

**BUSINESS ASSOCIATIONS REIGN SUPREME: THE CORPORATIST  
UNDERPINNINGS OF *CITIZENS UNITED V. FEDERAL ELECTION  
COMMISSION***

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But the new High group, unlike all its forerunners, did not act upon instinct but knew what was needed to safeguard its position. It had long been realized that the only secure basis for oligarchy is collectivism. Wealth and privilege are most easily defended when they are possessed jointly.

–George Orwell, British novelist and journalist<sup>1</sup>

Markets are eminently suitable for the pursuit of private interests, but they are not designed to take care of the common interest. The preservation of the market mechanism itself is one such common interest. Market participants compete not to preserve competition but to win; if they could, they would eliminate competition.

–George Soros, global financier and philanthropist<sup>2</sup>

## I. INTRODUCTION

In his work *When Corporations Rule the World*, Professor David C. Korten offers a contemporary critique of the manner in which national corporations control “active propaganda machinery” that is focused on the task of convincing Americans of the good of deregulation and promoting global expansion and consolidation of power at the expense of democracy and equity.<sup>3</sup> He observes, “Increasingly, it is the corporate interest rather than the human interest that defines the policy agendas of states and international bodies.”<sup>4</sup> He also points out that Adam Smith published his work *An Inquiry into the Nature and Causes of the Wealth of Nations*, in 1776, the same year as the Declaration of Independence.<sup>5</sup> Korten connects the thinking of Smith with that of the American colonists explaining how corporations, like large governments, were not to be trusted because both could be used as instruments for suppressing price reduction and free competition.<sup>6</sup>

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<sup>1</sup> GEORGE ORWELL, 1984, at 206 (Signet Classics 1961) (1949).

<sup>2</sup> George Soros, Keynote Address to the World Forum on Democracy (June 25, 2000) (transcript available at <http://www.fordemocracy.net/soros.shtml>).

<sup>3</sup> DAVID C. KORTEN, *WHEN CORPORATIONS RULE THE WORLD* 228 (2d ed. 2001).

<sup>4</sup> *Id.* at 60.

<sup>5</sup> *Id.* at 62.

<sup>6</sup> *Id.* at 62.

The East India Trading Company (the corporation that Smith most strongly criticized in his work), using its influence and sway over the British Crown and Parliament, interfered with the market supply in the American colonies by attempting to eliminate competition through duties and tariffs and manipulated prices to its favor; it was the tea of the East India Trading Company that the colonists dumped into the water in protest during the Boston Tea Party in 1773.<sup>7</sup> The collaborative action of a big government and a big corporation sparked discontent and the stirring events that resulted in the revolution that gave birth to the United States of America. Based on this distrust by the former colonists, the states reserved the power to issue corporate charters for the purpose of maintaining a watchful eye, keeping local-citizen control over corporations and including provisions in the charter “that limited use of the corporate vehicle to amass excessive personal power.”<sup>8</sup>

It comes as no surprise that the original United States Constitution was silent on the rights of corporations. These rights are nowhere expressly mentioned in the four corners of the document, nor are they mentioned in the Bill of Rights that was subsequently added.<sup>9</sup> Seeing as many corporations existed at the time, the founding fathers either inadvertently or intentionally omitted mention of them.<sup>10</sup> The Bill of Rights was added to the Constitution due to the advocacy

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<sup>7</sup> *Id.* at 62, 307-08. In 1767, to help the East India Trading Company compete with smuggled black-market Dutch tea that the colonists could obtain at cheaper prices, the English Parliament enacted the Indemnity Act, which lowered the tax on tea in Great Britain, and gave the East India Trading Company a refund of the twenty-five percent duty on tea that was exported to the colonies. *See also* T.H. BREEN, *THE MARKETPLACE OF REVOLUTION* 235, 299-300 (2004). To help offset this revenue loss, Parliament passed the Townshend Revenue Act of 1767 and levied new taxes in the colonies. *Id.* The Townshend duties renewed a controversy about Parliament’s right to tax the colonies, hence “taxation without representation.” *Id.* (discussing how the Townshend taxes benefited the East India Trading Company).

<sup>8</sup> KORTEN, *supra* note 3, at 63.

<sup>9</sup> *See generally* GERARD C. HENDERSON, *THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW*, 1, 6, 9, 19-22 (1918) (discussing the founding fathers’ views and opinions on the rights of corporations in the Constitution).

<sup>10</sup> KORTEN, *supra* note 3, at 62-63.

of Thomas Jefferson and to win over Patrick Henry,<sup>11</sup> George Mason,<sup>12</sup> and other Antifederalists;<sup>13</sup> it reflected the concern for the liberties of individuals as put forth by philosophers like John Locke; Jean-Jacques Rousseau; and Montesquieu.<sup>14</sup> The Antifederalists disdained federal power and believed that political power should not be centralized but rather that it should be reserved to the states and kept localized—agrarian republicanism. While the movement of the Antifederalists clearly died out after the passage of the Constitution and the Bill of Rights, its influence could be clearly seen in the roots of Jeffersonian Republicanism and Jacksonian Democracy that followed.<sup>15</sup>

When Alexis de Tocqueville traveled the United States in the nineteenth-century, an experience that he later wrote of in *Democracy in America*, he observed the influence of local governments on the fabric of American life and that, by centering on individual rights, community, and agriculture, the American people seemed clearly opposed to any philosophy that

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<sup>11</sup> See Patrick Henry, Speech at the Virginia Ratifying Convention (June 5, 1788), in *THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES* 199, 200 (Ralph Ketcham ed., 1986) (“The rights of conscience, trial by jury, liberty of the press, all your immunities and franchises, all pretensions to human rights and privileges, are rendered insecure, if not lost, by this change so loudly talked of by some, and inconsiderately by others. Is this same relinquishment of rights worthy of freemen? Is it worthy of that manly fortitude that ought to characterize republicans . . . [?]”).

<sup>12</sup> See George Mason, *Objections to the Proposed Federal Constitution* (1787), in *THE ANTIFEDERALISTS* 191, 192 (Cecilia M. Kenyon ed., 1966) (“Under their own construction of the general clause at the end of the enumerated powers, the Congress may grant monopolies in trade and commerce, constitute new crimes, inflict unusual and severe punishments, and extend their power as far as they shall think proper; so that the state legislatures have no security for the powers now presumed to remain to them, or the people for their rights. There is no declaration of any kind for preserving the liberty of the press, the trial by jury in civil cases, nor against the danger of standing armies in time of peace.”).

<sup>13</sup> See Brutus IV, *NEW YORK JOURNAL*, Nov. 29, 1787, reprinted in 1 *THE DEBATE ON THE CONSTITUTION* 424 (Bernard Bailyn ed., 1993) (“The small number which is to compose this legislature, will not only expose it to the danger of that kind of corruption, and undue influence, which will arise from the gift of places of honor and emolument, or the more direct one of bribery, but it will also subject it to another kind of influence no less fatal to the liberties of the people . . . . Men of this character are, generally, artful and designing, and frequently possess brilliant talents and abilities; they commonly act in concert, and agree to share the spoils of their country among them; they will keep their object ever in view, and follow it with constancy.”).

<sup>14</sup> See generally Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 *HASTINGS L.J.* 577 (1990) (discussing corporations claiming protection under the Bill of Rights).

<sup>15</sup> See generally Saul A. Connell, *The Changing Historical Fortunes of the Anti-Federalists*, 84 *NW. U. L. REV.* 39 (1989) (discussing the historical effects of the Antifederalist movement).

supported dependence and the hoarding of power.<sup>16</sup> However, to be clear, de Tocqueville was no fan of states' rights as it seemed clear that he leaned toward the use of federal power, and he expressed worries about too much power being reserved to the states.<sup>17</sup> Nonetheless, his observations are testament to the fact that the United States was founded on the premise of a strong work ethic and the notion that individuals are free to make their own fortune without fear of oppression and systemic exclusion along class lines. De Tocqueville also believed that civic associations with a public-minded purpose, not wealthy manufacturers and large companies, were what made a beneficial influence on a society like America.<sup>18</sup>

Therefore, it comes as a surprise that the subsequent traction gained and the momentum of the growing movement that has allowed corporations to exercise the cherished rights of American citizens—reflecting the migration of the constitutional system away from an individual prerogative, and toward placing greater and greater emphasis on the rights of amorphous, faceless organizations through a favorable, judicially activist interpretation of the law.<sup>19</sup> It is not surprising that corporations would advocate on their own behalf in order to advance such a position—corporations exist to generate revenue, and it is inevitable that they

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<sup>16</sup> See Philip C. Kissam, *Alexis de Tocqueville and American Constitutional Law: On Democracy, the Majority Will, Individual Rights, Federalism, Religion, Civic Associations, and Originalist Constitutional Theory*, 59 ME. L. REV. 35, 60 (2007) (“It was in local governments, especially the paradigmatic New England township meeting, and the jury that Tocqueville located the merits of decentralized government: participation, accountability and education in entrepreneurial and cooperative actions.”).

<sup>17</sup> See *id.* at 61 (“Tocqueville does not seem to have thought very highly of the capacity of state governments to govern wisely, innovatively, or experimentally as states’ rights theorists like to claim.”).

<sup>18</sup> John S. Shockley & David A. Schultz, *The Political Philosophy of Campaign Finance Reform as Articulated in the Dissents in Austin v. Michigan Chamber of Commerce*, 24 ST. MARY’S L.J. 165, 193-94 (1992) (“However . . . de Tocqueville was sufficiently aware of the destructive threat of wealthy manufacturers and private interests to republican, popular government. Therefore, de Tocqueville might also endorse some restrictions upon the means used to finance political speech. It is strange, then, that both Justices Antonin Scalia and Anthony Kennedy quote de Tocqueville in support of their view that business and non-profit corporations should be allowed to finance political campaigns from corporate treasuries.” (footnote omitted)).

<sup>19</sup> See Larry E. Ribstein, *The Constitutional Conception of the Corporation*, 4 SUP. CT. ECON. REV. 95 (1995). In his analysis, Ribstein puts forth three different schools of thought regarding how to view the constitutional rights of corporations: (1) contract theory or the contractarian approach, which views a corporation as an extension of a contract with rights and obligations; (2) corporate-personhood theory, which subjects corporations to the control of

will use any and every method at their disposal to obtain favorable legislative and judicial rulings.<sup>20</sup> However, it seems that using the principle of construction *expressio unius est exclusio alterius* in examining the history surrounding the design of the social contract that the Constitution, which the founding fathers knew exactly how to express in writing whether corporate speech should be protected or whether corporations should be granted any other

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the states, from which their rights stem; and (3) unconstitutional-conditions theory, a variant of corporate personhood, which limits the government's power of forcing corporations to relinquish their rights. *Id.*

<sup>20</sup> Consider this position as advanced by William Findley in 1786 on rechartering the Bank of North America:

Enormous wealth, possessed by individuals, has always had its influence and danger in free states. Thus, even in Rome, where patriotism seems to have pervaded every mind, and all her measures to have been conducted with republican vigour, yet even there, the patricians always had their clients—their dependents—by the assistance of whom they often convulsed the counsels, and distracted the operations of the state, and finally overturned the government itself. But the Romans had no chartered institutions for the sole purposes of gain. They chartered no banks.

Wealth in many hands operates as many checks: for in numberless instances, one wealthy man has a control over another. Every man in the disposal of his own wealth, will act upon his own principles. His virtue, his honour, his sympathy, and generosity, will influence his disposals and designs; and he is in a state of personal responsibility. But when such an unlimited institution is erected with such a capital, for the sole purpose of increasing wealth, it must operate according to its principle; and being in the hands of many, having only one point in view, and being put in trust, the personal responsibility arising from the principles of honour, generosity, [etc.] can have no place. The special temper of the institution pervades all its operations: and thus, like a snow ball perpetually rolled, it must continually increase its dimensions and influence.

This institution having no principle but that of avarice, which dries and shrivels up all the manly—all the generous feelings of the human soul, will never be varied in its object: and, if continued, will accomplish its end, viz. to engross all the wealth, power and influence of the state.

The human soul is affected by wealth, in almost all its faculties. It is affected by its present interest, by its expectations, and by its fears. And must not, therefore, every thinking man see what advantage this institution has on the human feelings, above that of wealth held by many individuals? If our wealth is less equal than our kind of government seems to require—and if agrarian [i.e., redistributionist] laws are unjust in our present situation, how absurd must it be for government to lend its special aid in so partial a manner, to wealth, to give it that additional force and spring, which it must derive from an almost unlimited charter? Can any gentleman avoid seeing this to be eventually and effectually overturning our government? Democracy must fall before it. Wealth is its foundation, and gain its object and design.

DEBATES AND PROCEEDINGS OF THE GENERAL ASSEMBLY OF PENNSYLVANIA, ON THE MEMORIALS PRAYING A REPEAL OR SUSPENSION OF THE LAW ANNULLING THE CHARTER OF THE BANK 65-66 (Matthew Carey & Co. ed., Seddon & Pritchard 1786).

constitutional protections for that matter.<sup>21</sup> That the press (a defined type of business entity) was expressly granted First Amendment protection points to the exception to a general rule showing that other exceptions not expressed were not intended.<sup>22</sup>

Some of the current Justices on the United States Supreme Court are firm believers in, and have long been using, the doctrine of originalism or original intent to arrive at many of the Court's decisions in the past few decades.<sup>23</sup> With such a doctrine, it is not clear how the Court could have necessarily arrived at the decision that it did in *Citizens United v. Federal Election Commission*, considering, as previously mentioned, that the founding fathers did not provide for any corporate protections in the Bill of Rights.<sup>24</sup> It was suggested in a dissenting portion of *Citizens United* that the failure to do so was indicative of original intent—the founding fathers did not see fit to grant corporations certain protections against either the states or the federal government.<sup>25</sup> It is undoubtedly clear that “[t]he use of these amendments by corporations raises extraordinary historical and political questions.”<sup>26</sup>

Part II of this Article will explain the relationship between Adam Smith and the founding fathers and his effect on the Constitution and the Bill of Rights. Part III of this Article will describe the origins of the corporate constitutional prerogative and the development of corporate

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<sup>21</sup> See *City of Walla Walla v. Walla Walla Water Co.*, 172 U.S. 1, 22 (1898) (“While the special act is silent with reference to the ratification of contracts to supply water, we think the maxim, *expressio unius est exclusio alterius*, is applicable, and that it was clearly the intention of the legislature to supersede the general law in that particular, leaving the general law to stand where it is proposed that the city shall erect and maintain water works of its own.”).

<sup>22</sup> See *id.*

<sup>23</sup> Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989) (“Originalism does not aggravate the principal weakness of the system, for it establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself. And the principal defect of that approach—that historical research is always difficult and sometimes inconclusive—will, unlike nonoriginalism, lead to a more moderate rather than a more extreme result. The inevitable tendency of judges to think that the law is what they would like it to be will, I have no doubt, cause most errors in judicial historiography to be made in the direction of projecting upon the age of 1789 current, modern values—so that as applied, even as applied in the best of faith, originalism will (as the historical record shows) end up as something of a compromise.”).

<sup>24</sup> See 130 S. Ct. 876 (2010).

<sup>25</sup> See generally *id.* at 929-79 (Stevens, J., dissenting).

<sup>26</sup> Mayer, *supra* note 14, at 578.

rights. Finally, this Article will explore the evolution of the case law in the past several decades, ending with an analysis of *Citizens United*.

## II. THE RELATIONSHIP BETWEEN THE FOUNDING FATHERS AND ADAM SMITH

Alexander Hamilton, Benjamin Franklin, John Jay, and James Madison (the Father of the Constitution), looking to the writings of the intellectual minds of the Enlightenment, they read Adam Smith's *Wealth of Nations* and looked for good ideas from this Scottish moral philosopher that they could put to work in the United States.<sup>27</sup> According to Smith (often described as the Father of Capitalism), human history was marked by stages of economic development—each the result of progress from the division of labor and greater realization of individual liberty.<sup>28</sup> The last and greatest level being the level of commerce, Smith noted that corporations were entities that influenced and often subverted the power of governments to engage in regulation that ensured that corporations could keep their power, control prices, and eliminate competition.<sup>29</sup> Therefore, Smith, though favoring free markets, was wary of the corporatist in that he observed that monopolies of joint-stock companies would form, which would work to destroy market forces. Much of what Smith wrote against the institution of the corporation applied equally as well to the institution of large government. He advocated for less government intervention precisely because large governments were the powers that consorted with and perpetuated these monopolies.<sup>30</sup> Governments, like large corporations, were filled with individuals managing other people's money and, thus, not having the requisite protective interest, they were the most likely

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<sup>27</sup> ROY C. SMITH, ADAM SMITH AND THE ORIGINS OF AMERICAN ENTERPRISE 109-10 (2004).

<sup>28</sup> See generally ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (David Campbell Publishers, Ltd. 1991) (1776).

<sup>29</sup> *Id.* at 111-12 (“It is to prevent this reduction of price, and consequently of wages and profit, by restraining that free competition which would most certainly occasion it, that all corporations, and the greater part of corporation laws, have been established. . . . But this prerogative of the crown seems to have been reserved rather for extorting money from the subject than for the defence of the common liberty against such oppressive monopolies.”).



to waste and squander it.<sup>31</sup> Governments and corporations restricted the flow of supply intentionally to manipulate prices. Smith favored individual freedom and advancement in so far as each person's self-interest guided them and, thus, resulted in the "invisible hand" that created favorable economic conditions that benefited others.<sup>32</sup>

At the time of the formation of the Constitution, a large part of the commerce of the world was carried on by famous, large corporations like the East India Trading Company, the Hudson's Bay Company, the Hamburg Company, the Levant Company, and the Virginia Company. Suffice it to say, that because some of these corporations exerted a monopoly over the colonies, the founding fathers were quite aware of them. Under the old regime, everything was a matter of privilege, and to this state of things the charter of the old companies corresponded with this privilege, the sovereign rights extended to them being in accordance with the views of this era.

James Wilson, who later went on to become one of the United States's first Supreme Court Justices, and who also assisted in drafting the Constitution, expressed the prevalent view at the time that caution needed to be exercised with respect to corporations:

A corporation is described to be a person in a political capacity created by the law . . . . It must be admitted, however, that, in too many instances, those bodies politick have, in their progress, counteracted the design of their original formation. . . . This is not mentioned with a view to insinuate, that such

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<sup>30</sup> *Id.* at 575 ("They will employ the whole authority of government, and pervert the administration of justice, in order to harass and ruin those who interfere with them in any branch of commerce, which by means of agents, either concealed, or at least not publicly avowed, they may choose to carry on.").

<sup>31</sup> *Id.* at 566 ("Since the establishment of the English East India Company, for example, the other inhabitants of England, over and above being excluded from the trade, must have paid in the price of the East India goods which they have consumed, not only for all the extraordinary profits which the company may have made upon those goods in consequence of their monopoly, but for all the extraordinary waste which the fraud and abuse, inseparable from the management of the affairs of so great a company, must necessarily have occasioned.").

<sup>32</sup> *Id.* at 399 ("By preferring the support of domestic to that of foreign industry, he intends only his own security; and by directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention.").

establishments ought to be prevented or destroyed: I mean only to intimate, that they should be erected with caution, and inspected with care.<sup>33</sup>

Three decades after the adoption of the Constitution and upon retiring from his term as President, Madison wrote an undated essay entitled *Monopolies, Perpetuities, Corporations, Ecclesiastical Endowments* that reflected his concerns that religious corporations were attempting to accumulate massive economic power.<sup>34</sup> He based his writings from his past experiences, but this essay also reflected the influence of Smith's way of thinking. Madison warned that the power of all corporations should be limited because their indefinite accumulation of wealth always seems to serve as a source of inevitable abuse.<sup>35</sup>

Madison was not alone in thinking this way, and, thus, it comes as no surprise that decades earlier, participants in the Constitutional Convention refused to include "the explicit power to incorporate" to improve the prospects of the Constitution being ratified.<sup>36</sup> Jefferson, who mentored Madison, likewise displayed his distrust of corporations as he wrote of crushing the infant stages of "the aristocracy of our monied corporations which dare already to challenge our government to a trial of strength and bid defiance to the laws our country."<sup>37</sup> Smith voiced four basic concerns about the corporation's tendencies to seek unlimited life, unlimited size, unlimited power, and unlimited license.<sup>38</sup>

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<sup>33</sup> JAMES WILSON, *Of Corporations*, in 2 COLLECTED WORKS OF JAMES WILSON 265, 265-66 (Kermit L. Hall & Mark David Hall eds., 2007), available at <http://oll.libertyfund.org/title/2074/166648/2957866>.

<sup>34</sup> JAMES MADISON, MONOPOLIES, PERPETUITIES, CORPORATIONS, ECCLESIASTICAL ENDOWMENTS, in James Madison, *Madison's "Detached Memoranda,"* 3 WM. & MARY Q. 534, 551, 555 (Elizabeth Fleet ed., 1946).

<sup>35</sup> See Robert Chen & John Hansen, *The Illusion of Law: The Legitimizing Schemas of Modern Policy and Corporate Law*, 103 MICH. L. REV. 1, 137-38 (2004).

<sup>36</sup> See Pauline Maier, *The Revolutionary Origins of the American Corporation*, 50 WM. & MARY Q. 51, 52 (1993).

<sup>37</sup> Letter from Thomas Jefferson to George Logan (Nov. 12, 1816), in 12 THE WORKS OF THOMAS JEFFERSON 42, 44 (Paul Leicester Ford ed., 1905).

<sup>38</sup> ROBERT A.G. MONKS, THE EMPEROR'S NIGHTINGALE: RESTORING THE INTEGRITY OF THE CORPORATION IN THE AGE OF SHAREHOLDER ACTIVISM 27 (1998).

If Madison and Jefferson seemed so anti-corporation, at the other end of the table, Hamilton, who had long been Jefferson's rival, seemed almost pro-corporation.<sup>39</sup> Hamilton became the first Secretary of the Treasury and advocated for the creation of the first national bank, which Jefferson strongly opposed as unconstitutional.<sup>40</sup> He sidestepped what could have been a negative impact of the Necessary and Proper Clause on his arguments because, in the Federalist Papers, he himself had lobbied for a narrow tailoring of the clause that would not permit the use he now presently sought of it.<sup>41</sup> He simply disregarded his prior position and argued to Congress that this was a power that the government should have even though it was not enumerated, which would allow the government to create the great bank he sought.<sup>42</sup> He continued to lure support by pointing to the benefits of creating the bank.<sup>43</sup> After the war, he also established the premise that a corporation need not show that its activities advance a specific public purpose. Prior to this premise, corporations had to operate under a strict charter and could only do business in accordance with what was indicated in that charter. In this sense, Hamilton stood for everything that the other founding fathers distrusted: the old ways of Great Britain, mercantilism, banking, and corporations.<sup>44</sup>

Madison ultimately wrote the First Amendment as one of many amendments to placate the concerns of Jefferson and other Antifederalists about the preservation of individual freedoms; consequently, the amendment is likely the product of both men. Yet Jefferson actually lobbied

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<sup>39</sup> See Joseph H. Sommer, *The Birth of the American Business Corporation: Of Banks, Corporate Governance, and Social Responsibility*, 49 BUFF. L. REV. 1011, 1065 (2001).

<sup>40</sup> See *id.* at 1077-78.

<sup>41</sup> See Joseph M. Lynch, *The Federalists and the Federalist: A Forgotten History*, 31 SETON HALL L. REV. 18, 20-21 (2000).

<sup>42</sup> See *id.* at 20.

<sup>43</sup> See *id.*

<sup>44</sup> See Christian C. Day, *Partner to Plutocrat: The Separation of Ownership from Management in Emerging Capital Markets—19th Century Industrial America*, 58 U. MIAMI L. REV. 525, 529 (2004) (“This model, proposed by the first Secretary of the Treasury, Alexander Hamilton, would defeat a competing vision offered by another great Founder, Thomas Jefferson, who had a deep distrust of commercial society. Hamilton’s model, patterned after the

Madison for a more-restrictive version as he seemed more concerned with limiting speech rather than giving greater liberty, particularly to the press.<sup>45</sup> In fact, Jefferson endorsed suppressing speech if the state was the actor that did it.<sup>46</sup> Therefore, considering that Madison and Jefferson both expressed serious fears about the growing powers of corporations, it seems unlikely that either would have wanted to oppose the power of the states, let alone the federal government, to restrict their activities, including their speech.<sup>47</sup> Jefferson's own papers, written after the ratification of the Constitution, are harshly critical of both banks and corporations.<sup>48</sup> It is ironic that Jefferson's own arguments against banks and corporations would be used to protect them in the decades that followed.<sup>49</sup> Nonetheless, it remained clear that at the Constitutional Convention, the founding fathers had more dislike than like for the corporation and it was, to some degree, due to the influence of Smith's apt analysis of the crisis that the colonists faced due to the oppression by the East India Trading Company and the Crown. To insist that the founding fathers would want to strike down any regulation by the states with respect to business corporations because they did not trust them, does not seem to conform or correlate with the actual historical record.

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British experience, called for the assumption and monetization of state war debts, the establishment of a national bank, and the promotion of trade and credit.”).

<sup>45</sup> Paul Finkelman, *Thomas Jefferson, Original Intent, and the Shaping of American Law: Learning Constitutional Law from the Writings of Jefferson*, 62 N.Y.U. ANN. SURV. AM. L. 45, 73 (2006).

<sup>46</sup> *Id.* at 74.

<sup>47</sup> *See id.* at 73-75. Consider, for example, this Jefferson quote: “If the American people ever allow private banks to control the issue of currency, first by inflation, then by deflation, the banks and corporations that will grow up around them will deprive the people of all property until their children wake up homeless on the continent their fathers conquered.” *Id.*

<sup>48</sup> Thomas Jefferson, Opinion on the Constitutionality of the Bill for Establishing a National Bank (Feb. 15, 1791), in 19 THE PAPERS OF THOMAS JEFFERSON 275, 276 (Julian P. Boyd ed., 1974). Jefferson's disgust at the opening of the bank is clear in another letter. Letter from Jefferson to James Monroe (July 10, 1791), in 20 THE PAPERS OF THOMAS JEFFERSON 296, 297-98 (Julian P. Boyd ed., 1982).

<sup>49</sup> Finkelman, *supra* note 45, at 67 (“The Federalists rejected Jefferson's theory of limited government in the antebellum period. But in the late nineteenth and early twentieth century, the Supreme Court, dominated by pro-business Republicans, would apply the logic of Jefferson's analysis to protect large corporations—the very entities Jefferson hated and feared—from federal regulation. In decisions that would doubtless have been anathema to Jefferson, the late nineteenth- and early twentieth-century Court made a distinction between manufacturing and commerce that is almost identical to the one Jefferson offered in opposition to the Bank.”).

### III. THE DEVELOPMENT OF THE CORPORATE CONSTITUTIONAL PREROGATIVE

Early on, the Court began to entertain appeals regarding corporations and joint-stock-trading companies,<sup>50</sup> even going as far back to the time of the Marshall Court.<sup>51</sup> Federal diversity jurisdiction was often determined not by the home state of the corporation, but by the state citizenship of the shareholders of the corporations.<sup>52</sup> Almost prophetically, the Justices in the case of *Hope Insurance Co. of Providence v. Boardman* recognized the dangers to be had by giving greater and greater constitutional rights to corporations:<sup>53</sup>

If there was a probability that an individual citizen of a state could influence the state courts in his favour, how much stronger is the probability that they could be influenced in favour of a powerful moneyed institution which might be composed of the most influential characters in the state. What chance for justice could a plaintiff have against such a powerful association in the courts of a small state whose judges perhaps were annually elected, or held their offices at the will of the legislature?<sup>54</sup>

Thus, the Marshall Court in 1809, exploring the limits of corporate personhood, practically divined that corporations, if unchecked, would use their corporate treasury to influence politicians including local elected judges, if they were given greater rights, to the detriment of those who would litigate against them in the courts.

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<sup>50</sup> See, e.g., *Anderson v. Longden*, 14 U.S. (1 Wheat.) 85 (1816) (holding that a surety of the agent of a joint-stock company acting at the instruction of its former director still remained liable on the bond, even though, after annual elections, the former director was not reelected and, therefore, discharged from his duties).

<sup>51</sup> John Marshall, in 1801, became the fourth Chief Justice of the United States Supreme Court, having been preceded by John Jay (1789-1795), John Rutledge (1795), and Oliver Ellsworth (1796-1800). TIMOTHY L. HALL, *SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY* 46, 5, 17, 36 (2001).

<sup>52</sup> See *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 86-87 (1809) (defining corporation as a “mere legal entity . . . not a citizen”).

<sup>53</sup> 9 U.S. (5 Cranch) 57, 59 (1809) (“The term *citizen* could not with propriety be applied to a corporation aggregate. It could only be a citizen by *intendment of law*. It is only a moral person; but it may be a citizen *quoad hoc*, i.e. in the sense in which the term *citizen* is used in that part of the constitution which speaks of the jurisdiction of the judicial power of the United States. The term is indeterminate in its signification. It has different meanings in different parts of the constitution. When it says ‘the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states,’ the term *citizens* has a meaning different from that in which it is used in describing the jurisdiction of the courts.”).

<sup>54</sup> *Id.* at 60.

In light of this point illustrated in *Boardman*, consider the recent case of *Caperton v. A.T. Massey Coal Co.*, in which a coal company had been found liable for \$50 million in damages.<sup>55</sup> Knowing which appeals-court judge the matter would come before and that he was up for reelection, the principal officer and chairman made \$3 million in campaign expenditures on behalf of the appeals-court judge, an amount which was not only greater than any other campaign expenditure, but also which exceeded all other contributions and expenditures.<sup>56</sup> The appeals-court judge won the election. When the matter came before the appeals-court judge, the plaintiff–appellee moved for the judge to recuse himself, and the judge denied the motion.<sup>57</sup> The appellate court then reversed the award.<sup>58</sup> When the plaintiff–appellee moved for a rehearing, renewing his motion for recusal, the particular appeals-court judge again refused to recuse himself, and the appellate court again reversed the award.<sup>59</sup>

The decision of the Roberts Court was a narrow one, five-to-four in favor of reversing the denial of the recusal.<sup>60</sup> Justice Anthony M. Kennedy acted as the swing vote and delivered the majority opinion of the Court holding that the facts of the decision were extreme and mandated nothing less than recusal.<sup>61</sup> Chief Justice John G. Roberts, Jr., along with Justices Antonin Scalia, Samuel A. Alito, Jr., and Clarence Thomas dissented. Chief Justice Roberts posed forty questions in his dissenting opinion such as how does the Court define *disproportionate*, how long does the probability of bias last, does this also bar a nonparty supporter who may also be

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<sup>55</sup> 129 S. Ct. 2252 (2009).

<sup>56</sup> *Id.* at 2257.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 2258.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 2252, 2267.

<sup>61</sup> *Id.* at 2265 (“Our decision today addresses an extraordinary situation where the Constitution requires recusal. Massey and its *amici* predict that various adverse consequences will follow from recognizing a constitutional violation here—ranging from a flood of recusal motions to unnecessary interference with judicial elections. We disagree. The facts now before us are extreme by any measure. The parties point to no other instance involving judicial campaign contributions that presents a potential for bias comparable to the circumstances in this case.”).

affected by the outcome of the case, and numerous other questions that call the wisdom of the majority opinion into question.<sup>62</sup> Chief Justice Roberts refused to consider the model American Bar Association standard or the state judicial codes of conduct that encouraged recusal based on the “appearance of impropriety” and were more rigorous than the current federal standard.<sup>63</sup> It was as if the *Boardman* Court used a crystal ball to scry the nightmarish future that would lead to *Massey* scenarios. Or perhaps it was that the founding fathers knew all along that expanding the rights of rich corporations beyond what was contained in the Constitution would lead to great peril.

While the states in the nineteenth-century reserved the right to control and oversee the chartering and incorporation of these business entities, it was not uncommon for Congress to do so in the absence or cession of state power.<sup>64</sup> The first significant expression of the Court regarding corporate constitutional rights can be found in the case *Trustees of Dartmouth College v. Woodward*,<sup>65</sup> where the Court held that a New Hampshire statute that altered the terms of a British Crown charter granted to Dartmouth College violated the Contract Clause.<sup>66</sup> The Court held that because the charter was a contract, it would be entitled to protection from impairment by the state government.<sup>67</sup> Chief Justice John Marshall began to describe the aspects of the fictional character of the corporation when he wrote,

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

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<sup>62</sup> *Id.* at 2269-72 (Roberts, C.J., dissenting).

<sup>63</sup> *Id.* at 2266 (majority opinion). “The need to consider these and countless other questions helps explain why the common law and this Court’s constitutional jurisprudence have never required disqualification on such vague grounds as ‘probability’ or ‘appearance’ of bias.” *Id.* at 2272 (Roberts, C.J., dissenting).

<sup>64</sup> *See, e.g.*, *Scott v. Jones*, 46 U.S. (5 How.) 343, 343-45 (1847).

<sup>65</sup> 17 U.S. (4 Wheat.) 518 (1819).

<sup>66</sup> U.S. CONST. art. I, § 10, cl. 1.

<sup>67</sup> Chief Justice Marshall likened the Dartmouth College charter to “a contract, on the faith of which, real and personal estate has been conveyed to the corporation. It is then a contract within the letter of the constitution.” *Dartmouth Coll.*, 17 U.S. (4 Wheat.) at 644.

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.<sup>68</sup>

Thus, while laying the groundwork for a contract-based or “contractarian”<sup>69</sup> approach to corporations through the effect of the decision, his actual description of the corporation as a “mere creature of law” implied that ultimately the government defined corporate rights that could not merely be created by contract alone. At this stage in the history of corporate law, anyone who wished to establish a corporation had to seek the approval of the state legislatures for state charters that extended the permission to incorporate.<sup>70</sup>

In *Bank of Augusta v. Earle*, the Court made it abundantly clear that a corporation was a fictional person within the meaning of the law and explored the character of the corporation, as its business would inevitably lead to litigation in other jurisdictions:

The question is not on the powers of a corporation, but as to whom and to what objects those powers can be exerted. A corporation is the creature of the law, and it is clothed with all the powers of a person. The position on the other side is, that when it leaves the state which gave it existence by granting its charter, it loses its personal existence, and has no existence whatever. This is a harsh doctrine, and seems at war with the principles of those who assert and maintain state rights. It is certainly true that a corporation in one state, is not a corporation in another state, as to the full exercise of corporate powers.<sup>71</sup>

The issue in *Earle* was whether a corporation from one state could maintain a lawsuit in a different state where that corporation was not recognized.<sup>72</sup>

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<sup>68</sup> *Id.* at 636.

<sup>69</sup> Mark J. Roe, *Can Culture Constrain the Economic Model of Corporate Law?*, 69 U. CHI. L. REV. 1251, 1251 (2002) (“Corporate law is—or in its normative version should be—a contractarian arrangement between and among managers, the board, and shareholders.”).

<sup>70</sup> Bayless Manning, *Thinking Straight About Corporate Law Reform*, LAW & CONTEMP. PROBS., Summer 1977, at 3, 7 (“In the newborn United States of America . . . the nation embarked at once upon a system under which corporate charters were granted by state legislatures.”).

<sup>71</sup> 38 U.S. (13 Pet.) 519, 524 (1839).

<sup>72</sup> *Id.* at 522.



The Court reasoned that merely because a corporation drew its powers, rights, and privileges from its home state did not mean that a corporation simply vanished and ceased to exist when it attempted to exercise a right in another state or even another country.<sup>73</sup> The Court reasoned that governmental bodies were public corporations that did not lose their existence and subsequent character when they attempted to sue in another jurisdiction, or even a foreign country for that matter.<sup>74</sup>

The Court, therefore, deduced that “[e]very principle of law which allows foreign states to sue in the [c]ourts of other countries, applies to corporations.”<sup>75</sup> The Court concluded that because the law of Alabama provided for international comity, it must additionally allow suits from corporations and thus honor contract disputes in which corporations are a party as well.<sup>76</sup> The Court reached the result it wanted but took a circuitous path to get there and created a new rule in the process. The argument actually presented to the Court was whether corporations were entitled to “special treatment” granting them the protection of citizen rights under the Privileges and Immunities Clause of Article IV.<sup>77</sup> The Court rejected this approach and did so once more, revisiting the issue in *Paul v. Virginia*.<sup>78</sup>

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<sup>73</sup> *Id.* at 524.

<sup>74</sup> *See id.* at 528-29 (“And when the Courts of the United States sustain an action in the name of a state corporation, it is only because citizens of the state have associated together under the name and in the form of a corporation. Still it is those citizens only who are the parties before the Court, and not the corporation, quasi corporation. Upon no other hypothesis can the Courts of the United States have any jurisdiction in the cause, none other being justified or authorized by the Constitution.”).

<sup>75</sup> *Id.* at 525.

<sup>76</sup> *Id.* at 596 (“We have already shown that the comity of suit brings with it the comity of contract; and where the one is expressly adopted by its Courts, the other must also be presumed according to the usages of nations, unless the contrary can be shown.”).

<sup>77</sup> *See* U.S. CONST. art. IV, § II, cl. 1 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”).

<sup>78</sup> 75 U.S. (8 Wall.) 168, 181-82 (1868) (“At the present day corporations are multiplied to an almost indefinite extent. There is scarcely a business pursued requiring the expenditure of large capital, or the union of large numbers, that is not carried on by corporations. It is not too much to say that the wealth and business of the country are to a great extent controlled by them. And if, when composed of citizens of one State, their corporate powers and franchises could be exercised in other States without restriction, it is easy to see that, with the advantages thus possessed, the most important business of those States would soon pass into their hands. The principal business of

Special chartering came to be replaced by general incorporation in which the states adopted a hands-off approach, and their only involvement in creating the corporation was merely to serve as a place to file the articles of incorporation.<sup>79</sup> As general incorporation became the norm across the country, courts and legal theorists came to view corporations as a contract between private parties, rather than the state, as the creators of the corporate entity.<sup>80</sup> The end of the chartering requirement, however, did not necessarily dispose of the question of corporate rights and whether the corporate-personhood theory still lingered.<sup>81</sup> Limitations on tort liability and choice of law for litigation were still matters that remained to be decided by the states, rather than by the terms of any contract provisions.<sup>82</sup> Corporate law did not begin to radically change until the United States neared the end of the nineteenth-century.<sup>83</sup>

In *Santa Clara County v. Southern Pacific Railroad Co.*, decided in 1886, a comment from Chief Justice Morrison Remick Waite was included with the text of the opinion, for reasons not quite clear.<sup>84</sup> The transcription of these comments between the Court and the parties at oral argument, which has now become famous, was considered obiter dictum, but it lent support to the notion of and spoke openly of the Fourteenth Amendment rights that corporations have since spent much time trying to claim:

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

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every State would, in fact, be controlled by corporations created by other States.”), *abrogated by* United States v. Se. Underwriters Ass’n, 322 U.S. 533 (1944).

<sup>79</sup> David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 211 (1990) (“The conception of the corporation as an artificial creation entirely dependent on the state for its powers gradually gave way to the view that corporations are the natural products of individual initiative and possess powers conferred by their constituent shareholders.”).

<sup>80</sup> *Id.*

<sup>81</sup> See Note, *Constitutional Rights of the Corporate Person*, 91 YALE L.J. 1641, 1645-46 (1982).

<sup>82</sup> See generally DAN B. DOBBS, *THE LAW OF TORTS* 39 (2001) (“The common law of torts is almost exclusively state law.”).

<sup>83</sup> See generally Gregory A. Mark, Comment, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441 (1987) (discussing the renovation of corporations at the end of the nineteenth-century).

<sup>84</sup> 118 U.S. 394, 396 (1886).

the equal protection of the laws, applies to these corporations. We are all of opinion that it does.<sup>85</sup>

Indeed, by its own admission, the Court in *Santa Clara* refused to consider or decide any federal-constitutional question.<sup>86</sup> As Justice John Marshall Harlan’s unanimous opinion for the Court made painfully clear, the Court decided the case based solely on California’s laws concerning the tax-assessment issue.<sup>87</sup> Despite Justice Stephen Johnson Field’s eagerness to reach the issue while sitting as a member of the circuit court that considered the case below, the Court elected to pass over the Fourteenth Amendment question in *Santa Clara*.<sup>88</sup> This was evident from majority opinions written by Justice Field while sat he on the Court—he would word his opinions carefully to advance the understanding of corporate rights beyond what the Court previously articulated in *Dartmouth College*, but moving in the direction of *Santa Clara*.<sup>89</sup> In fact, Justice Field authored five opinions between 1888 and 1892 that always included wording that the Fourteenth Amendment applied to corporations even though none of the cases ever actually decided that the challenged state legislation was unconstitutional as applied to each corporation involved.<sup>90</sup>

Take, for example, his opinion in *Missouri Pacific Railway Co. v. Mackey* that seized upon the dicta of *Santa Clara* and decided that while the state statute in question was not unconstitutional as applied, railroad corporations, like other corporations, still deserved the equal

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<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 404.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 409-10.

<sup>89</sup> *See, e.g., Tomlinson v. Jessup*, 82 U.S. (15 Wall.) 454, 459 (1872) (“Rights acquired by third parties, and which have become vested under the charter, in the legitimate exercise of its powers, stand upon a different footing; but of such rights it is unnecessary to speak here. The State only asserts in the present case the power under the reservation to modify its own contract with the corporators; it does not contend for a power to revoke the contracts of the corporation with other parties, or to impair any vested rights thereby acquired.”).

<sup>90</sup> *See Charlotte, C. & A. R.R. Co. v. Gibbes*, 142 U.S. 386 (1892); *Minneapolis & St. Louis Ry. Co. v. Beckwith*, 129 U.S. 26, 28 (1889); *Minneapolis & St. Louis Ry. Co. v. Herrick*, 127 U.S. 210 (1888); *Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania*, 125 U. S. 181, 188-89 (1888).

protection of the Fourteenth Amendment.<sup>91</sup> No rationale or discussion was included in the decision concerning this grant of increased corporate rights.<sup>92</sup> How far would this little-discussed grant of rights from Justice Field’s five opinions go? Not far, initially. Justice Harlan rejected the notion that corporations were persons within the meaning of the Fourteenth Amendment in the *Northwestern National Life Insurance Co. v. Riggs* decision eighteen years later.<sup>93</sup> In *Riggs*, the Court reviewed the application of a Missouri statute designed to protect anyone insured under a life-insurance policy.<sup>94</sup> The Court observed that the insurer attempted to deny the claim upon the death of the policyholder by claiming that he had made a prior, unrelated misrepresentation that did not bear on, and was not relevant to, the cause of death itself.<sup>95</sup> The Court found itself faced with the argument that application of the statute violated the Equal Protection Clause.<sup>96</sup> The Court held that the “liberty referred to in that Amendment is the liberty of natural, not artificial persons.”<sup>97</sup> The plain effect of such a decision seemed, at first glance, to turn back the clock on the status of a corporation to the time period before *Santa Clara* and *Mackey*. However, this turning back of the clock also proved to be short-lived, as subsequent cases began to reextend Fourteenth Amendment protections to corporations.<sup>98</sup>

Consider the Court’s decision in *Louis K. Liggett Co. v. Lee* in 1933.<sup>99</sup> A Florida statute made it unlawful “to operate any store within the state without first having obtained a license,

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<sup>91</sup> 127 U.S. 205, 209 (1888) (“Such legislation is not obnoxious to the last clause of the fourteenth amendment, if all persons subject to it are treated alike under similar circumstances and conditions in respect both of the privileges conferred and the liabilities imposed. It is conceded that corporations are persons within the meaning of the amendment.”).

<sup>92</sup> See generally *id.*

<sup>93</sup> 203 U.S. 243, 255 (1906) (holding that the liberty guaranteed by the Fourteenth Amendment extends only to natural persons and not to corporations).

<sup>94</sup> See generally *id.*

<sup>95</sup> *Id.* at 254.

<sup>96</sup> *Id.* at 255.

<sup>97</sup> *Id.*

<sup>98</sup> See, e.g., *Iowa–Des Moines Nat’l Bank v. Bennett*, 284 U.S. 239 (1931); *Liggett Co. v. Baldrige*, 278 U.S. 105 (1928); *Power Mfg. Co. v. Saunders*, 274 U.S. 490 (1927).

<sup>99</sup> 288 U.S. 517 (1933).

designate[d] the officer to whom application shall be made, regulate[d] the procedure for issuance of licenses, and provide[d] for annual renewal.”<sup>100</sup> The statute further provided that certain filing fees and taxes had to be paid.<sup>101</sup> The statute, though designed in a neutral way, placed a de facto heavier tax burden on large, corporation-run chain stores, which were fast becoming a significant public concern in the Progressive Era.<sup>102</sup> An affected corporation challenged the statute’s constitutionality based on the Fourteenth Amendment. While not deciding in favor of the corporation, the majority opinion, as delivered by Justice Owen Roberts, found that “[c]orporations are as much entitled to the equal protection of the laws guaranteed by the Fourteenth Amendment as are natural persons.”<sup>103</sup> Justice Louis Brandeis dissented, and his dissenting opinion is of considerable value in explaining the history and the development of the corporation in the states.<sup>104</sup> He did not contest whether the Fourteenth Amendment applied to corporations, as he conceded that it did in part.<sup>105</sup> But he still favored upholding the Florida statute to the extent that the corporation was not a natural person, and, thus, it was part of a class of persons<sup>106</sup> that the state was free to regulate if it served a valid purpose.<sup>107</sup> Justice Brandeis

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<sup>100</sup> *Id.* at 528.

<sup>101</sup> *Id.* at 528-29.

<sup>102</sup> The modern-day effects of this concern are readily apparent. See Barry C. Lynn, *Let’s Put Mom and Pop Back in Business*, WASH. POST, Feb. 21, 2010, at B1 (“Where the independent pharmacist counted pills, we see a CVS employee. Where family livestock farms dotted the landscape, we see immense operations run by Smithfield and Tyson. Where the buttonmakers of New York and Los Angeles sold their wares, we see the imported products of Li & Fung. Where our community bank stood, we see Bank of America. Where the local grocer marketed local fruit, we see Wal-Mart. Where the local general-merchandise store stacked jeans, we see, well, Wal-Mart again.”).

<sup>103</sup> *Liggett*, 288 U.S. at 536.

<sup>104</sup> *Id.* at 548-67 (Brandeis, J., dissenting).

<sup>105</sup> See *id.* at 575 (discussing the applicability of the Due Process Clause and the Equal Protection Clause to corporations).

<sup>106</sup> *Id.* at 572 (“The difference in power between corporations and natural persons is ample basis for placing them in different, classes. Even as between natural persons, where the equality clause applies rigidly, differences in size furnish an adequate basis for discrimination in a tax rate.”).

<sup>107</sup> *Id.* at 574 (“Businesses may become as harmful to the community by excessive size, as by monopoly or the commonly recognized restraints of trade. If the State should conclude that bigness in retail merchandising as manifested in corporate chain stores menaces the public welfare, it might prohibit the excessive size or extent of that business as it prohibits excessive size or weight in motor trucks or excessive height in the buildings of a city.”).

considered exactly what the founding fathers feared. Five years would pass before another opinion would discuss the subject with the precision that Justice Brandeis did.

Justice Hugo Black's dissenting opinion in *Connecticut General Life Insurance Co. v. Johnson* discussed detailed methodology in examining the rights of a corporation within the meaning of the Due Process and Equal Protection Clauses.<sup>108</sup> He carefully considered the words, context, and history of the Fourteenth Amendment and realized that, indeed, there is no textual basis to regard a corporation as a person entitled to the protections of the Due Process and Equal Protection Clauses.<sup>109</sup> Justice Black called on the Court to "now overrule previous decisions which interpreted the Fourteenth Amendment to include corporations."<sup>110</sup> His approach actually seemed truer to the form of originalism than the approaches that would subsequently be taken by Justices Scalia and Thomas in their opinions that would review this issue decades later.

It is strange that the Fourteenth Amendment was specifically enacted to provide protection to persons of color (actual human beings), yet the judicially activist doctrine of separate but equal permitted discrimination against African Americans.<sup>111</sup> Within the context of corporate law, it was seemingly clear that the Fourteenth Amendment's true purpose became increasingly twisted and distorted. Ironically, it would seem corporations gained far greater protection than African Americans even though they were not the persons intended nor did they need protection considering the vastness of their monetary resources.<sup>112</sup>

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<sup>108</sup> 303 U.S. 77, 85-90 (1938) (Black, J., dissenting).

<sup>109</sup> *See id.* at 85-88.

<sup>110</sup> *Id.* at 85.

<sup>111</sup> *See Plessy v. Ferguson*, 163 U.S. 537, 548, 551 (1896).

<sup>112</sup> *Conn. Gen. Life Ins. Co.*, 303 U.S. at 89 (Black, J., dissenting) ("Both Congress and the people were familiar with the meaning of the word 'corporation' at the time the Fourteenth Amendment was submitted and adopted. The judicial inclusion of the word 'corporation' in the Fourteenth Amendment has had a revolutionary effect on our form of government. The states did not adopt the amendment with knowledge of its sweeping meaning under its present construction. No section of the amendment gave notice to the people that, if adopted, it would subject every state law and municipal ordinance, affecting corporations, (and all administrative actions under them) to censorship of the

Justice Black explained a possible reason for this development, a devastating revelation about the history of the Fourteenth Amendment:

In an argument before the Supreme Court of the United States in 1882, Roscoe Conkling, a former member of the Joint Congressional Committee which in 1866 drafted the Fourteenth Amendment, produced for the first time the manuscript journal of the Committee, and by means of extensive quotations and pointed comment conveyed the impression that he and his colleagues in drafting the due process and equal protection clauses intentionally used the word “person” in order to include corporations. “At the time the Fourteenth Amendment was ratified,” he declared, “individuals and joint stock companies were appealing for congressional and administrative protection against invidious and discriminating State and local taxes. One instance was that of an express company, whose stock was owned largely by citizens of the State of New York . . . [.]” The unmistakable inference was that the Joint Committee had taken cognizance of these appeals and had drafted its text with particular regard for corporations.

Coming from a man who had twice declined a seat on the Supreme Bench, who spoke from first hand knowledge, and who submitted a manuscript record in support of his stand, so dramatic an argument could not fail to make a profound impression. Within the next few years the Supreme Court began broadening its interpretation of the Fourteenth Amendment, and early in 1886 it unanimously affirmed Conkling’s proposition, namely that corporations were “persons” within the meaning of the equal protection clause.<sup>113</sup>

Still in the face of this information, Justice Black concluded that “[a] secret purpose on the part of the members of the committee, even if such be the fact, however, would not be sufficient to justify any such construction.”<sup>114</sup> The history reflected that people were never told of this secret purpose and instead were told that “its purpose was to protect weak and helpless human beings . . . not . . . that it was intended to remove corporations in any fashion from the control of state

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United States courts. No word in all this amendment gave any hint that its adoption would deprive the states of their long-recognized power to regulate corporations.”).

<sup>113</sup> Howard Jay Graham, *The “Conspiracy Theory” of the Fourteenth Amendment*, 47 YALE L.J. 371, 374 (1938) (footnotes omitted).

<sup>114</sup> *Conn. Gen. Life Ins. Co.*, 303 U.S. at 87 (Black, J., dissenting).

governments.”<sup>115</sup> Nonetheless, Justice Black’s dissent was heeded in part and seemed to fall on deaf ears in part.

The Roosevelt, Truman, and Eisenhower administrations accepted monopolies, for instance, in the case of many utilities as long as governments were allowed some form of say and control. And they permitted a few corporations to engage in large-scale industry, as long as competition measures were in place (e.g., vigilant enforcement of antitrust laws).<sup>116</sup> In retail and agriculture, the populist movement proceeded to regulate the markets, creating an environment where individual owners and small businesses could deliver their goods and services unimpeded by the influence of larger corporations.<sup>117</sup> This solution, while not outright attacking the roots of the underlying problem, worked with some degree of efficacy for a time.

#### IV. THE ROAD TO *CITIZENS UNITED*

As previously mentioned, the First Amendment omits any mention of the word *corporation* in its text.<sup>118</sup> Yet in 1942, the Court tackled its first commercial-speech case in *Valentine v. Chrestensen*.<sup>119</sup> An owner of a World War I submarine attempted to distribute advertising bills in the streets of New York to attract crowds to view his property for the purpose of profit.<sup>120</sup> On one side of the bill was protest literature designed to make it seem as if the bill was speech for political purposes—a protected use.<sup>121</sup> On the other side was his advertisement to attract customers for to the submarine, which violated the New York City Sanitary Code’s

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<sup>115</sup> *Id.*

<sup>116</sup> Lynn, *supra* note 102, at B4.

<sup>117</sup> *Id.*

<sup>118</sup> U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

<sup>119</sup> 316 U.S. 52 (1942), *overruled by* Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 770 (1976).

<sup>120</sup> *Id.* at 52-53.

<sup>121</sup> *Id.* at 53.



prohibition of business and commercial advertising in that fashion.<sup>122</sup> Justice Owen Roberts, in delivering the opinion of the Court, held that the municipal code was not unconstitutional on the grounds that there was a distinction between political speech and commercial speech.<sup>123</sup> The states remained free to regulate political speech so long as the regulations advanced in the public interest did not proscribe the speech or unduly burden it, but no corresponding requirement existed with respect to regulations concerning commercial speech.<sup>124</sup>

This decision would recede into obscurity, and the seeds of reversal would develop three decades later.<sup>125</sup> Corporations went on the offensive, once again, seeking the furtherance of corporate rights, in line with the arguments advocated by Lewis Powell—then a board member of Phillip Morris and private attorney who had often represented the Tobacco Institute and the various tobacco companies in numerous cases—before the U.S. Chamber of Commerce in 1971.<sup>126</sup> He was then appointed to the Court that same year, setting into motion a chain of events of startling change.<sup>127</sup> First, the Court held a state’s criminal prohibition on abortion advertising unconstitutional in *Bigelow v. Virginia*.<sup>128</sup> Then in *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council*, the Court invalidated a state law regulating pharmaceutical-price advertising, effectively overruling *Valentine*.<sup>129</sup> Justice William H. Rehnquist issued a dissenting opinion taking the side of the state in its ability to regulate commerce, stating that “nothing in the United States Constitution . . . requires the Virginia Legislature to hew to the teachings of Adam

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<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 54.

<sup>124</sup> *Id.*

<sup>125</sup> See generally J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1006, 1013-21 (1976) (discussing 1974 campaign-reform laws that raised many First Amendment concerns).

<sup>126</sup> Memorandum from Lewis F. Powell, Jr., to Eugene B. Syndor, Jr., Chairman, Educ. Comm., U.S. Chamber of Commerce (Aug. 31, 1971), available at [http://www.reclaimdemocracy.org/corporate\\_accountability/powell\\_memo\\_lewis.html](http://www.reclaimdemocracy.org/corporate_accountability/powell_memo_lewis.html).

<sup>127</sup> *Id.* Lewis Powell was the replacement for Justice Black, who analyzed corporate-rights cases with a textualist or originalist approach. See ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 274 (2nd ed. 1997) (arguing that corporations are not persons under the Fourteenth Amendment).

Smith.”<sup>130</sup> Ironically, in making this statement, perhaps Justice Rehnquist failed to realize that Adam Smith would have actually favored tighter state regulation of a pharmaceutical corporation and, thus, would have disagreed with the majority opinion as to a corporation’s entitlement to constitutional protection.

In *Buckley v. Valeo*, the Court upheld a federal law that set limits on campaign contributions—but ruled that spending money to influence elections is a form of constitutionally protected free speech—and struck down portions of the law concerning certain expenditures.<sup>131</sup> Two years after the *Buckley* decision, in *First National Bank v. Bellotti*, several large corporations challenged a Massachusetts prohibition on corporate expenditures to influence ballot questions, except those questions “materially affecting any of the property, business or assets of the corporation.”<sup>132</sup> The Massachusetts Supreme Judicial Court rejected the challenge, observing that a corporation does not have the same First Amendment right to free speech as those of a natural person.<sup>133</sup>

Justice Louis Powell delivered the majority opinion of the Court and noted that corporations had long been recognized as persons and granted constitutional protections for a century, going back to the *Santa Clara* case.<sup>134</sup> Having already dispensed with the issue of whether corporations had constitutional rights, he then ultimately opined that “[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the

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<sup>128</sup> 421 U.S. 809, 829 (1975).

<sup>129</sup> *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 770 (1976).

<sup>130</sup> *Id.* at 783-84 (Rehnquist, J., dissenting) (“The Court speaks of the importance in a ‘predominantly free enterprise economy’ of intelligent and well-informed decisions as to allocation of resources. . . . While there is again much to be said for the Court’s observation as a matter of desirable public policy, there is certainly nothing in the United States Constitution which requires the Virginia Legislature to hew to the teachings of Adam Smith in its legislative decisions regulating the pharmacy profession.”).

<sup>131</sup> 424 U.S. 1, 14 (1976) (per curiam).

<sup>132</sup> 435 U.S. 765, 767-68 (1978) (quoting Mass. Gen. Laws Ann. ch. 55, § 8 (West Supp. 1977) (amended 1986)). The *First Nat’l* Court rejected as an “artificial mode of analysis” the idea that corporations cannot claim the Fourteenth Amendment’s protection of liberty. *Id.* at 778-79.

identity of its source, whether corporation, association, union, or individual.”<sup>135</sup> Thus, he chose not to rest his decision on an approach that necessarily depended on the identity of the speaker. Justice Rehnquist again sided with the view that corporations were creations of the state and subject to their regulation and control.<sup>136</sup> Justice Rehnquist focused not on whether there was a difference between political speech and commercial speech (the analysis in *Valentine*), but rather whether there was a difference between the rights of a natural person and an artificial person.<sup>137</sup> His subsequent dissenting opinions would continue to reflect this viewpoint.

Having opened the floodgates, subsequent federal-court decisions in the 1980s would continue to see more and more state regulations struck down as unconstitutionally infringing upon the rights of corporations.<sup>138</sup> But in a turnabout 1990 decision, the Court upheld a commercial-speech restriction as applied in the case of *Austin v. Michigan Chamber of Commerce*.<sup>139</sup> The majority opinion by Justice Marshall stated that “[c]orporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions.”<sup>140</sup> Thus, the Court noted that the state regulation served a compelling interest, satisfying the first prong of a strict-scrutiny

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<sup>133</sup> *Id.* at 767.

<sup>134</sup> *Id.* at 780 n.15.

<sup>135</sup> *Id.* at 777.

<sup>136</sup> *Id.* at 823-24 (Rehnquist, J., dissenting) (“The appellants herein either were created by the Commonwealth or were admitted into the Commonwealth only for the limited purposes described in their charters and regulated by state law.”).

<sup>137</sup> *Id.* at 824-25 (“It does not necessarily follow that such a corporation would be entitled to all the rights of free expression enjoyed by natural persons. Although a newspaper corporation must necessarily have the liberty to endorse a political candidate in its editorial columns, it need have no greater right than any other corporation to contribute money to that candidate’s campaign. Such a right is no more ‘incidental to its very existence’ than it is to any other business corporation.”).

<sup>138</sup> *See, e.g.*, *Fed. Election Comm’n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986) (affirming the lower court’s decision that a statute that prohibited a corporation from publishing and distributing a newsletter urging readers to vote pro-life in upcoming primary elections was an unconstitutional restriction on commercial speech), *overruled by* *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876 (2010).

<sup>139</sup> 494 U.S. 652 (1990).

<sup>140</sup> *Id.* at 660.

analysis.<sup>141</sup> The Court held, in its analysis, that it was narrowly tailored and appeared to be the least-restrictive means to achieve the purpose.<sup>142</sup> Lastly, the Court saw fit to point out the distinction between media corporations and other corporations, showing that the press, as enumerated in the First Amendment, receives greater protection.<sup>143</sup> The Court upheld the statute as constitutional.<sup>144</sup> Justice Kennedy wrote the dissenting opinion, joined by Justices Sandra Day O'Connor and Antonin Scalia.<sup>145</sup> Justice Kennedy contended plainly that the regulation served no compelling purpose, nor was it narrowly tailored.<sup>146</sup> Justice Scalia wrote a separate dissent as well, maintaining that the majority opinion essentially relied on an “Orwellian principle,” the distinction between media corporations and other corporations was not merited, and the founding fathers would never have agreed to the restriction on speech advanced by the Court.<sup>147</sup> Justice Scalia clearly failed to remember, or never read about, Jefferson’s republican, agrarian hostility toward banks and corporations and Madison’s fear about the rise of religious corporations.

In 2002, Senators John McCain and Russell Feingold undertook the effort of campaign-finance reform and sought to change the way that money was raised and spent, resulting in the passage of the Bipartisan Campaign Reform Act of 2002 (BCRA).<sup>148</sup> This federal law sought to impose: (1) a ban on unrestricted donations made directly to political parties (often by

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<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 691.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 692.

<sup>145</sup> *Id.* at 695 (Kennedy, J., dissenting).

<sup>146</sup> *Id.* at 701.

<sup>147</sup> *Id.* at 693 (majority opinion) (“I doubt that those who framed and adopted the First Amendment would agree that avoiding the New Corruption, that is, calibrating political speech to the degree of public opinion that supports it, is even a *desirable* objective, much less one that is important enough to qualify as a compelling state interest. Those Founders designed, of course, a system in which popular ideas would ultimately prevail; but also, through the First Amendment, a system in which true ideas could readily become popular. For the latter purpose, the calibration that the Court today endorses is precisely backwards: To the extent a valid proposition has scant public support, it should have wider rather than narrower public circulation. I am confident, in other words, that Jefferson and Madison would not have sat at these controls; but if they did, they would have turned them in the opposite direction.”).

corporations, unions, or wealthy individuals); (2) limits on the advertising that unions, corporations, and nonprofit organizations could make within sixty days prior to an election; and (3) restrictions on use of such of funds by the political parties for advertising.<sup>149</sup> The Court took up the matter, as applied to a corporation, in the case of *McConnell v. Federal Election Commission*, in which Justice Scalia issued a nineteen-page dissenting opinion because he felt the need to write a “few words” about the extraordinary importance of the cases involved.<sup>150</sup> Because the case in controversy concerned soft-money donations and other less-troublesome campaign contributions, as opposed to advertising expenditures, the Court had little difficulty in reaching a result based on a rationale similar to *Buckley* and *Austin* and inevitably concluded, in part, that there was, again, a compelling-governmental purpose to target corruption and that the means were sufficiently narrowly tailored (not overly broad) to the extent that the Court upheld the BCRA as applied.<sup>151</sup> There were other portions of the BCRA that were problematic, however. Justice Scalia, in his dissent, asserted that *Buckley* was wrongly decided and put forth the following contentions: (1) money is undoubtedly speech; (2) pooling money is the same as assembly and freedom of association; (3) corporations deserve First Amendment protection equal to that of natural persons; (4) the BCRA should have been reviewed under strict scrutiny, not a lower standard; and (5) the line between media corporations and other corporations is blurring and as a result the Court could use the same rationale to restrict the rights of the press, news radio, and news-television stations.<sup>152</sup>

In 2007, the Court weakened the application of the BCRA in *Federal Election Commission v. Wisconsin Right to Life, Inc.*, in which electioneering communications were

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<sup>148</sup> Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002).

<sup>149</sup> *Id.*

<sup>150</sup> 540 U.S. 93, 257-58 (2003) (Scalia, J., concurring in part and dissenting in part).

<sup>151</sup> *Id.* at 223-24 (majority opinion).

challenged.<sup>153</sup> Chief Justice John G. Roberts, Jr., delivered the majority opinion and seriously questioned the usefulness of campaign-finance-reform laws; however, the Court ruled the BCRA invalid in an as-applied challenge.<sup>154</sup> The majority outright refused to find the BCRA unconstitutional,<sup>155</sup> but Justices Scalia, Kennedy, and Thomas called for the invalidation of the statute altogether.<sup>156</sup> The showdown culminated in the decision of *Citizens United* the years later. The Court voted five-to-four in favor of ruling the BCRA unconstitutional, with respect to its prohibition against electioneering communications released within sixty days of a general election or within thirty days of a primary election.<sup>157</sup> The dispute resulted from whether the nonprofit corporation Citizens United could air, via video-on-demand, a film critical of Hillary Clinton.<sup>158</sup> Citizens United wanted to advertise the film in broadcast ads featuring Clinton's image.<sup>159</sup> Chief Justice Roberts and Justices Scalia, Alito, Thomas, and Kennedy voted in favor of invalidating the federal law.<sup>160</sup>

Justice Kennedy, in delivering the Court's opinion, pointed to decades of case law that recognized corporations as persons for purposes of First Amendment speech, that is commercial speech.<sup>161</sup> The majority opinion explicitly overruled *Austin*, and Chief Justice Roberts's concurring opinion declared the framework in *Wisconsin Right to Life* unworkable.<sup>162</sup> Justice Scalia's concurring opinion took the time to attack Justice John Paul Stevens's attempt to look at

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<sup>152</sup> *Id.* at 247-64 (Scalia, J., concurring in part and dissenting in part); *see also id.* at 264-86 (Thomas, J., concurring).

<sup>153</sup> 551 U.S. 449, 449-50 (2007).

<sup>154</sup> *Id.* at 451-52.

<sup>155</sup> *Id.* at 455-82.

<sup>156</sup> *Id.* at 484-504 (Scalia, J., concurring in part).

<sup>157</sup> *See id.* at 455 (majority opinion), *see also id.* 481-85, 504 (Scalia, J., concurring).

<sup>158</sup> *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 886-88 (2010).

<sup>159</sup> *See id.* at 887.

<sup>160</sup> *See id.* at 886, 913, 917, 925.

<sup>161</sup> *See id.* at 899-900, 914-15.

<sup>162</sup> *Id.* at 918-19.

the original intent of the framers.<sup>163</sup> Justice Scalia contended that a textualist analysis would not bear this approach out, the historical sources are contradictory at best, and it is difficult to claim that the Framers would have restricted corporate speech.<sup>164</sup> The dissenting opinion of Justice Stevens pointed out that precedent provides that a special reason is needed to overrule a well-settled doctrine and that the majority opinion failed to produce such a reason.<sup>165</sup> Justice Stevens pointed to the majority's outright abandonment of *stare decisis* as follows:

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. The ruling rests on several premises. First, the Court claims that *Austin* and *McConnell* have "banned" corporate speech. Second, it claims that the First Amendment precludes regulatory distinctions based on speaker identity, including the speaker's identity as a corporation. Third, it claims that *Austin* and *McConnell* were radical outliers in our First Amendment tradition and our campaign finance jurisprudence. Each of these claims is wrong.<sup>166</sup>

In this sense, Justice Stevens made a valid point: the majority opinion exaggerated much of the actual effect of the prior decisions and case precedent.<sup>167</sup>

Additionally, as Justice Stevens pointed out, the identity of the speaker mattered.<sup>168</sup> The view of the majority, if followed to its conclusion, "would appear to afford the same protection to multinational corporations controlled by foreigners as to individual Americans."<sup>169</sup> Justice Stevens also pointed out that the historical record, as recounted by Justice Scalia, left a lot to be desired and that his prior enlistment of the aid of the founding fathers would not currently

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<sup>163</sup> *Id.* at 925-28 (Scalia, J., concurring).

<sup>164</sup> *Id.* at 928-29.

<sup>165</sup> *Id.* at 938 (Stevens, J., concurring in part and dissenting in part) (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 864 (1992)).

<sup>166</sup> *Id.* at 942.

<sup>167</sup> *Id.* at 943 ("The laws upheld in *Austin* and *McConnell* leave open many additional avenues for corporations' political speech.").

<sup>168</sup> *Id.* at 947-48.

<sup>169</sup> *Id.*

support his position, or in this case, would be inconsistent at best.<sup>170</sup> Justice Stevens added that taking a textualist approach still cannot discount the distinction of news and media corporations, corporations which Justice Scalia would readily group with other types of corporations even though the text suggests otherwise.<sup>171</sup> Lastly, under antidistortion rationale, there is a compelling basis for wanting to differentiate corporations from natural persons, because of the effect of their monetary resources on the integrity of elections.<sup>172</sup> In short, the effect of *Citizens United* will likely be devastating. Its effects will not be felt immediately and the planet will not stop spinning tomorrow; however, with time, the influence of corporations will ultimately serve to dilute from participation those who the process was specifically designed for, natural persons, i.e., people.

## V. CONCLUSION

It is unfortunate that for well over a century the Court has exhibited aggressiveness and hostility toward state legislations and regulatory judgments, invalidating them on the premise that the corporation had somehow been a victim of invidious discrimination over the years. Corporations have evolved from the British Crown-chartered-mercantilist monopolies that engaged in market tampering and price fixing in the colonies to expansionist railroad, mining, and utility companies; large-scale automobile manufacturers; tobacco, alcohol, and pharmaceutical corporations; retail-store chains; fast-food chains; news corporations; and hospital-health-system corporations.<sup>173</sup> Historically created, monitored, and controlled by the states, the laws regarding corporations have evolved in their favor, and corporations gain inconceivable amounts of power daily. Small proprietors, mom-and-pop operations, and small

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<sup>170</sup> *Id.* at 950-52.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 979.

<sup>173</sup> KORTEN, *supra* note 3, at 61.



businesses have been crushed in the process, and almost every industry is fast becoming dominated by a corporate giant ultimately seeking a de facto corporatocracy. If unchecked, corporations will monopolize the United States by virtue of sheer power and influence over the government, laws, and courts. While antitrust laws once served to try to even the playing field, corporations have the resources to hire a fleet of attorneys to creatively argue in the courts daily as to why certain regulations are unlawful as applied to them. The ruling of the Court in *Citizens United* has likely set back this precarious situation even farther.

Americans sought to expand, not dilute, democratic participation of the people in elections. Corporations seek to expand their own participation regardless of whether that infringes upon or impairs the rights of others. Corporations exist to accumulate wealth and power and do not have the best interest of the public at heart. In making such a statement, the Author does not discredit the usefulness of corporations or even advocate for their eradication from the American scene. Corporations have their uses and serve a vital business purpose in this country. Nonetheless, they can at times be at odds with a true free market and interfere with a capitalistic process precisely because, by virtue of their nature, they must seek to eliminate competition.

Additionally, as shown by the historical record of the Fourteenth Amendment, it was enacted with the best of intentions but has been twisted to serve a different purpose. Behind-closed-door manipulations of the Equal Protection and Due Process Clauses have led to terrible jurisprudence. The Court needs to end corporate misuse of the First and Fourteenth Amendments. By recognizing that corporations do not have rights akin to those of natural persons, the Court will return the Constitution to the state that the founding fathers intended. The Constitution considered that the American people should have freedom of conscience,

speech, debate, and a vigorous political process. It also considered a vibrant, diverse press that remains free and protected, thus supporting, rather than diminishing, our great democracy. A continued corporatist approach will only lead to collectivism and a great loss of the ultimate freedoms of everyone.