 138
Orlando, Florida 32801
(407) 254-3298

© 2012 Florida A&M University College of Law. All Rights Reserved.

The *Florida A&M University Law Review* (ISSN 1935-5173) is published annually by the Florida A&M University Law Review, Florida A&M University College of Law, 201 Beggs Avenue, Orlando, Florida 32801. The telephone number of the *Florida A&M University Law Review* is 407-254-3298. The *Florida A&M University Law Review* offices are located in Suite 138 in the Florida A&M University Law Library.

Subscriptions in the United States and Canada are \$15.00 per year, payable in advance; international subscription information is available upon request. Subscriptions are renewed automatically unless notice to the contrary is received. Address changes or other requests regarding subscription information should be directed to the Business Managing Editor, 407-254-3298.

Back issues may be obtained from Joe Christensen, Inc., 1540 Adams Street, Lincoln, Nebraska 68521. The telephone number is 1-800-228-5030. Prices are available upon request.

The *Florida A&M University Law Review* invites the submission of unsolicited manuscripts either through the mail or electronically. Directions for electronic submission can be found on ExpressO available at <http://law.bepress.com/expresso/>. Manuscripts should be sent to the attention of the Editor in Chief. The *Florida A&M University Law Review* requests that contributing authors disclose any economic interests and affiliations that may influence the views expressed in submissions.

The citations in the *Florida A&M University Law Review* conform to *The Bluebook: A Uniform System of Citation* (18th ed. 2003).

Except as otherwise provided, the author of each article in this issue has granted permission for copies of that article to be made for classroom use, provided that (1) copies are distributed at or below cost, (2) author and journal are identified, (3) proper notice of copyright is affixed to each copy, and (4) the user obtains permission to make such copies from the *Florida A&M University Law Review* or the author.

The views expressed in the *Florida A&M University Law Review* are those of the authors and do not necessarily reflect the policies or opinions of the Florida A&M University Law Review, the Florida A&M University College of Law, or Florida A&M University.

Postage is paid at Orlando, Florida and additional mailing offices. POSTMASTER: Send address changes to Florida A&M University Law Review, Florida A&M University Law Review, 201 Beggs Avenue, Orlando, Florida 32801.

FLORIDA A & M UNIVERSITY LAW REVIEW

VOLUME 8

FALL/SPRING 2012-2013

NUMBER 2

EDITORIAL BOARD 2012-2013

COURTNI E SWEARINGEN
Editor-in-Chief

ERIN BARTHOLOMEW-COOK
Executive Editor

DANA HEYDORN
Articles Editor

KYLE LEE
Notes & Comments Editor

TA'RONCE STOWES
Business Managing Editor

STAFF EDITORS

NEIL AMBEKAR
JOSHUA ANDONE
DAVID BERMAN
DENISE CESPEDES
DILLON CHANSEN
HECTER CONCEPCION
JOSHUA DAY
IAN DEPAGNIER
DAREN DORMINY
JENNIFER DRUFFEL
STACY FALLON
PHIL GUERRA
PHIL GUREVICH

MATTHEW HALDEMAN
STEPHANIE HAMPTON
KELMAN HARRELL
MICHAEL HARRISON
ANDREW IRVIN
ROBERT JOHNSON
ALEXANDRA KALMAN
BRITTANY LEONARD
JUSTIN LEVITT
DANIEL LEWIS
CYNTHIA MCGEE
STEVEN MILLER

ANDRE'A MINUS
RYAN MURPHY
JEFF NUCKOLS
THU PHAM
PATRICK RAJASINGAM
CYNTHIA RAMKELLAWAN
LESLEE TREMEL
TAYLOR TREMEL
ROBERT TROTT
KEITH USTLER
AISHA WHITE
LASHARONTE D. WILLIAMS
JASON WILLIS

FACULTY ADVISOR

RANDALL S. ABATE

FLORIDA A & M UNIVERSITY

LAW REVIEW

VOLUME 8

SPRING 2013

NUMBER 2

FLORIDA A&M UNIVERSITY-COLLEGE OF LAW

ADMINISTRATION

LEROY PERNELL, B.A., J.D., DEAN

JOAN BULLOCK, B.A., M.B.A., J.D., ASSOCIATE DEAN FOR TEACHING AND
FACULTY DEVELOPMENT & PROFESSOR OF LAW

REGINALD M. GREEN, B.A., J.D., ASSOCIATE DEAN FOR STUDENT SERVICES &
ADMINISTRATION

DARRYLL K. JONES, B.A., J.D., LL.M., ASSOCIATE DEAN OF ACADEMIC
AFFAIRS & PROFESSOR OF LAW

FACULTY OF LAW

RANDALL S. ABATE, B.A., M.S.E.L., J.D., DIRECTOR OF CENTER FOR
INTERNATIONAL LAW AND JUSTICE & ASSOCIATE PROFESSOR OF LAW

ROBERT ABRAMS, B.A., J.D., PROFESSOR OF LAW

DELESO A. ALFORD, B.S., J.D., LL.M., ASSOCIATE PROFESSOR OF LAW

BARBARA BERNIER, B.A., M.S.W., J.D., LL.M., PROFESSOR OF LAW

NICOLA BOOTHE-PERRY, B.S., J.D., ASSOCIATE PROFESSOR OF LAW

PATRICIA A. BROUSSARD, B.S., J.D., ASSOCIATE PROFESSOR OF LAW

JEFFERY BROWN, B.A., J.D., ASSOCIATE PROFESSOR OF LAW

RHODA PIERRE CATO, B.A., J.D., ASSOCIATE PROFESSOR OF LAW

ANN MARIE B. CAVAZOS, B.S., J.D., DIRECTOR OF CLINICAL PROGRAMS &
ASSOCIATE PROFESSOR OF LAW

MARKITA COOPER, A.B., J.D., PROFESSOR OF LAW

KRISTY D'ANGELO-CORKER, B.A., J.D., LEGAL METHODS INSTRUCTOR

JOHN DUNCAN, B.A., M.A., M.S., M.B.P.A., J.D., PH.D., PROFESSOR OF LAW

JONATHAN FINEMAN, B.A., J.D., ASSOCIATE PROFESSOR OF LAW

HERMAN "SPARKY" GIERKE, B.A., J.D., DISTINGUISHED JUDICIAL LECTURER

WILLIAM HENSLEE, B.A., M.F.A., J.D., DIRECTOR OF LEGAL METHODS &
PROFESSOR OF LAW

ALICIA JACKSON, B.S., M.P.A., J.D., DIRECTOR OF ACADEMIC SUCCESS AND
BAR PREPARATION

JOHN PAUL JONES, B.S., J.D., PROFESSOR OF LAW

LUNDY R. LANGSTON, B.S., J.D., LL.M., PROFESSOR OF LAW

JEREMY I. LEVITT, B.A., J.D., PH.D., DISTINGUISHED PROFESSOR OF
INTERNATIONAL LAW

KARIN MOORE, B.A., J.D., DIRECTOR OF DEFENSE AND DEATH PENALTY
CLINICS & ASSISTANT PROFESSOR OF LAW

NISÉ NEKHEBA, B.A., M.Div., J.D., ASSISTANT PROFESSOR OF LAW

SHIV N. PERSAUD, B.A., J.D., ASSISTANT PROFESSOR OF LAW

TSHAKA C. RANDALL, B.A., M. ED., J.D., ASSISTANT PROFESSOR OF LAW

RHONDA REAVES, B.A., J.D., PROFESSOR OF LAW

MARITZA REYES, B.S., J.D., LL.M., ASSOCIATE PROFESSOR OF LAW

OMAR SALEEM, B.A., J.D., LL.M., PROFESSOR OF LAW
JENNIFER M. SMITH, B.S., J.D., ASSOCIATE PROFESSOR OF LAW
PHYLLIS C. SMITH, B.C.J., J.D., LL.M., ASSOCIATE PROFESSOR OF LAW
KA'JUEL WASHINGTON, B.S., J.D., CLINIC STAFF ATTORNEY

VISITING FACULTY

EUNICE CAUSSADE-GARCIA, B.A., J.D., LAW CLINIC INSTRUCTOR
J. RICHARD HURT, B.A., M.A., J.D., LL.M., PROFESSOR OF LAW
MELINDA MARBES, B.A., J.D., VISITING ASSOCIATE PROFESSOR
MICHAEL PILLOW, B.A., J.D., VISITING INSTRUCTOR OF LAW

LEGAL METHODS INSTRUCTORS

CAROLEEN DINEEN, B.A., M.B.A., J.D.
ROBERT MINARCIN, B.A., J.D.
LORI ROSS, B.A., M.A., J.D.
TONYA WALKER, B.A., J.D.
REBECCA OLAVARRIA, B.A., M.B.A., J.D.

BOARD OF TRUSTEES ADDENDUM

MR. WILLIAM JENNINGS, B.S., CHAIR
MR. DARYL PARKS, ESQ., B.A., J.D., VICE-CHAIR
MR. TOREY L. ALSTON, B.A., M.B.A.
DR. SOLOMON L. BADGER, B.A., M.A., ED.D.
MR. RICHARD DENT, B.A., M.B.A.
DR. MAURICE HOLDER, B.S., M.S., PH.D.
MR. GALLOP FRANKLIN, II, FAMU STUDENT GOVERNMENT ASSOCIATION
PRESIDENT
REV. DR. R.B. HOLMES, JR., B.A., M.A., D.MIN.
DR. CHARLES LANGSTON, B.A., M.B.A., D.B.A.
DR. SPURGEON McWILLIAMS, B.S., M.D.
MS. ANGELA ROUSON, B.A., M.B.A.
MS. MARJORIE TURNBULL, A.A., B.A., M.A.
MR. KARL E. WHITE, B.S., M.B.A.