

# The Real Error in *Citizens United*

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\* Candidate for J.D., Washington and Lee University School of Law, May 2013. I thank Professor Christopher Bruner and Professor David Millon for their great help as advisors for this Note. I dedicate this, my first publication, to John Williamson and the faculty at Highlands High School, the Philosophy Department at the University of Virginia, and Professor Adam Scales and the faculty at Washington and Lee School of Law for being influential teachers.

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### I. Introduction

Corporations typically retain statutory personal rights with respect to commercial activity, such as the rights to own property, to sue and be sued, and to enter into contracts.<sup>1</sup> But the extent to which corporations have constitutional personal rights, such as the right to free speech,<sup>2</sup> is the source of debate among courts, legislatures, citizens, the legal academy, and, of course, corporations.

The academic community has analyzed corporations—particularly their essence, rights, and purposes—throughout their evolution. Corporate law encompasses many theories, and virtually every theory either aims to answer any of three basic questions or presumes a position on those questions in order to tackle a more nuanced issue.<sup>3</sup> These three questions, therefore, are a defining feature of corporate theory as an area of study.

First, what is a corporation's essence? Most theories describe a corporation's essence in terms of one of two metaphors: an entity that exists separately from its shareholders or a mere aggregation of the corporation's constituents.<sup>4</sup> This Note will refer to this distinction as the corporate-essence dichotomy.

1. See, e.g., DEL. CODE ANN. tit. 8, § 122(4) (2012) (providing a corporation's right to own property); *id.* § 122(2) (stating that a corporation may sue and be sued); *id.* § 122(13) (providing a corporation's right to contract); see also 1 U.S.C. § 1 (2012) (stating that, in congressional acts, the word "person" presumptively includes corporations).

2. See U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . .").

3. Although this Note categorizes the theories by how they answer certain questions, scholars conceptualize corporate theories in many different ways because the theories and their interrelation are complicated. See, e.g., Susanna K. Ripken, *Corporations Are People Too: A Multi-Dimensional Approach to the Corporate Personhood Puzzle*, 15 FORDHAM J. CORP. & FIN. L. 97, 97 (2009) (providing a different organization of theories).

4. See David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 201

Second, what are the rights of a corporation? Many theories presume or posit that corporations represent either artificial creations of state law, thereby only possessing such rights as are explicitly granted by statute, or natural products of private initiative, thereby possessing rights beyond those granted by statute.<sup>5</sup> This Note will refer to this distinction as the corporate-rights dichotomy.

Third, what are the purposes and goals of corporations? Some theories argue that corporations are mechanisms purely for private investment, aiming to maximize shareholder wealth. Other theories assert that corporations are vehicles both for private investment and for broader, public purposes, considering also the betterment of the economy and society.<sup>6</sup> This Note will refer to this distinction as the corporate-purpose dichotomy. Often, intimately tied to this final question is an analysis of the balance of power between shareholders and the board of directors because that balance seems to indicate how corporations ought to be governed.<sup>7</sup> This Note, however, will not discuss particular governance theories because they implicitly answer one of the three main questions common to virtually all corporate-law

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(1990) (distinguishing the corporation as an entity from that as “a mere aggregation of natural individuals without a separate existence”).

5. See Daniel Lipton, Note, *Corporate Capacity for Crime and Politics: Defining Corporate Personhood at the Turn of the Twentieth Century*, 96 VA. L. REV. 1911, 1915 (2010) (discussing the real-entity and artificial-entity theories of corporate personhood) (citations omitted). Lipton uses the phrase “conclusions about the nature of corporate personhood” to mean rights derived from some corporate essence. *Id.*

6. See Millon, *supra* note 4, at 201 (discussing a development in corporate theory focusing on a public-private distinction about “the nature of corporate activity and the appropriate goals of corporate law”). “According to one view, corporate activity has broad social and political ramifications that justify a body of corporate law that is deliberately responsive to public interest concerns. The alternative viewpoint portrays corporate law as governing little more than the private relations between the shareholders of the corporation and management . . . .” *Id.*

7. See, e.g., Christopher M. Bruner, *The Enduring Ambivalence of Corporate Law*, 59 ALA. L. REV. 1385, 1396 (2008) (introducing the “nexus of contracts” theory, the “team production” theory, and the “shareholder primacy” theory as answering the question, “[W]hose interests are corporate decision-makers to pursue?”); Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 550 (2003) (discussing different theories about the means of corporate governance in terms of the division of power between the board and shareholders).

theories, and thus fall within the general discussion of this Note.<sup>8</sup> Because of the importance of personal rights and the public attention to corporate personal rights, this Note focuses on the second of the three questions—the corporate-rights dichotomy—but also heavily implicates the first question, the corporate-essence dichotomy.

In 2010, *Citizens United v. FEC*<sup>9</sup> stirred debate of corporations' personal rights under the U.S. Constitution.<sup>10</sup> The U.S. Supreme Court concluded, first, that “the Government may not suppress political speech on the basis of the speaker’s corporate identity.”<sup>11</sup> Second, the Court overruled a law that prohibited corporate independent campaign expenditures on the grounds that the law was a ban on speech violating the First Amendment.<sup>12</sup> The Court had already held, in a previous case, that speech could not be restricted solely because the speaker was a corporation,<sup>13</sup> but the effect of *Citizens United*—that corporations may now spend unlimited funds advocating the success or defeat of candidates under the protection of the First

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8. For example, the nexus-of-contracts theory, which views the corporate power structure as an aggregation of private interests, implicitly answers the corporate-essence question: the corporation must be an aggregation, not an entity. See Stefan J. Padfield, *The Dodd-Frank Corporation: More Than a Nexus-of-Contracts*, 114 W. VA. L. REV. 209, 215 (2011) (“The aggregate theory is generally understood to capture the nexus-of-contracts view, the artificial-entity theory captures concession theory, and the real-entity theory arguably captures the director-primacy view of the corporation.” (citation omitted)); Reuven S. Avi-Yonah, *Citizens United and the Corporate Form*, in 1 ACCOUNTING, ECONOMICS, AND LAW 1, 25 n.142 (2011) (“The point that the nexus-of-contracts theory is a reinvention of the aggregate view has been made repeatedly.”).

9. *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

10. See *id.* at 913–16 (stating that the government could not suppress political speech on the basis of the speaker’s corporate identity and that a federal statute barring corporate expenditures for campaigns violated the First Amendment).

11. *Id.* at 913.

12. *Id.* at 896–98.

13. See *id.* at 913 (relying on previous U.S. Supreme Court holdings that restricting campaign expenditures amounts to a restriction on speech and that the government may not restrict corporate speech); *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776 (1978) (holding that a Massachusetts statute prohibiting certain corporate political expenditures violates the First Amendment).

Amendment—has itself sparked considerable discourse among the media and the general public.<sup>14</sup>

One source of public concern is that corporate entities can overwhelm the voices of individual citizens by pouring their amassed wealth into lobbying efforts and media ownership.<sup>15</sup> Indeed, if corporations dominate both the media and elected offices, they can essentially control policy and law. Even private business owners or wealthy individuals typically cannot rival a large corporation's resources.<sup>16</sup> Such power is self-perpetuating because corporations can then use their influence to enhance their own wealth-seeking interests.<sup>17</sup> Thus, members of the public often fear that corporations will have a corruptive influence on government officials.<sup>18</sup>

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14. See, e.g., Dan Eggen, *Corporate Sponsorship Is Campaign Issue on Which Both Parties Can Agree*, WASH. POST, Feb. 18, 2010, at A15 (providing poll results and statements of political figures who oppose unlimited corporate campaign expenditure); Alex Blumberg, *Forget Stocks or Bonds, Invest in a Lobbyist*, NAT'L PUB. RADIO (Jan. 6, 2012), <http://www.npr.org/blogs/money/2012/01/06/144737864/forget-stocks-or-bonds-invest-in-a-lobbyist> (last visited Jan. 8, 2012) (reporting results of a study showing a corporate tax benefit of \$220 on every dollar spent lobbying for the benefit) (on file with the Washington and Lee Law Review); Jason Potteiger, *'Occupiers' Reflect on Movement One Year Later*, NAT'L PUB. RADIO (Sept. 13, 2012), <http://www.npr.org/2012/09/13/161103621/occupiers-reflect-on-movement-on-year-later> (last visited Sept. 28, 2012) (“[W]e want a constitutional amendment to reverse *Citizens United* or we want to end corporate personhood.”) (on file with the Washington and Lee Law Review).

15. See, e.g., Richard L. Hasen, *Campaign Finance Laws and the Rupert Murdoch Problem*, 77 TEX. L. REV. 1627, 1628 (1999) (listing major corporations that own corporate media subsidiaries such as ABC, NBC, and FOX News).

16. See *Citizens United v. FEC*, 130 S. Ct. 876, 904 (2010) (refusing to recognize a government interest in corporations' having an unfair advantage by using “resources amassed in the economic marketplace” (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 659 (1990))).

17. See Supplemental Brief Amicus Curiae of the Reporters Committee for Freedom of the Press in Support of Appellant, *Citizens United v. FEC*, 130 S. Ct. 876, 904 (2010) (No. 08-205), 2009 WL 2219299 at \*2–3 (“The original, laudable intent of Congress presumably was to limit speech by corporations that seek to promote their own interests by influencing elections, while continuing to allow all other commentary (either non-corporate entities or by the news media) on political issues.”).

18. See *Citizens United*, 130 S. Ct. at 908 (addressing and rejecting the argument that the government has a sufficiently important interest in preventing corruption, based on corporate independent expenditures, of elected officials).

In *Citizens United*, however, the Federal Judiciary—the only Branch structurally insulated from political influence<sup>19</sup>—defended corporations' right to freely spend their funds on electioneering communications under the highest protection of the law.<sup>20</sup> The U.S. Supreme Court rejected its earlier policy-based position against the distorted corporate influence and political corruption that would likely accompany unlimited corporate campaign expenditures.<sup>21</sup> The decision leaves individual citizens and the legal community with the question: What kind of person is a corporation, such that it can speak under protection of the Constitution?

Central to the debate, and the focus of this Note, is how *Citizens United* has affected corporate personhood in theory and in practice. In particular, the public's criticism of the 2010 case amplifies the flaw in the idea that we can deduce traits from a corporate person or essence—a notion that is fundamental to corporate-rights theories.<sup>22</sup> Additionally, *Citizens United* indicates the U.S. Supreme Court's stance on justifying corporate rights.

This Note focuses exclusively on publicly held businesses because the corporate rights debate primarily raises issues with the influence and standard characteristics of large-scale enterprises. The idea of corporate personhood does not raise the same questions with closely held companies whose owners also retain control over decisionmaking.<sup>23</sup>

Part II of this Note discusses theories about characteristics of the corporate form prior to *Citizens United*, arising out of the entity and aggregate theories of corporate form (the corporate-

19. Federal judges are theoretically insulated from the politics involved in elected offices and nontenured positions. See Girardeau A. Spann, *Expository Justice*, 131 U. PA. L. REV. 585, 636 (1983) (“[The Judiciary] has been insulated purposely from immediate political accountability.”).

20. See *Citizens United*, 130 S. Ct. at 913 (applying constitutional protections and a strict-scrutiny analysis to state that corporate independent expenditures are permissible).

21. See *id.* at 902–11 (overruling precedent that permits a ban on political speech under the “antidistortion” and “anticorruption” rationales).

22. See *infra* Part II (discussing corporate-rights theories).

23. See Bruner, *supra* note 7, at 1386 n.1 (implying that issues arise from the separation of ownership and control, which is characteristic of publicly held businesses rather than those that are closely held).

essence dichotomy).<sup>24</sup> This Part then raises two important critiques of these theories that resurface in later discussion.<sup>25</sup> Part III analyzes the *Citizens United* opinion as it relates to corporate-rights theories and its repercussions in law and society.<sup>26</sup> Part IV revives the two critiques from Part II to reject the notion that rights can be deduced from any theoretical conception of the corporation.<sup>27</sup> Because no corporate-law theories can provide an appropriate source from which the U.S. Supreme Court can ascribe rights to the corporation, this Part then identifies the proper source.<sup>28</sup> Specifically, the opinion's language suggests that the Court grounds the right to corporate political speech in public policy.<sup>29</sup> Finally, based on this refined reading of *Citizens United*, Part V provides more accurate bases for criticizing the opinion or otherwise addressing the public's concerns.<sup>30</sup>

Part VI concludes by reiterating the overarching argument of this Note: (1) *Citizens United* is unclear about the source of the corporate political speech right; (2) because the Court fails to make the source clear, public criticism of *Citizens United* is misguided; (3) the source for the constitutional corporate speech right is public policy, not some existential truth about the corporate form; and (4) real, functional claims about corporate rights only relate to corporate-rights theories in the sense that these theories are metaphors to discuss the real rights.<sup>31</sup>

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24. See *infra* Part II.A (discussing entity and aggregate theories).

25. See *infra* Part II.B (discussing the circularity problem).

26. See *infra* Part III (discussing *Citizens United*).

27. See *infra* Part IV (finding a fatal flaw in using entity and aggregate theories to deduce corporate rights).

28. See *infra* Part IV (finding the real source of the corporate speech right).

29. See *infra* Part IV (dissecting *Citizens United* to find the source of the corporate speech right).

30. See *infra* Part V (describing a proper analysis).

31. See *infra* Part VI (concluding that the Court failed in its duty to justify the right of corporate political speech by not clearly explaining its source).

## II. Corporate Form Pre-Citizens United

### A. Entity and Aggregate Theories of Corporate Form

By the nineteenth century, corporate America began to develop from joint stock trading companies and partnerships into quasi-public entities.<sup>32</sup> As legislators and courts unequivocally granted corporate entities rights that, by statute, explicitly applied to persons,<sup>33</sup> complex corporate-law questions led theorists to contemplate the ontology of the corporate legal personality.<sup>34</sup> Generally, nineteenth-century theories conceptualized the corporate form either as an entity separate from its shareholders or as an aggregate of its members,<sup>35</sup> and theorists attempted to deduce inherent rights or characteristics based on the corporate form.<sup>36</sup>

Under the artificial-entity theory of corporate personhood, which “character[ized] . . . legal discourse for much of the 19th century,”<sup>37</sup> the corporation is a mere “creature of the law, whose rights consist[] only of those conferred by the state.”<sup>38</sup> The

32. See ADOLF A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 11 (rev. ed. 1968) (outlining the development of the corporate form).

33. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870–1960*, at 66–67 (1992) (discussing the impact of an 1886 U.S. Supreme Court decision finding—without explanation—that “a corporation was a person under the Fourteenth Amendment” (citing *Cnty. of Santa Clara v. S. Pac. R.R. Co.*, 118 U.S. 394 (1886))).

34. See *id.* at 67, 70–76, 98–107 (discussing various theories of corporate personhood developing around the turn of the nineteenth century).

35. See, e.g., Avi-Yonah, *supra* note 8, at 3 & n.10 (stating that the aggregate theory, the artificial-entity theory, and the real-entity theory are “standard theories found in literature”). The essence of these theories can be traced back to before the nineteenth century. See *id.* at 4–6 (discussing the history of corporate theories). But the “shift from small, closely held enterprises to massive, publicly held ones” led to a “re-examination of the corporate form” under these three theories. *Id.* at 14.

36. See Bruner, *supra* note 7, at 1387–88 (describing Sir Edward Coke’s theory that a corporation is an artificial legal person); Jess M. Krannich, *The Corporate “Person”: A New Analytical Approach to a Flawed Method of Constitutional Interpretation*, 37 *LOY. U. CHI. L.J.* 61, 66–86 (2005) (providing U.S. Supreme Court precedent for “the artificial-entity theory, the aggregate entity theory, and the real-entity theory” (citations omitted)).

37. Millon, *supra* note 4, at 211.

38. Lipton, *supra* note 5, at 1915 (citations omitted).



corporate entity, under this view, is a legal fiction that exists only to the extent that statutory law prescribes.<sup>39</sup> When courts have used language indicating an artificial-entity view, they typically have distinguished the corporate entity from its members to justify state regulation, rather than to imbue the corporation with rights.<sup>40</sup>

In the second half of the nineteenth century, the advent of general incorporation laws facilitated widespread incorporation by simplifying the state-law requirements, making the corporation more universally available as a business form.<sup>41</sup> At the same time, these laws signified a shift away from the idea of an artificial entity heavily regulated by the state.<sup>42</sup> Theorists recognized corporations as “nothing but aggregations of private individuals,” as opposed to entities distinct from their constituents.<sup>43</sup> Under this aggregation theory, corporations have rights derived from the rights of the natural persons behind the corporate veil.<sup>44</sup> Although not consistently adopting the aggregate theory over entity theories, courts have applied constitutional protections to corporations on the grounds that “the members do not, because of such association, lose their rights to protection.”<sup>45</sup>

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39. See *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 636 (1819) (“Being the mere creature of law, [the corporation] possesses only those properties which the charter of its creation confers upon it . . .”); Millon, *supra* note 4, at 206 (“[T]he corporation owed its existence to the positive law of the state rather than to the private initiative of individual incorporators.”).

40. See, e.g., *Hale v. Henkel*, 201 U.S. 43, 74 (1906) (“[A corporation] has no right to refuse to submit its books [for state review, but an] individual may stand upon his constitutional rights as a citizen.”).

41. See Krannich, *supra* note 36, at 75 (discussing how general incorporation laws “allowed individuals to incorporate their businesses without first seeking a special charter from the state legislature”); Avi-Yonah, *supra* note 35, at 13 & n.75 (providing an example of general incorporation law).

42. See Krannich, *supra* note 36, at 75 (“The immediate effect of the general incorporation acts was to ‘move[] the predominant role in corporate organization from the state to the incorporators and shareholders.’” (citation omitted)).

43. Millon, *supra* note 4, at 202.

44. See Krannich, *supra* note 36, at 77 (discussing how courts “imputed the corporation’s constitutional personhood from that of the individuals who had formed the corporation”).

45. See *Cnty. Of Santa Clara v. S. Pac. R.R. Co.*, 18 F. 385, 402–03 (C.C.D. Cal. 1883).

The turn of the twentieth century saw significant developments in the corporate form, including corporations' acquisition of several legal features that make the public corporation an attractive entity form, as we know it today.<sup>46</sup> For example, limited shareholder liability and free transferability of shares promote economic efficiency and investment by encouraging risk taking and reducing transaction costs.<sup>47</sup> Similarly, corporations' perpetual existence incentivizes investment.<sup>48</sup> Perhaps most significantly, companies with widely dispersed ownership vest control in boards of directors—rather than in their expanding base of shareholders, whose interest in the company becomes so insignificant that they, rationally, are apathetic about business decisions.<sup>49</sup>

The ownership–control dichotomy, which divides the corporate identity between its directors and shareholders, coincided with the growing popularity of a third theory in legislative, judicial, and academic discourse about the corporate form.<sup>50</sup> The idea of the corporation as a state-created artificial

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46. See HORWITZ, *supra* note 33, at 72–74 (discussing “fundamental changes . . . in the legal treatment of the corporation”); see also STEPHEN M. BAINBRIDGE, *CORPORATION LAW AND ECONOMICS* 4–11 (2002) (describing the essential attributes of the corporation and, as applicable, referring to their formal codification); Steven A. Bank, *A Capital Lock-In Theory of the Corporate Income Tax*, 94 GEO. L.J. 889, 891 & n.9 (2006) (listing attributes of the corporation) (citations omitted).

47. See David L. Cohen, *Theories of the Corporation and the Limited Liability Company: How Should Courts and Legislatures Articulate Rules for Piercing the Veil, Fiduciary Responsibility and Securities Regulation for the Limited Liability Company?*, 51 OKLA. L. REV. 427, 439 (1998) (“Limited liability promotes the free transfer of shares, which creates incentives for managers to act efficiently since the results of their inefficient actions will be punished by the market.” (citing FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 42–43 (1991))).

48. See MODEL BUS. CORP. ACT § 3.02 (2005) (“Unless its articles of incorporation provide otherwise, every corporation has perpetual duration . . . and has the same powers as an individual to do all things necessary or convenient to carry out its business . . .”).

49. See BERLE & MEANS, *supra* note 32, at 84–85, 108–16 (discussing the separation of ownership and control among large-scale corporations).

50. See, e.g., HORWITZ, *supra* note 33, at 98 (discussing the emergence of the natural-entity theory, which recognized a distinction between the corporate entity and the shareholders); Cohen, *supra* note 47, at 435–36 (“[T]he growing size of firms and the recognition of the separation of ownership and control in firms resulted in commentators arguing that firms were somehow independent

entity gave way to a description of a corporation as an entity arising naturally by private initiative.<sup>51</sup> Coupled with the separation of ownership and control, these theoretical developments “transformed shareholders from entrepreneurs into passive investors who placed their economic interests in the hands of professional managers.”<sup>52</sup> This advent of the natural-entity theory (or real-entity theory) accompanied corporations’ growth in size and pervasiveness, leading to a corporate structure that has persisted as “the dominant form of organization and production.”<sup>53</sup> Professor Reuven Avi-Yonah has deemed this theory the most persistent of corporate-rights theories, partly because it is the “most congruent with business realities [such as the business judgment rule] as well as the [theory] most suited to a corporation–state balance.”<sup>54</sup>

The artificial-entity theory, the aggregate theory, and the natural-entity theory each have sought to affirmatively describe the corporate form, and this debate has in turn prompted normative discussion among the academic community as to what corporations ought to be.<sup>55</sup> For example, the political-speech right might appear to attach to corporations pursuant to a natural-entity perspective: corporations are entities whose speech the U.S. Supreme Court has deemed protected, so they have the

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of their owners.” (citing Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441 (1987)); see also Stephen M. Bainbridge, *The Politics of Corporate Governance*, 18 HARV. J.L. & PUB. POL’Y 671, 671–73 (1995) (identifying Berle and Means’s theory on separation of ownership and control as a motivating tenet of “the modern era of corporate governance scholarship”). See generally BERLE & MEANS, *supra* note 32 (discussing the separation of ownership and control in large corporations).

51. See Krannich, *supra* note 36, at 80 (describing the corporation as an autonomous being with existence independent of its shareholders and beyond state grant of authority); Millon, *supra* note 4, at 202 (“The aggregate characterization did not prove to be persuasive, but the notion of the corporation as a natural creation of private initiative and market forces replaced the idea that the corporation was artificial.”).

52. Millon, *supra* note 4, at 214–15.

53. BERLE & MEANS, *supra* note 32, at xxv.

54. Avi-Yonah, *supra* note 8, at 19.

55. See Millon, *supra* note 4, at 204 (recognizing that “normative implications then are said to follow from the positive assertion [of what corporations are]”).

capacity for speech.<sup>56</sup> Natural-entity theorists (and the general public) would then debate whether it is appropriate that corporations have the capacity for speech already found to be constitutionally protected.<sup>57</sup>

The vast majority of corporate-theory scholars, in discussing corporations' rights and the corporate form, adopt (at least implicitly) the aggregate theory or one of the two entity theories,<sup>58</sup> despite each theory's enduring inconsistencies.<sup>59</sup>

### *B. The Circularity of Defining a Corporation by Inherent Characteristics*

All three theories face a problem of circular reasoning. Because the entity theories and the aggregate theory all describe the essence of a corporation, they inevitably make claims about attributes or rights of corporations.<sup>60</sup> Attributes such as limited shareholder liability, free transferability of shares, perpetual existence, and centralized governance may seem to clearly define the corporation. Corporations, however, like people, can have an indefinite number of characteristics, some of which seem inconsistent.<sup>61</sup> For example, a corporation can sign a document

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56. See *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010) (“[T]he Government may not suppress political speech on the basis of the speaker's corporate identity.”); Avi-Yonah, *supra* note 8, at 41 (“The entire *Citizens United* opinion, both the majority and the dissent, are thus reflective of the real entity view. Corporations stand on their own, independent of both the state that created them and the shareholders that own them.”).

57. See Millon, *supra* note 4, at 204 (stating that normative implications follow from positive assertions about corporations).

58. See Avi-Yonah, *supra* note 8, at 3 (“[T]hroughout all of [the changes in the legal conception of the corporation], spanning two millennia, the same three theories of the corporation can be discerned.”).

59. See *infra* notes 66–72 and accompanying text (pointing out major flaws in the theories).

60. See H.L.A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 42 (Oxford Univ. Press 1983) (“Theories of the traditional form . . . make the common assumption that [expressions for corporate bodies] must stand for or describe something, and then give separate and incompatible accounts of its peculiarity as a complex or recondite or a fictitious entity . . .”).

61. See *id.* (“[T]he peculiarity lies . . . in the distinctive characteristics of expressions used in the enunciation and application of rules.”).

(and we picture this as requiring a human agent)<sup>62</sup> but cannot swear an oath (though we could imagine a human proxy on the stand).<sup>63</sup> In fact, as corporations accumulate characteristics, inconsistencies suggest confusion in the line of questioning between asking about the corporation, on the one hand, and asking about the people who comprise it, on the other hand.<sup>64</sup> Although some scholars offer explanations for the “oscillation between the three views” over time,<sup>65</sup> the reality is that no single theory can consistently define a corporation.<sup>66</sup>

Two inherent flaws prevent any entity or aggregate theory from fully and accurately defining a corporation. First, each of the two major categories distorts the corporate form in its own direction: entity theories have trouble explaining rights arising from the aggregate, and aggregate theories struggle with traits arising from a holistic entity.<sup>67</sup> Under an entity theory, deriving personal rights on the corporation’s behalf may be difficult to

62. See DEL. CODE ANN. tit. 8, § 142(a) (2012) (“Every corporation organized under this chapter shall have such officers with such titles and duties . . . necessary to enable it to sign instruments . . .”).

63. See Bruner, *supra* note 7, at 1388 (providing the seventeenth century view that corporations do not possess bodies or souls and thus can neither “be in person, nor swear” an oath (quoting 5 EDWARD COKE, THE REPORTS OF SIR EDWARD COKE, KNT.: IN THIRTEEN PARTS pt. X, at \*32b (photo. reprint 2002) (1826))).

64. See HART, *supra* note 60, at 43 (discussing group personalities, such as “[t]he crowd was angry”).

65. Avi-Yonah, *supra* note 8, at 17. “The Court is trying to strike a balance between the rights of the corporations, which can best be protected under either the aggregate or the real entity views, and the regulatory power of the state, which is best reflected in the artificial entity view.” *Id.* at 17–18.

66. Hart provides examples of inconsistencies under the entity theories:

[J]ust as a Realist theory appears to tell us that a company “cannot” be bound by an agreement empowering another company to direct its business and appoint its personnel because this would be “to degrade to the position of a tool” a person with a real will, so a Fiction theory appears to say that company “cannot” be guilty of certain crimes because it has no mind.

HART, *supra* note 60, at 45 (citation omitted); see also, e.g., Bruner, *supra* note 7, at 1388–89 (criticizing the aggregate theory for its conclusion that “an aggregation of souls equals no soul”, which “den[ies] the humanity of what is, in essence, a collection of human actors”).

67. See HART, *supra* note 60, at 43 (“Under what conditions do we refer to numbers . . . of men as aggregates of individuals and under what conditions do we adopt instead unifying phrases extended by analogy from individuals?”).

explain; the only sense in which a corporation can act on its personal rights is via individual people, and if the corporation is in fact a separate entity it arguably should be regulated as such.<sup>68</sup> Under the aggregate theory, on the other hand, replacing a corporation's entire membership would seem to form a new corporation.<sup>69</sup> As corporations have developed over time, each category of theories (aggregate theories and entity theories) faces the same obstacle: it must "simultaneously recognize[] entity and aggregate characteristics"<sup>70</sup> and be somewhat "schizophrenic about what ultimately the firm is."<sup>71</sup>

The second inherent flaw in corporate-rights theories is that defining a corporation by listing its characteristics presumes corporations have inherent attributes that resemble those of persons.<sup>72</sup> Recognizing the circularity in this reasoning, H.L.A. Hart concluded that statements about inherent characteristics do not define a corporation; that would beg the question by defining what a corporation is.<sup>73</sup> Applying Hart's theory, no corporate essence exists from which to derive rights; rather, the legislatures and courts must say what rights a corporation has.<sup>74</sup> Therefore, we must abandon the notion that a corporation can be defined by its characteristics and instead ask the question: "Under what

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68. See Cohen, *supra* note 47, at 435 (discussing the aggregate theory as responding to the problem of government regulation of the corporate entity).

69. See Arthur W. Machen, Jr., *Corporate Personality*, 24 HARV. L. REV. 253, 259 (1911) ("Any group of men . . . whose membership is changing, is necessarily an entity separate and distinct from the constituent members." (citation omitted)).

70. William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives From History*, 41 STAN. L. REV. 1471, 1505 (1989) (criticizing the commonality problem of aggregate and entity theories).

71. Cohen, *supra* note 47, at 436.

72. See HART, *supra* note 60, at 45 ("These statements [about corporations' entity or ontological capacity] confuse the issue because they look like eternal truths about the nature of corporations given us by definitions . . ."); Bruner, *supra* note 7, at 1388–89 (considering that there may not be an inherent soul-like ontology of a corporate entity).

73. See HART, *supra* note 60, at 42–47 (discussing the definition of a corporation).

74. See *id.* at 29–30 (analogizing the corporation to a game in which a rule "attach[es] a single consequence to the successive actions of a set of different men—as when a team is said to have won a game").

types of conditions does the law ascribe liabilities”—and rights—“to corporations?”<sup>75</sup>

The circularity problem arises when answering the question *What is a corporation?* by listing corporate rights as if they naturally belong in the definition. The problem does not arise in every discussion about corporate qualities. If the question is *How does a corporation function in the real world?*, listing corporate rights such as “corporations can sign contracts” is informative and avoids the circularity problem. The claim is now helpful because it identifies a corporate right.<sup>76</sup> For example, identifying which crimes a corporation is capable of committing reveals its capacity as a legal device. Consider perjury: a corporate official may lie under oath in his role as an agent of the corporation, yet courts have held that the corporation is not a person capable of taking an oath and cannot be criminally liable for the crime of perjury.<sup>77</sup> Therefore, legislatures and courts determine which crimes a corporation could potentially commit.

Corporations seem suspect insofar as they retain, through statutes or court decisions, certain humanlike capacities while escaping moral and legal accountability for humanlike actions.<sup>78</sup> If Congress and state legislatures (and courts, via judicial review) make the rules, they cannot hide behind an ontological argument to defend unpopular corporate traits. Legislatures and courts seem unlikely to use these ontological theories as a cop-out,

75. *Id.* at 43. (internal quotation marks omitted).

76. *See id.* (stating that the discussion of the law ascribing rights to corporations will “bring out the precise issues at stake when judges, who are supposed not to legislate, make some new extension to corporate bodies of rules worked out for individuals”).

77. *See, e.g., State v. Saint Paul Fire & Marine Ins. Co.*, 835 So. 2d 230, 233–34 (Ala. Crim. App. 2000) (finding a corporation incapable of committing perjury); Note, *Criminal Liability of Corporations for Acts of Their Agents*, 60 HARV. L. REV. 283, 284 (1946) (discussing corporations’ capacity to commit crimes). *But see United States v. Ingredient Tech. Corp.*, 698 F.2d 88, 99–100 (2d Cir. 1983) (concluding that a corporation could be convicted of subscribing to a false federal income tax return even though it has been held that corporations are incapable of taking an oath).

78. “The structure of the public corporation ‘insulates shareholders from social and moral sanctions and processes,’ both by rendering them ‘largely anonymous’ to the public, as well as by virtue of their ‘relative lack of information about how corporate operations may impact the public interest.’” Bruner, *supra* note 7, at 1393 (quoting Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 798 (2005)).

however, but rather as a legal defense of the corporate rights they determine. In a 1906 case, the U.S. Supreme Court stated:

[W]e do not wish to be understood as holding that a corporation is not entitled to immunity, under the Fourth Amendment, against *unreasonable* searches and seizures. 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 Fourteenth Amendment, against unlawful discrimination. Corporations are a necessary feature of modern business activity, and their aggregated capital has become the source of nearly all great enterprises.<sup>79</sup>

The Court uses the aggregate view of the corporation as a means to justify its application of the personal due process protection.<sup>80</sup> Using the aggregate theory as a scapegoat would look more like: We wish we could hold that a corporation is not entitled to immunity against unreasonable searches and seizures, as humans are, but we simply cannot because the corporation is an association of individuals in all contexts. Legislatures' and courts' hiding behind an ontological theory to explain corporate rights, then, is most likely a figment of the public's imagination.

### C. The Stance of the Courts

A common belief among corporate-law theorists is that courts, before upholding a corporation's constitutional rights, examine the values and policies underlying those rights with respect to individuals and determine whether those justifications apply to corporations.<sup>81</sup> Courts have performed this task in two ways. The first reflects the circularity trap, as described above.<sup>82</sup>

79. *Hale v. Henkel*, 201 U.S. 43, 76 (1906) (citation omitted).

80. *See id.* (indicating that the corporation derives personal rights from its being an association of individuals).

81. *See, e.g.,* Krannich, *supra* note 36, at 64, 104–08 (positing that the U.S. Supreme Court should analyze constitutional corporate rights “in light of the values and policies that are thought to underlie it.” (citation omitted)).

82. *See supra* Part II.B (explaining the circularity of presuming inherent corporate characteristics).



This occurs when courts use language that presumes the existence of a truth-value for corporate characteristics, as if corporations have inherent rights to be protected and we only need to discover what they are.<sup>83</sup> For example: Is it true that a corporation has the capacity for speech?<sup>84</sup> If so, perhaps corporate speech merits constitutional protection. At times the U.S. Supreme Court has adopted this view, most famously in *Trustees of Dartmouth College v. Woodward*:<sup>85</sup> “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*.”<sup>86</sup>

At other times, courts have not deduced corporate rights from the essence of a corporation. In these cases, traits or rights often attach to corporations simply based on courts’ interpretations of statutory law.<sup>87</sup> If not directly citing to statute, courts have justified the attachment of a trait based on precedent or have simply refused to elaborate on how or when a corporate trait attaches.<sup>88</sup> In *Citizens United*, for example, the Court supported the premise that “First Amendment protection extends to corporations” with a paragraph solely citing to case law, but with no reference to when or how the right attached.<sup>89</sup> The right most

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83. See HART, *supra* note 60, at 45 (arguing that statements such as “[a] company has no mind and therefore cannot intend’ . . . confuse the issue because they look like eternal truths about the nature of corporations”).

84. The opposing view would be that the claim has no truth-value: one can neither say that a corporation has the inherent ability to speak or that it does not. This might be attributable to the fact that corporations can speak in some contexts but not others. See *supra* Part II.B (discussing inconsistencies in deducing inherent corporate characteristics).

85. *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518 (1819).

86. *Id.* at 636 (emphasis added). The Court paraphrased the language of Sir Edward Coke. See EDWARD COKE, 5 THE REPORTS OF SIR EDWARD COKE, KNT.: IN THIRTEEN PARTS pt. X, at \*32b (photo. reprint 2002) (1826).

87. See, e.g., *NMI Sys., Inc. v. Pillard*, 179 B.R. 357, 371 (Bankr. D.D.C. 1995) (stating that corporations, through officers, can “sign instruments” (quoting DEL. CODE ANN. tit. 8, § 142(a) (2010))).

88. See, e.g., HORWITZ, *supra* note 33, at 66–67 (discussing how *Santa Clara* was the first U.S. Supreme Court assertion that “a corporation was a person under the Fourteenth Amendment” and how the Court failed to elaborate or provide a rationale).

89. *Citizens United v. FEC*, 130 S. Ct. 876, 899–900 (2010). The Court cited twenty-one cases to support this contentious point. *Id.*

likely attached in the predecessor cases that the Court relies upon now for support.<sup>90</sup> When courts do not cite to statute or precedent, one would hope that the courts' language and reasoning indicate the source of the corporate right; a sheer lack of elaboration can be "puzzling and controversial."<sup>91</sup> The corporate right to constitutionally protected speech, traced back through precedent, ultimately rests on the premise that corporations are persons within the meaning of the Fourteenth Amendment<sup>92</sup>—a premise that is, itself, unexplained.<sup>93</sup>

Part of the reason for the U.S. Supreme Court's silence might be an uncertain balance between state and federal powers. Generally, for matters dealing with the internal affairs of corporations, the Court looks to the state of incorporation to interpret the law.<sup>94</sup> Ultimately, however, Congress retains power over the entire corporate function via the Commerce Clause.<sup>95</sup> This leaves the U.S. Supreme Court and state courts in a strange

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90. See, e.g., *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 252, 263 (1986) (stating that a restriction on direct expenditure of corporate funds for electioneering violated the corporation's First Amendment rights); HORWITZ, *supra* note 33, at 66–67 (discussing the impact of an 1886 U.S. Supreme Court decision finding—without explanation—that “a corporation was a person under the Fourteenth Amendment”) (citing *Cnty. of Santa Clara v. S. Pac. R.R. Co.*, 118 U.S. 394 (1886)); Krannich, *supra* note 36, at 62 (“[T]he Court has granted corporations constitutional rights without engaging in the preliminary inquiry of whether a corporation is entitled to them under the Constitution.”).

91. HORWITZ, *supra* note 33, at 66.

92. See *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 780 & n.15 (1978) (“Freedom of speech . . . always ha[s] been viewed as . . . safeguarded by the Due Process Clause, and the Court has not identified a separate source for the right when it has been asserted by corporations.” (citations omitted)).

93. See HORWITZ, *supra* note 33, at 66–67 (discussing how the Court simply stated, without explanation, that “a corporation was a person under the Fourteenth Amendment”); see also HORWITZ, *supra* note 88 (providing the case that asserts the corporate right without explanation).

94. See, e.g., *Rogers v. Guar. Trust Co. of N.Y.*, 288 U.S. 123, 130 (1933) (“[A] court—state or federal—sitting in one State will . . . decline to interfere with . . . the management of the internal affairs of a corporation organized under the laws of another state but will leave controversies as to such matters to the courts of the state of the domicile.”).

95. See U.S. CONST. art. I, § 8, cl. 3 (granting Congress the power to regulate commerce); Norman R. Williams, *Why Congress Cannot “Overrule” the Dormant Commerce Clause*, 53 UCLA L. Rev. 153, 216 (2005) (discussing Laurence Tribe's position that the Commerce Clause empowers Congress to set rules for corporations).

conundrum: because state courts do not answer questions of federal constitutional law and the Supreme Court avoids questions of corporate law, judicial interpretation of the corporate entity remains a mystery.<sup>96</sup> When the Court then issues decisions asserting corporations' personal rights without explanation, the public, not surprisingly, views the decision with a degree of cynicism, or at least skepticism.<sup>97</sup>

In state courts, of course, the Fourteenth Amendment is not the source, but rather the vehicle, of corporations' personal rights.<sup>98</sup> In fact, the amendment exacerbates the confusion by virtue of its own far-reaching applications. Although corporations are persons under the Fourteenth Amendment,<sup>99</sup> the Court cannot mean that they share the exact same set of Fourteenth Amendment rights as individual persons. Even if corporations' rights were a subset of persons' rights, corporations could not "vote on equal terms with natural persons,"<sup>100</sup> much less attend the same elementary school.<sup>101</sup> Thus the question remains: What subset of person-type rights do corporations possess?

If legislatures refuse to say that corporations are a subset of persons or share the same set of rights as its members, and likewise do not state that corporations' only rights are those

96. This Note credits Professor Christopher Bruner with pointing out the federalism problem here. Other authors have discussed, for example, "whether the internal affairs doctrine is only a choice-of-law rule or whether it is also a rule of constitutional law." Jack B. Jacobs, *The Reach of State Corporate Law Beyond State Borders: Reflections Upon Federalism*, 84 N.Y.U. L. REV. 1149, 1164–67 (2009).

97. See, e.g., Jeff Clements, "We Never Said Corporations Are People; We Said They Are Voices, Speakers, Speech-Makers, a Class of Persons. That's Different.", CORPORATIONS ARE NOT PEOPLE (Jan. 23, 2012), <http://corporationsarenotpeople.com/2012/01/23/we-never-said-corporations-are-people-we-said-they-are-voices-speakers-speech-makers-a-class-of-persons-thats-different/> (last visited Feb. 18, 2012) (arguing against the *Citizens United* result) (on file with the Washington and Lee Law Review).

98. See, e.g., *Gitlow v. New York*, 268 U.S. 652, 664, 666 (1925) (incorporating the First Amendment to the states via the Fourteenth Amendment).

99. See *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 779–80 (1978) (applying Fourteenth Amendment protections to corporations).

100. Carolyn B. Ramsey, *Restructuring the Debate Over Fetal Homicide Laws*, 67 OHIO ST. L.J. 721, 755 n.170 (2006) (citation omitted).

101. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (desegregating schools under the Equal Protection Clause of the Fourteenth Amendment).

explicitly provided by charter, then the courts cannot wholly define a corporation by ascribing some of its rights in a few different contexts.<sup>102</sup> Finding a holistic framework for determining, in theory, whether and when particular personal rights ought to apply to corporations thus becomes an arduous task—one the U.S. Supreme Court has not fully or consistently undertaken.<sup>103</sup> *Citizens United* embodies this struggle with respect to corporate political speech.<sup>104</sup>

### III. Citizens United

#### A. Background

Aside from legal limitations, corporations have the financial ability to make large donations, in the form of direct “contributions” to candidates or “independent expenditures”<sup>105</sup> toward electioneering, using funds amassed from the efforts of individual persons. Contributions are direct donations to candidates and have historically been prohibited as a means for corporations to spend funds on federal candidates.<sup>106</sup> Independent expenditures—the type of spending at issue in *Citizens United*—are “money[s] spent for a communication that expressly advocates the election or defeat of a clearly identified Federal candidate.”<sup>107</sup> The first congressional prohibitions on corporate

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102. See HART, *supra* note 60, at 41 (“It is easy to see that a statement about the rights of a limited company is not equivalent to the statement that its members have those same rights.”).

103. See Krannich, *supra* note 36, at 62 (observing that the Court has frequently used the entity or aggregate theories as metaphors to interpret the Constitution in the corporate context, but that the use has been ad hoc and without regard to any simultaneous mutual exclusiveness among the theories).

104. Compare *Citizens United v. FEC*, 130 S. Ct. 876, 900 (2010) (stating without explanation that the U.S. Supreme Court has treated corporations as people under the First Amendment), with *id.* at 928 (Scalia, J., concurring) (“[T]he individual person’s right to speak includes the right to speak in association with other individual persons.” (emphasis removed)).

105. 11 C.F.R. § 100.16(a) (2000) (defining *independent expenditure* as “an expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate . . .”).

106. See *id.* at 887 (stating that the corporate contribution ban persists).

107. Federal Election Commission, *Citizens’ Guide Brochure* (Feb. 2004), [http://www.fec.gov/pages/brochures/citizens\\_guide\\_brochure.pdf](http://www.fec.gov/pages/brochures/citizens_guide_brochure.pdf) (last visited

contributions and independent expenditures were the Tillman Act of 1907<sup>108</sup> and the Labor Management Relations Act of 1947 (the Taft–Hartley Act).<sup>109</sup> The complete ban on corporate general fund political spending endured until the Federal Election Campaign Act of 1971 (FECA)<sup>110</sup> provided an exception.<sup>111</sup> FECA allowed corporations to establish separate funds through so-called Political Action Committees (PACs) to solicit voluntary donations that could be contributed to federal campaigns.<sup>112</sup>

In 1976, the Court in *Buckley v. Valeo*<sup>113</sup> upheld limits on individual direct contributions to candidates, even though they suppressed political speech, because the government had a prevailing interest in preventing quid pro quo corruption (or the appearance thereof) by candidates accepting large contributions.<sup>114</sup> The U.S. Supreme Court overturned individual

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Feb. 24, 2012) (providing information for citizens to participate in the federal election process) (on file with the Washington and Lee Law Review).

108. See Tillman Act of 1907, Pub. L. No. 59-36, 34 Stat. 864 (codified as amended at 2 U.S.C. § 441b(a) (2006)) (prohibiting corporate monetary contributions to political campaigns).

109. See Labor Management Relations (Taft–Hartley) Act of 1947, Pub. L. No. 80-101, sec. 304, § 313, 61 Stat. 136, 159 (codified as amended at 29 U.S.C. § 141 (2006)) (barring corporate independent expenditures to political campaigns); Federal Election Commission, *The Federal Election Campaign Laws: A Short History*, <http://www.fec.gov/info/appfour.htm> (last visited Nov. 18, 2011) (outlining the history of campaign laws) (on file with the Washington and Lee Law Review).

110. Federal Election Campaign Act, Pub. L. No. 92-225, § 316, 90 Stat. 490 (codified as amended at 2 U.S.C. § 441b(a) (2006)) (placing legal limits on corporate contributions to campaigns).

111. See *A Guide to the Current Rules for Federal Elections*, CAMPAIGN LEGAL CENTER, [http://www.campaignlegalcenter.org/index.php?option=com\\_content&view=article&id=1187%3Aa-guide-to-the-current-rules-for-federal-elections&catid](http://www.campaignlegalcenter.org/index.php?option=com_content&view=article&id=1187%3Aa-guide-to-the-current-rules-for-federal-elections&catid) (last visited Aug. 23, 2012) (explaining the law on corporate political contributions) (on file with the Washington and Lee Law Review).

112. See 2 U.S.C. § 441b(b) (2006) (providing for Political Action Committees); E. Stewart Crosland, Note, *Failed Rescue: Why Davis v. FEC Signals the End to Effective Clean Elections*, 66 WASH. & LEE L. REV. 1265, 1270 (2009) (discussing PACs); Federal Election Commission, *The Federal Election Campaign Laws: A Short History*, <http://www.fec.gov/info/appfour.htm> (last visited Nov. 18, 2011) (outlining the history of campaign laws) (on file with the Washington and Lee Law Review).

113. *Buckley v. Valeo*, 424 U.S. 1 (1976). In *Buckley*, the Court held that expenditure limits suppress constitutionally protected political speech. *Id.* at 54.

114. See *id.* at 29 (finding that the “weighty interests [that are] served by restricting the size of financial contributions to political candidates are

independent expenditure limits, however, because they were a severe restriction on political-speech rights<sup>115</sup> and did not “serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process.”<sup>116</sup> (This rule—that the government may restrict individual contributions but not individual independent expenditures—is essentially what *Citizens United* later applied to corporations.)<sup>117</sup> Two years after *Buckley*, in *First National Bank of Boston v. Bellotti*,<sup>118</sup> the Court held that corporations may spend unlimited funds on issues and initiative campaigns so that the public may hear the corporate perspective.<sup>119</sup>

In 1990, *Austin v. Michigan Chamber of Commerce*<sup>120</sup> stated that a prohibition on a corporation’s use of treasury funds for direct independent campaign expenditures amounted to suppression of political speech.<sup>121</sup> Yet the Court upheld a

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sufficient to justify the limited effect upon First Amendment freedoms”). The Court stated that restrictions on contributions are the “the Act’s primary weapons against the reality or appearance of improper influence stemming from the dependence of candidates on large campaign contributions.” *Id.* at 58.

115. *See id.* at 25 (“The expenditure limitations contained in the [Federal Election Campaign Act of 1971] represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech.”).

116. *Id.* at 47–48.

117. *See Citizens United v. FEC*, 130 S. Ct. 876, 917 (2010) (striking down the ban on corporate independent expenditures).

118. *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765 (1978). In *Bellotti*, the Court held that a Massachusetts statute prohibiting certain corporate political expenditures violates the First Amendment. *Id.* at 776.

119. *See id.* at 784 (“[I]t amounts to an impermissible legislative prohibition of speech based on the identity of the interests that spokesmen may represent in public debate over controversial issues and a requirement that the speaker have a sufficiently great interest in the subject to justify communication.”); *see also* Nathaniel Persily, *Contested Concepts in Campaign Finance*, 6 U. PA. J. CONST. L. 118, 121 (2003) (discussing *Bellotti*’s holding).

120. *See Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 654–55 (1990) (holding that a statute prohibiting corporations from using corporate treasury funds for independent expenditures was constitutional because the provision was narrowly tailored to a compelling governmental purpose). In *Austin*, the Court found that preventing corruption (or the appearance of corruption) in the political arena to be a compelling governmental interest because mass corporate treasuries could unfairly influence election outcomes. *See id.* at 660 (“Corporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures . . .”).

121. *See id.* at 657 (stating that requiring corporations to make political contributions only through PACs “burdens corporate freedom of expression”

restriction on corporate expenditures because it found a compelling governmental interest in preventing the “distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form.”<sup>122</sup> The Bipartisan Campaign Reform Act of 2002 (McCain–Feingold Act or BCRA)<sup>123</sup> and *McConnell v. FEC*<sup>124</sup> reemphasized that PACs provide a sufficient outlet for corporate speech and asserted the constitutionality of prohibiting corporate independent expenditures not from these designated funds.<sup>125</sup> Specifically, BCRA amended 2 U.S.C. § 441b to prohibit corporations from using general treasury funds to expressly advocate the election or defeat of a political

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(citing *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 252 (1986)). The *Citizens United* Court deemed *Austin* a shift in corporate campaign contribution jurisprudence. See *Citizens United*, 130 S. Ct. at 903 (“The Court is thus confronted with conflicting lines of precedent: a pre-*Austin* line that forbids restrictions on political speech based on the speaker’s corporate identity and a post-*Austin* line that permits them.”). But see Case Comment, *Citizens United v. FEC: Corporate Political Speech*, 124 HARV. L. REV. 75, 75 (2010) (listing the history from the Tillman Act of 1907 through *Austin* as consistently upholding restrictions on corporate campaign spending).

122. *Austin*, 494 U.S. at 660.

123. See Bipartisan Campaign Reform (McCain–Feingold) Act of 2002, Pub. L. No. 107-155, § 203, 116 Stat. 81, 91–92 (codified at 2 U.S.C. § 441b(b)(2) (2006)) (prohibiting corporations and unions from using funds to make independent expenditures for electioneering communications or for speech expressly targeting a political candidate).

124. See *McConnell v. FEC*, 540 U.S. 93, 204 (2003) (concluding that § 441b does not impermissibly ban speech “[b]ecause corporations can still fund electioneering communications with PAC money”); see also Richard L. Hasen, *Citizens United and the Orphaned Antidistortion Rationale*, 27 GA. ST. U. L. REV. 989, 992 (2011) (discussing *McConnell*); Ciara Torres-Spelliscy, *Has the Tide Turned in Favor of Disclosure? Revealing Money in Politics After Citizens United and Doe v. Reed*, 27 GA. ST. U. L. REV. 1057, 1063 (2011) (deferring to Congress’s bright-line test for defining what constitutes an electioneering communication).

125. See *McConnell*, 540 U.S. at 104–05 (“Because those entities may still organize and administer segregated funds, or PACs, for such communications, the provision is a regulation of, not a ban on, expression.”); see also Case Comment, *supra* note 121, at 76 n.11 (pointing out that the four Justices concurred with the portion of the opinion regarding corporate expenditures).

candidate.<sup>126</sup> In 2010, the U.S. Supreme Court considered the constitutionality of this provision in *Citizens United*.<sup>127</sup>

### B. The Opinion

*Citizens United*, a nonprofit corporation with funds primarily donated by individuals, wanted to air a film that clearly advocated the defeat of Senator Hillary Clinton in the Democratic Party's 2008 Presidential primary elections.<sup>128</sup> This violated the terms of the § 441b prohibition on corporate independent expenditures.<sup>129</sup>

Justice Kennedy, writing for the five-Justice majority, placed the weight of the decision on whether corporations have the same rights as individuals with respect to political speech.<sup>130</sup> Two predecessor cases, taken together, suggested they do: *Bellotti* upheld First Amendment protection of corporate speech rights<sup>131</sup> and *Buckley* maintained that contribution limits curb political speech.<sup>132</sup> Members of the public have sometimes generalized this as: corporations are people, and money is speech, so corporate expenditures cannot be restricted.<sup>133</sup>

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126. See Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 203, 116 Stat. 81, 91–92 (codified at 2 U.S.C. § 441b (2006)) (prohibiting corporate electioneering independent expenditures).

127. See *Citizens United v. FEC*, 130 S. Ct. 876, 886 (2010) (explaining the relevant statute and precedent).

128. See *id.* at 887 (stating the facts).

129. *Id.*

130. See *id.* at 903 (“The Court is thus confronted with conflicting lines of precedent: a pre-*Austin* line that forbids restrictions on political speech based on the speaker’s corporate identity and a post-*Austin* line that permits them.”).

131. See *id.* at 902 (applying *Bellotti*); *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 784–85 (1978) (stating that corporations are entitled to protected speech).

132. See *Citizens United*, 130 S. Ct. at 898 (applying *Buckley*); *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (stating that expenditure limits substantially restrain political speech).

133. See, e.g., David Kairys, *Money Isn’t Speech and Corporations Aren’t People*, SLATE (Jan. 22, 2010, 9:03 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2010/01/money\\_isnt\\_speech\\_and\\_corporations\\_arent\\_people.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2010/01/money_isnt_speech_and_corporations_arent_people.html) (last visited Feb. 18, 2012) (arguing against *Citizens United*) (on file with the Washington and Lee Law Review).



Justice Kennedy overruled *Austin* as inconsistent with “the principle established in *Buckley* and *Bellotti* that the Government may not suppress political speech on the basis of the speaker’s corporate identity.”<sup>134</sup> To protect this speech, the Court applied the most protective standard: “Laws that burden political speech are subject to strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.”<sup>135</sup>

A statute restricting political speech based on the antidistortion rationale in *Austin* fails to meet this standard because the government has no interest “in equalizing the relative ability of individuals and groups to influence the outcome of elections.”<sup>136</sup> Rejecting the antidistortion rationale in *Austin*, the Court stated that “[n]o sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.”<sup>137</sup> By finding the conflicting precedent in *Austin* to be a speech restriction based on the speaker’s corporate identity, contrary to the First Amendment, Justice Kennedy overruled the case as poorly reasoned. The Court also overruled *McConnell* to the extent that it upheld the statute restricting corporate independent expenditures, finding the antidistortion interest “unconvincing and insufficient.”<sup>138</sup>

After dismissing the antidistortion rationale as being inconsistent with precedent and with the Constitution,<sup>139</sup> the Court rejected the Government’s other main justifications for the § 441b restrictions, that limits are necessary to prevent corruption of political officials and that shareholders would be compelled to fund corporate speech.<sup>140</sup> The Court followed *Buckley*,<sup>141</sup> concluding that “[t]he anticorruption interest is not

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134. *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010).

135. *Id.* at 898 (citing *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007)) (internal quotation marks omitted).

136. *Id.* at 904 (quoting *Buckley*, 424 U.S. at 48) (citation omitted).

137. *Id.* at 913.

138. *Id.*

139. *See id.* at 904–08 (providing reasoning to overrule *Austin*).

140. *See id.* at 908–11 (rendering the anticorruption and shareholder-interest rationales invalid).

141. *See id.* at 908 (stating that “the governmental interest in preventing corruption and the appearance of corruption [is] inadequate to justify [the ban]

sufficient to displace the speech here in question” and that “independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.”<sup>142</sup> The shareholder-interest rationale, the Court stated, “would allow the Government to ban the political speech even of media corporations” when the abuse could instead be “corrected by shareholders ‘through the procedures of corporate democracy.’”<sup>143</sup>

In terms of novelty, therefore, *Citizens United*'s real contribution was its rejection of the government's policy rationales for permitting a ban on corporate political speech, rather than the already-established proposition that corporate speech is protected to the same extent as individual speech.<sup>144</sup> Regardless of the legal reality, however, the media and the public have sometimes interpreted the case differently.

### C. Public Impact

*Citizens United* has prompted a wide range of discussion among the general public, primarily criticism.<sup>145</sup> But the fear that large public corporations would use amassed funds to make sweeping expenditures has greatly subsided as the public has realized how relatively little corporations have spent on campaigns.<sup>146</sup> Corporations' hesitancy is most likely because

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on independent expenditures” (quoting *Buckley v. Valeo*, 424 U.S. 1, 45 (1976)).

142. *Id.* at 908–09.

143. *Id.* at 911 (quoting *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 794 (1978)).

144. See Allison R. Hayward, *Citizens United: Correct, Modest, and Overdue*, 2 AKRON J. CONST. L. & POL'Y 1, 2–3 (2010) (discussing that *Citizens United* does not overturn long-standing precedent).

145. See, e.g., Avi-Yonah, *supra* note 8, at 2 & n.3 (listing responses); Robert L. Kerr, *Naturalizing the Artificial Citizen: Repeating Lochner's Error in Citizens United v. Federal Election Commission*, 15 COMM. L. & POL'Y 311, 311–12 (2010) (listing a range of reactions to the case).

146. See Matt Bai, *How Much Has Citizens United Changed the Political Game?*, N.Y. TIMES, July 17, 2012, <http://www.nytimes.com/2012/07/22/magazine/how-much-has-citizens-united-changed-the-political-game.html?pagewanted=all> (last visited Aug. 23, 2012) (“[W]hile it is true that corporations can now give money for specific purposes that were prohibited before, it seems they aren't . . .”) (on file with the Washington and Lee Law Review).

publicly traded companies have to answer to shareholders and customers about any questionable use of funds.<sup>147</sup> The election statistics from the first presidential general election since *Citizens United* support this result. For example, companies “contributed roughly \$75 million to super PACs in the 2012 election cycle,”<sup>148</sup> compared with the approximately \$661 million super PACs raised overall in that cycle.<sup>149</sup>

Some fears about the influence of super PACs and *Citizens United*, however, have materialized. For example, although super PACs may only advocate for—not directly contribute to—political candidates, those supporting presidential candidates in the 2012 general election collected and spent more funds than the candidates themselves.<sup>150</sup> Priorities USA Action spent \$67.5 million supporting President Barack Obama and liberal agendas,

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147. See *id.* (“[Public companies] know those contributions might become public at some point, and no company that sells a product wants to risk [a substantial negative consumer reaction].”); Ctr. for Responsive Politics, *Mystery Firm is Election’s Top Corporate Donor at \$5.3 Million*, OPENSECRETS.ORG (Nov. 5, 2012), <http://www.opensecrets.org/news/2012/11/mystery-firm-is-elections-top-corporo.html> (last visited Nov. 7, 2012) (“‘Fortune 500 companies are the least likely to be the ones who will be out in front giving publicly,’ said Rick Hasen, a law professor at the University of California-Irvine. ‘They want to have influence over elections and elected officials, but they don’t want to alienate customers.’”) (on file with the Washington and Lee Law Review).

148. Ctr. for Responsive Politics, *Mystery Firm is Election’s Top Corporate Donor at \$5.3 Million*, OPENSECRETS.ORG (Nov. 5, 2012), <http://www.opensecrets.org/news/2012/11/mystery-firm-is-elections-top-corporo.html> (last visited Nov. 7, 2012) (providing super PAC independent expenditure data) (on file with the Washington and Lee Law Review).

149. Ctr. for Responsive Politics, *2012 Outside Spending, by Super PACs*, OPENSECRETS.ORG, <http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&chrt=V&type=S> (last visited Nov. 7, 2012) (on file with the Washington and Lee Law Review).

150. See Peter Overby, *As ‘Citizens United’ Turns 2, SuperPACs Draw Protests*, NAT’L PUB. RADIO (Jan. 20, 2012), <http://www.npr.org/2012/01/20/145500168/superpacs-celebrate-anniversary-of-citizens-united-case> (last visited Nov. 7, 2012) (quoting lawyer Ken Gross as stating that super PACs “are metastasizing” and are “almost bigger than the party committees”) (on file with the Washington and Lee Law Review); Alan Greenblatt, *Big Money: Stuffing the Ballot Box?*, NAT’L PUB. RADIO (June 4, 2012), <http://www.npr.org/2012/05/29/153914560/big-money-and-the-ballot-box> (last visited Nov. 7, 2012) (quoting Republican consultant Ed Goetas as stating, “Money is now at the end that’s furthest away from the candidates and furthest away from the parties. . . . The money is with these other groups that are having more impact on the campaign than the campaign itself.”) (on file with the Washington and Lee Law Review).

and Restore Our Future spent \$142.7 million supporting Republican nominee Mitt Romney and conservative agendas.<sup>151</sup> Possibly even more influential are the 501(c)(4) organizations, such as Crossroads GPS, co-founded by Karl Rove,<sup>152</sup> and Americans for Prosperity, affiliated with the Koch brothers; these organizations can fund advertisements without disclosing how much they have spent until after the election and without ever disclosing their donors.<sup>153</sup>

Although the laws regulating these groups' expenditures and disclosures are not the direct result of *Citizens United*,<sup>154</sup> some people view the case as converting the political race to a money standoff and "unleash[ing] a torrent of poorly disclosed, if disclosed at all, spending by the superwealthy"<sup>155</sup> and "of money from businesses and the multimillionaires who run them, and as a result we are now seeing the corporate takeover of American politics"<sup>156</sup>—however inaccurate that perspective may be.<sup>157</sup> Still,

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151. See Ctr. for Responsive Politics, *2012 Outside Spending, by Super PACs*, OPENSECRETS.ORG, <http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&chrt=V&type=S> (last visited Nov. 7, 2012) (providing super PAC independent expenditure data) (on file with the Washington and Lee Law Review).

152. Crossroads GPS also owns a super PAC, American Crossroads, which spent \$104.7 million for conservative agendas during the 2012 election cycle. *Id.*

153. See S.V. Date, *Hate the Latest Political Ads? Don't Blame 'Citizens United'*, NAT'L PUB. RADIO (June 13, 2012), <http://www.npr.org/blogs/itsallpolitics/2012/06/13/154943400/hate-the-latest-political-ads-dont-blame-citizens-united> (last visited Aug. 23, 2012) (describing the impact of "social welfare organizations") (on file with the Washington and Lee Law Review).

154. *Id.* (stating that "[social welfare groups] secret spending . . . is not due to the 2010 *Citizens United* decision").

155. Frank James, *Watchdogs Seek to Shed More Light on 'Dark Money; It's Not Easy*, NAT'L PUB. RADIO (Aug. 2, 2012), <http://www.npr.org/blogs/itsallpolitics/2012/08/02/157789593/watchdogs-seek-to-shed-more-light-on-dark-money-its-not-easy> (last visited Aug. 23, 2012) (on file with the Washington and Lee Law Review).

156. Bai, *supra* note 146.

157. A critic might argue the significance of the fact that President Obama won the reelection with 30% of his contributions coming from "amounts less than \$200 per person" and despite a huge Republican super PAC influence. Ctr. for Responsive Politics, *2012 Election Spending Will Reach \$6 Billion, Center for Responsive Politics Predicts*, OPENSECRETS.ORG (Oct. 31, 2012), <http://www.opensecrets.org/news/2012/10/2012-election-spending-will-reach-6.html> (last visited Nov. 7, 2012) (on file with the Washington and Lee Law Review).

the 2012 election cycle saw more outside<sup>158</sup> spending than every other election cycle since 1990—combined;<sup>159</sup> the \$1,032,901,165-total is almost 3.5 times the 2008 election cycle's spending.<sup>160</sup> When adding in official spending, the people of the United States spent a total of approximately \$6 billion on federal election campaigns for 2012.<sup>161</sup>

Regardless of the actual factors driving the substantial increase in expenditures for this presidential election, many Americans are legitimately concerned that *Citizens United* overturned precedent that restricted corporate political speech rights, stating that such corporate speech is protected by the U.S. Constitution.<sup>162</sup> One extreme generalization takes the form: “the Supreme Court held that corporations are ‘people,’” but they do not deserve the same rights as human people.<sup>163</sup> This argument indicates a belief that the Court based its decision on an entity theory.<sup>164</sup> Some commentators, and perhaps even Justice Stevens,<sup>165</sup> might agree that the Court assumes corporations are

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158. This statistic considers independent expenditures, electioneering communications, and communication costs, and it excludes party committees. Ctr. for Responsive Politics, *Total Outside Spending by Election Cycle, Excluding Party Committees*, OPENSECRETS.ORG, [http://www.opensecrets.org/outsidespending/cycle\\_tots.php](http://www.opensecrets.org/outsidespending/cycle_tots.php) (last visited Nov. 7, 2012) (on file with the Washington and Lee Law Review).

159. *Id.*

160. *Id.*

161. See Ctr. for Responsive Politics, *2012 Election Spending Will Reach \$6 Billion, Center for Responsive Politics Predicts*, OPENSECRETS.ORG (Oct. 31, 2012), <http://www.opensecrets.org/news/2012/10/2012-election-spending-will-reach-6.html> (last visited Nov. 7, 2012) (stating, one week before the election, that spending already reached \$5.8 billion) (on file with the Washington and Lee Law Review).

162. *Citizens United v. FEC*, 130 S. Ct. 876, 912–13 (2010) (overruling *Austin* because it “abandoned First Amendment principles” by restricting corporate political speech).

163. See, e.g., Mario, *Tomorrow: Occupy Wall Street West*, MITCHELL KAPOR FOUND. (Jan. 19, 2012), <http://blog.mkf.org/2012/01/19/tomorrow-occupy-wall-street-west/> (last visited Feb. 29, 2012) (posting a flyer amounting *Citizens United* to this claim) (on file with the Washington and Lee Law Review).

164. See *supra* Part II.A (discussing entity theories).

165. See *Citizens United*, 130 S. Ct. at 972 (Stevens, J., dissenting) (“[Corporations] ‘personhood’ often serves as a useful legal fiction. But they are not themselves members of ‘We the People’ by whom and for whom our Constitution was established.”).

entities—either real or artificial.<sup>166</sup> In general, those viewing the Court as adopting an entity theory are suspicious of this theory (as they see the Court taking it);<sup>167</sup> the critics see the Court's conclusion in *Citizens United* as having adopted an entity theory without any reason for doing so.<sup>168</sup> Some theorists have argued that the opinion supports either an entity or an aggregate theory, and they criticize the normative conclusions that they draw from the theory's application in *Citizens United*.<sup>169</sup> Professor David Millon, however, recognized the social cost of this seemingly endless<sup>170</sup> debate:

[E]fforts to derive 'ought' from 'is' have not succeeded. Indeed, such intellectual exercises may have stood in the way of careful examination of the truly urgent questions raised by corporate activity. Analysis of difficult questions of social policy have probably been hindered by assumptions about the distinctiveness of activity in the corporate form, whether the corporation is thought to be an entity or instead is an aggregation of people distinct from the rest of society.<sup>171</sup>

*Citizens United* supports Professor Millon's point because of the significant (and negative) public reaction.<sup>172</sup> Perhaps the policy questions should be at the forefront of individuals' minds because those are the real terms that affect corporate rights; even if the

166. See, e.g., Avi-Yonah, *supra* note 8, at 41 (“The entire *Citizens United* opinion, both the majority and the dissent, are thus reflective of the real entity view. Corporations stand on their own, independent of both the state that created them and the shareholders that own them.”).

167. Editorial, *The Court and Citizens United II*, N.Y. TIMES, Feb. 21, 2012, at A22, available at <http://www.nytimes.com/2012/02/22/opinion/the-supreme-court-and-citizens-united-take-2.html?scp=1&sq=citizens%20united&st=cse> (“It's hard to see how the court's conservative majority could contend that these expenditures pose no threat to American democracy.”).

168. See *id.* (arguing that the Court had no reason to rule broadly, had mistaken assumptions, and wrongly dismissed the likelihood of corruption).

169. See, e.g., Avi-Yonah, *supra* note 8, at 41 (arguing that the Court used a real-entity theory); Padfield, *supra* note 8, at 225 (arguing that the Court used an aggregate theory); Kerr, *supra* note 145, at 314 n.28 (asserting the artificial-entity theory in a *Citizens United* analysis).

170. See Avi-Yonah, *supra* note 8, at 3 (“[T]hroughout all of [the changes in the legal conception of the corporation], spanning two millennia, the same three theories of the corporation can be discerned.”).

171. David Millon, *The Ambiguous Significance of Corporate Personhood*, 2 STANFORD AGORA 39, 58 (2001).

172. See *supra* Part III.C (discussing *Citizens United's* public impact).

Supreme Court adopted an entity theory, no one ought to care about the metaphor when policy implications are in dispute.<sup>173</sup> In fact, *Citizens United* may implicate some new policy considerations, particularly in the campaign finance context.<sup>174</sup>

#### D. Legal Impact

*Citizens United* might constrain courts or affect the public in unanticipated ways, which could bear on corporate rights. First, the Court upheld constitutional protection of corporate speech to the same extent that individual speech is protected under the First Amendment.<sup>175</sup> By proclaiming this right to be facially constitutional instead of addressing the issue as-applied,<sup>176</sup> the Court has limited its discretion. For example, corporations currently cannot contribute directly to candidates,<sup>177</sup> but individuals may currently contribute up to \$2,500 per federal candidate, per election cycle.<sup>178</sup> Based on the reasoning in

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173. See *infra* Part IV.C (discussing the difference between making metaphysical versus function claims).

174. See *infra* Part V (discussing policy arguments).

175. See *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010) (upholding constitutional protection for corporate speech). The speech right first attached to corporations in a previous case. See *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 784–85 (1978) (stating that corporations are entitled to protected speech).

176. See *id.* at 894 (“[I]t is necessary . . . to consider the [statute’s] facial validity.”).

177. See Tillman Act of 1907, Pub. L. No. 59-36, 34 Stat. 864 (codified as amended at 2 U.S.C. § 441b(a) (2006)) (prohibiting corporate monetary contributions to political campaigns); see also *Buckley v. Valeo*, 424 U.S. 1, 58 (1976) (stating that individual contribution limits are constitutional because they “serve the basic governmental interest in safeguarding the integrity of the electoral process without directly impinging upon the rights of individual citizens and candidates to engage in political debate and discussion”).

178. Compare 2 U.S.C. § 441a(a)(1)(A) (2006) (limiting individual contributions), with 11 C.F.R. § 110.1(b) (2012) (increasing by price index), and Price Index Adjustments for Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 77 Fed. Reg. 9925-01 (Feb. 21, 2012) (setting the 2012-election individual contribution limit at \$2,500). To clarify the distinction between corporate funds and PAC funds, a corporation’s PAC may contribute to each candidate up to \$5,000 of the funds that corporate members designate for that PAC, see 2 U.S.C. § 441a(a)(2)(A) (limiting PAC contributions to federal candidates and their committees); corporations, however, cannot contribute corporate general treasury money, see Tillman Act of 1907, Pub. L. No. 59-36, 34 Stat. 864 (codified as amended at 2 U.S.C. § 441b(a) (2006)) (prohibiting

*Citizens United* that monetary restrictions burdening political speech are subject to strict scrutiny,<sup>179</sup> and based on the Court's rejection of the antidistortion rationale,<sup>180</sup> the U.S. Supreme Court might strike down the ban on corporations contributing directly to candidates as impermissibly restricting political speech.<sup>181</sup> Though a decision extending the protection to corporate contributions might affect legal discourse about public policy, this seems to be the extent of such a ruling's collateral impact on corporate theory because further protecting the corporate right to speech through political contributions would most likely rely on the same reasoning as the Court used to permit corporate independent expenditures. Thus, a possible future decision to permit corporate contributions might necessarily follow from *Citizens United*.<sup>182</sup>

Second, although the media has sometimes exaggerated or misinterpreted *Citizens United*,<sup>183</sup> some legal implications of the

corporate monetary contributions to political campaigns).

179. See *Citizens United*, 130 S. Ct. at 898 (applying strict scrutiny to laws burdening political speech).

180. See *id.* at 913 (finding the antidistortion interest "unconvincing and insufficient").

181. Interview with Jason Torchinsky, Partner, HoltzmanVogelJosefiak PLLC, in Lexington, Va. (Feb. 29, 2012).

182. *Id.* But see, e.g., *United States v. Danielczyk*, 683 F.3d 611, 616 (4th Cir. 2012) (reversing a federal district court decision that applied *Citizens United* to ban corporate contributions); *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 880 (8th Cir. 2012) (affirming a federal district court decision upholding a state's ban on direct corporate contributions to candidates); Eugene Volokh, *Constitutional to Ban Corporate Contributions to Candidates (as Opposed to Independent Expenditures)*, THE VOLOKH CONSPIRACY (May 16, 2011, 12:20 PM), <http://volokh.com/2011/05/16/constitutional-to-ban-corporate-contributions-to-candidates-as-opposed-to-independent-expenditures/> (last visited Nov. 7, 2012) (arguing it is constitutional to ban corporate contributions to candidates) (on file with the Washington and Lee Law Review).

183. See, e.g., *Supreme Court OKs Corporate Campaign Contributions*, PBS (Jan. 21, 2010), [http://www.pbs.org/newshour/bb/law/jan-june10/supreme\\_court\\_01-21.html](http://www.pbs.org/newshour/bb/law/jan-june10/supreme_court_01-21.html) (last visited Nov. 7, 2012) [hereinafter PBS.ORG] (headlining, erroneously, that corporate contributions are constitutional, as opposed to independent expenditures) (on file with the Washington and Lee Law Review); Stephen Colbert SuperPAC & Frank Lutz, *Corporations Are People*, COLBERT NATION (Oct. 24, 2011), <http://www.colbertnation.com/the-colbert-report-videos/400559/october-24-2011/colbert-super-pac-corporations-are-people-frank-lutz> (last visited Nov. 7, 2012) (attempting to make the idea that corporations are people appealing to the public) (on file with the Washington and Lee Law Review).



opinion might indeed have far-reaching effects on the public and on campaign finance reform. Groups forming under § 527 of the Internal Revenue Code, including PACs,<sup>184</sup> may gather uncapped corporate and individual donations and use the funds for independent campaign expenditures.<sup>185</sup> Since *Citizens United*, courts have had no discretion to limit these groups.<sup>186</sup> *Citizens United* also laid the groundwork<sup>187</sup> for a federal circuit court decision two months later, *SpeechNow.org v. FEC*,<sup>188</sup> which led to the clear ability for individuals to form “super PACs” to make only independent expenditures.<sup>189</sup> Super PACs have proliferated as a means to “raise unlimited sums of money from corporations, unions, associations and individuals, then spend unlimited sums to overtly advocate for or against political candidates.”<sup>190</sup> Rather than focusing on the potential for public corporations’ overwhelming influence in the political sphere, perhaps the public ought to be more concerned with individual associations, unions, closely held companies, and other coordinating campaign spenders that can raise and spend unlimited funds.<sup>191</sup>

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184. Bill de Blasio, *Citizens United and the 2010 Midterm Elections*, THE PUB. ADVOCATE FOR THE CITY OF N.Y. 8 (Dec. 2010), <http://advocate.nyc.gov/files/12-06-10CitizensUnitedReport.pdf> (last visited Feb. 24, 2012) (explaining 527 groups after *Citizens United*) (on file with the Washington and Lee Law Review).

185. *Id.* at 3–5 (discussing the effect of *Citizens United*).

186. *See id.* at 4 (stating that the Court enables 527 organizations to solicit unlimited donations).

187. *See SpeechNow.org v. FEC*, 599 F.3d 686, 693 (D.C. Cir. 2010) (“The independence of independent expenditures was a central consideration in [*Citizens United*]. By definition, independent expenditures are not made in concert or cooperation with or at the request or suggestion of such candidate [or his committees or agents].” (internal quotation marks omitted)).

188. *See id.* at 698 (concluding that contribution limits cannot constitutionally be applied to individuals pooling money only to make unlimited independent expenditures).

189. *See* Ctr. for Responsive Politics, *Super PACs*, OPENSECRETS.ORG (Sept. 13, 2012), <http://www.opensecrets.org/pacs/superpacs.php?cycle=2012> (last visited Feb. 29, 2012) (explaining super PACs) (on file with the Washington and Lee Law Review).

190. *Id.*

191. *See* Interview with Jason Torchinsky, Partner, HoltzmanVogelJosefiak PLLC, in Lexington, Va. (Feb. 29, 2012) (suggesting that publicly held corporations are not the primary concern after *Citizens United* and *SpeechNow.org*). These groups “cannot coordinate with campaigns” and must disclose all expenditures frequently, allowing competing groups to track their

Third, *Citizens United* may have committed courts and legislatures to a broader conception of constitutionally protected speech than anticipated. For example, although the decision upheld disclosure requirements on independent expenditures,<sup>192</sup> social welfare organizations formed under § 501(c)(4) of the Internal Revenue Code can still accept unlimited anonymous donations and use the funds for electioneering expenditures,<sup>193</sup> and since 2010, corporations have been able to donate their funds to those organizations.<sup>194</sup> By allowing unlimited independent expenditures and not protecting against loopholes such as the use of 501(c)(4) organizations, *Citizens United* opened the door for unlimited undisclosed corporate expenditures,<sup>195</sup> and the courts will have no discretion within the Constitution to ban these expenditures if they become substantial.<sup>196</sup> In addition, *Citizens United* seems to have little or no effect on restrictions on charity lobbying efforts.<sup>197</sup>

*Citizens United's* legal impact is thus significant in the context of electioneering, and the developments in this area of

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spending. *Id.*

192. See *Citizens United v. FEC*, 130 S. Ct. 876, 916 (2010) (finding disclosure requirements constitutional).

193. 501(c)(4)s may remain tax-exempt if the communications are "issue-based," but advertisements can still reflect particular candidates in a bad light. See Peter Overby, *A Fine Line: Distinguishing Issue Ads From Advocacy*, NAT'L PUB. RADIO (June 19, 2012), <http://www.npr.org/2012/06/19/155325685/a-fine-line-distinguishing-issue-ads-from-advocacy> (last visited Aug. 23, 2012) (showing how an issue advertisement can walk the line of advocating the defeat of a candidate) (on file with the Washington and Lee Law Review).

194. See Blasio, *supra* note 184, at 4 (explaining 501(c)(4)s after *Citizens United*).

195. See *id.* at 3 ("While the Court acknowledged the permissibility of disclosure requirements for political spending, the decision enabled many corporations to spend money on independent political broadcasts without disclosing the donors that fund their activities.").

196. See *Citizens United*, 130 S. Ct. at 892 ("[T]he Court cannot resolve this case on a narrower ground without chilling political speech, speech that is central to the meaning and purpose of the First Amendment.").

197. See Lloyd Hitoshi Mayer, *Charities and Lobbying: Institutional Rights in the Wake of Citizens United*, 10 ELECTION L.J. 407, 426 (2011) (concluding that "*Citizens United* strongly suggests that the existing limits on lobbying by charities continue to be valid").

law are deeply interrelated with the policy arguments regarding corporate rights.<sup>198</sup>

#### IV. Corporate Theory After Citizens United

As some legal scholars were ready to move on from the question of corporate personhood,<sup>199</sup> the question became vastly more interesting to the public.<sup>200</sup> Commentators have interpreted *Citizens United* as adopting the aggregate theory, the real-entity theory, the artificial-entity theory, or no theory of corporate rights.<sup>201</sup> Courts do not consistently adopt one of these views over the others.<sup>202</sup> Even various U.S. Supreme Court Justices have adopted, explicitly or implicitly, each of these three theories at some point—and in some cases, more than one theory in the same opinion.<sup>203</sup> Given the inconsistent and seemingly incompatible application of theories propounded by legal scholars and courts alike, the public's misunderstanding of *Citizens*

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198. See *infra* Part IV.D (concluding that the real source of the corporate right in *Citizens United* is policy).

199. See, e.g., Millon, *supra* note 171, at 58 (arguing that we may be better off with a more appropriately focused debate). *But see, e.g.,* Padfield, *supra* note 8, at 223 & n.74 (noting Millon's and Dewey's respective arguments against the corporate theory debate and concluding that the debate is relevant to the question of the corporate role in society).

200. See, e.g., Dan Eggen, *Corporate Sponsorship Is Campaign Issue on Which Both Parties Can Agree*, WASH. POST, Feb. 18, 2010, at A15 (providing poll results and statements of political figures who oppose unlimited corporate campaign expenditure).

201. See, e.g., Avi-Yonah, *supra* note 8, at 41 (arguing that the Court used a real-entity theory); Kerr, *supra* note 145, at 314 n.28 (asserting the artificial-entity theory in a *Citizens United* analysis); Millon, *supra* note 171, at 56–57 (discussing the modern relevance of entity or aggregate theories of corporate personhood); Padfield, *supra* note 8, at 225 (arguing that the Court used an aggregate theory). This Note does not discuss the many other theories that answer questions other than those concerning the nature or existence of the corporate form. See, e.g., Padfield, *supra* note 8, at 215 (discussing other prominent corporate theories).

202. See *supra* Part II.C (discussing the various positions courts have taken on the corporate form and corporate personhood).

203. See Krannich, *supra* note 36, at 62 (observing that the Court has frequently used the entity or aggregate theories as metaphors to interpret the Constitution in the corporate context, but that the use has been ad hoc and without regard to any simultaneous mutual exclusiveness among the theories).

*United* is not surprising. Moreover, the public is misguided about the source of the corporate speech right because the public relies on the media's rendition of an already inadequate opinion.<sup>204</sup>

### A. *The Public's Misuse of "Person"*

Public attention to corporate rights, after *Citizens United* in particular, amplifies a main problem with theories of corporate personhood: the fallacy that metaphysical discussions about corporations can imply functional, legal conclusions.<sup>205</sup>

The use of the phrase "corporations are people" to deduce personal corporate rights is a misclassification.<sup>206</sup> Consider dividing descriptive language about corporations, taken in context, into three distinct sets: (1) metaphysical language, such as "corporations are entities" or "corporations have rights derived from their constituents," which describes an ontological conception of what a corporation is;<sup>207</sup> (2) functional language, such as "corporations provide limited shareholder liability" or "corporations are established by charter," which describes what corporations are in real, legal, or practical terms;<sup>208</sup> and (3) language that is neither metaphysical nor functional, such as normative or qualitative language. Focusing on the first two of these three sets, the phrase "corporate person" can have two different meanings. Metaphysically, it refers to a corporate ontology in the same way that corporate-essence theories attempt to represent corporations by using one of two metaphors—either as entities separate from their shareholders or as an aggregate of

204. See, e.g., PBS, *supra* note 183 (headlining an error that corporate contributions are constitutional, as opposed to independent expenditures—to which the anchors correctly refer).

205. See *supra* Part II.B (discussing the circularity problem with presuming an inherent truth about some corporate essence and then defining the essence by deriving traits from that essence).

206. See John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 660 (1926) (distinguishing the metaphysical from the pragmatic use of "person").

207. See *id.* (providing "two radically different types of definitions," one being "a definite metaphysical conception regarding the nature of things").

208. See *id.* at 660–61 (providing a second type of definition "which proceeds in terms of consequences, . . . stated in terms of specific effects *extrinsically* wrought in other things").

participants. Importantly, this language does not ascribe real traits to corporations, but rather allows us to speak about what a corporation should be, based on its ontology or essence. Functionally, “corporate person” defines a set of human rights that corporations are permitted to adopt if the issue arises, as if a court were saying, “Treat the corporation like a human in this context.”<sup>209</sup> This language is used to establish that corporations actually have explicit, real rights when legislatures, courts, or charters assign such rights.

Sometimes people confuse these two types of language in order to answer questions about what a corporation or corporate person is. For example, consider the two main branches of the corporate-rights dichotomy: artificial and natural. Both attempt to define what rights a corporation has to function within the law. But when the law does not state whether a corporation has a particular right, it may be tempting to ask the question, “What sort of thing is a corporation—one that ought to have this right, or one that ought not?” This crosses over into the metaphysical category because we are speaking about the essence of a corporation as a metaphor for something we can otherwise only explain to the extent the law provides details.

Using language from one category in an attempt to draw conclusions in another would be a “category error,” as Gilbert Ryle defined the term in his philosophy of the human mind.<sup>210</sup> In Ryle’s classic example of a category error, a foreigner visits a university, tours all the buildings and fields, sees the students and faculty, and then asks: “But where is the University?”<sup>211</sup> Ryle explains that the foreigner asking the question commits a category error by inferring that the university exists as another “member of the class of which [the colleges, libraries, playing fields, etc.] are members.”<sup>212</sup> Classifying the language in Ryle’s example into the three categories listed above makes the precise flaw obvious. The term “where” indicates that the speaker wishes to know a physical (functional) location. If he instead asked the

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209. See *id.* at 661–62 (stating that calling corporations “persons” is a verbal matter and does not impute new behaviors).

210. See GILBERT RYLE, *THE CONCEPT OF MIND* 16 (1949) (explaining his term “category-mistake”).

211. *Id.*

212. *Id.*

implicit question (“What is a university?”), the expected response would remain in the metaphysical category and commit no error.<sup>213</sup>

Before applying the category-error notion to the corporate-theory context, it might help to illustrate why committing a category error is problematic. Consider a mythical figure such as the stork that delivers babies. People construct this idea for when children ask the inevitable conception question and for the purpose of answering without being accountable for the implications of the true answer, as a child would perceive it. Parents can ascribe fictional traits to the stork: it can fly; it carries the baby in swaddling clothes to the proper doorstep; maybe even, it likes pickles. The stork continues to serve its real purpose, and parents are satisfied.

But the stork is a fabrication by humans for a purpose. Realities persist: just as limited shareholder liability does not mean nobody pays a loss, babies are actually being conceived regardless of children’s naivety. Talking about the stork in the same construct as real beings or objects produces inconsistencies. A husband who tells his wife, “Honey, ask the stork if he wants more pickles,” will leave the wife bewildered; it puts the stork in the “existing” category when it should be in the “non-existing” category. Likewise, discourse about corporations on a metaphysical level using functional language (where the legal world seems to operate) commits a category error.<sup>214</sup> The only way we can consistently speak about what corporations ought to be is on the metaphysical level, but we can speak about what corporations can actually, legally do on the functional level.<sup>215</sup>

Once one spouse commits the error by talking about the stork in functional and metaphysical terms simultaneously, the other spouse rightly questions whether the stork is overstepping its purpose; no partner wants to be replaced by a mythical stork. Returning to the logical flaw in reasoning, the phrase “ask the stork if he wants more pickles” presumes there exists a truth-

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213. See *id.* (dissecting the university example).

214. See *id.* at 16 (explaining category mistakes).

215. See Dewey, *supra* note 206, at 660 (describing two different types of definitions: metaphysical regarding the nature of things and pragmatic regarding consequences).

value about whether he does.<sup>216</sup> But the answer to the question is derived from the parents, not the stork; there is no answer until the parents make it up. Likewise, after *Citizens United*, the public's fear that corporations are people in the metaphysical sense, deriving rights from the person mold it attempts to fill, illuminates the real problem at issue: the corporate right to free speech via independent expenditures does not derive from corporate personhood.<sup>217</sup>

When criticizing *Citizens United*, the public interprets the Court as speaking about the essence of a corporation, which belongs in the metaphysical category.<sup>218</sup> In fact, Justice Kennedy uses terms that describe corporate constituents or qualities in themselves, which belong in the functional category.<sup>219</sup> For a simple example, "*Citizens United wanted to make [the film] available . . . . It feared, however, that both the film and the ads would be [banned].*"<sup>220</sup> Most people would recognize that these personal verbs are only being used in the functional sense; it is hard to imagine this language as an indication that corporations literally and naturally are capable of having desires or fears.

The problem with using theories to derive corporate traits arises with the idea that corporations have an essence from which we can deduce corporate rights.<sup>221</sup> In 1926, John Dewey distinguished the corporate body as a mere right-and-duty-bearing unit from the corporate body as having a nature such that rights can be ascribed to it.<sup>222</sup> He rejects the notion that even

216. See *supra* Part II.B (discussing the circularity of deducing characteristics that only exist if fabricated).

217. See *supra* Part II.B (concluding that deducing rights from corporate personhood begs the question).

218. See, e.g., David Kairys, *Money Isn't Speech and Corporations Aren't People*, SLATE (Jan. 22, 2010, 9:03 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2010/01/money\\_isnt\\_speech\\_and\\_corporations\\_arent\\_people.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2010/01/money_isnt_speech_and_corporations_arent_people.html) (last visited Feb. 18, 2012) (arguing against *Citizens United*) (on file with the Washington and Lee Law Review).

219. See, e.g., *Citizens United v. FEC*, 130 S. Ct. 876, 888 (2010) (using personal language).

220. *Id.* (emphasis added).

221. See Dewey, *supra* note 206, at 660 (arguing that ordinary connotations of "person" do not apply in the sense of the corporate person as a unit bearing rights and duties).

222. See *id.* at 658–59 (2010) (discussing whether we assume corporations have a nature).

“right-and-duty-bearing unit[s] should have a character of [their] own”<sup>223</sup> by asserting that implicit theories in the minds of jurists, such as the aggregate and entity theories, do not vest in jurisprudence without “confusion, conflict and uncertainty.”<sup>224</sup> Dewey exposes the error of packing the term “person” with extraneous uses of the word, such as psychological or philosophical uses; “person” is meant for the limited use with which courts or legislators explicitly dictate.<sup>225</sup>

Although the public might misunderstand *Citizens United*'s use of *person*, the opinion's use is precisely to give constitutional protection to corporations to the same extent as it applies to individuals.<sup>226</sup> Indeed, if the courts and legislatures could physically list every manifestation of personal speech rights and then map that list onto corporations, the debate would not concern corporate personhood but rather purely normative claims about whether policy supports a corporation's having those rights. “Person” is a mere convenience to answer questions about corporate rights and duties, and deducing corporate rights from some corporate essence is a semantic error—a category error from conflating the metaphysical with the functional.<sup>227</sup>

## B. Looking for Theoretical Language in *Citizens United*

### 1. Justice Kennedy's Majority Opinion

In *Citizens United*, Justice Kennedy, writing for the majority, avoids committing a category error because he does not deduce the corporate right from the essence of a corporate person. Instead, he begins with general language about a speaker's rights without establishing first whether a corporation qualifies as a speaker: “the Court cannot resolve this case on a narrower

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223. *Id.* at 660.

224. *Id.*

225. *See id.* at 655–56 (arguing that the term “person” in the legal sense is affected by extraneous influences, such as what “person” signifies in popular speech, psychology, philosophy, or morals).

226. *See Citizens United v. FEC*, 130 S. Ct. 876, 899 (2010) (“First Amendment protection extends to corporations.”).

227. *See HART*, *supra* note 60, at 42–43 (explaining the circularity in deducing corporate characteristics from a corporate form).



ground without chilling political speech, speech that is central to the meaning and purpose of the First Amendment.”<sup>228</sup> Further, “[t]he right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.”<sup>229</sup> Next, Justice Kennedy finds corporations’ right of free speech: “The Court has recognized that First Amendment protection extends to corporations.”<sup>230</sup> He cites this sentence to twenty-one cases that support similar claims based on a chain of precedent tracing back to the single 1886 case, which declares the corporate right without justification.<sup>231</sup> Justice Kennedy follows suit by providing only this one sentence to explain the extension of that right to corporations.<sup>232</sup> From that right, Justice Kennedy immediately extends the protection to political speech, and then to the primary issue of independent expenditures, never returning to the application of personal rights to corporations.<sup>233</sup>

In the following sections of the opinion, Justice Kennedy addresses and rejects the arguments that the government has sufficient interest in preventing corruption (or its appearance),<sup>234</sup> in preventing a distortion based on the speaker’s wealth,<sup>235</sup> and in protecting shareholders from being compelled to fund corporate speech, concluding that none of those arguments adequately protect a valid constitutional right of speech.<sup>236</sup> He specifically applies each of these conclusions to corporations, stating that *Buckley* and *Bellotti* “could not have been clearer” that “the Government cannot restrict political speech based on the speaker’s corporate identity”<sup>237</sup> and rejecting the “post-*Austin* line

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228. *Citizens United*, 130 S. Ct. at 892.

229. *Id.* at 898.

230. *Id.* at 899.

231. See HORWITZ, *supra* note 33, at 66–67 (discussing how *Santa Clara* was the first U.S. Supreme Court assertion that “a corporation was a person under the Fourteenth Amendment” and how the Court failed to elaborate or provide a rationale).

232. *Citizens United v. FEC*, 130 S. Ct. 876, 899–90 (2010).

233. *Id.* at 900–01.

234. *Id.* at 908.

235. *Id.* at 904.

236. *Id.* at 911.

237. *Id.* at 902.

[of cases] that permits [corporate-based restrictions].”<sup>238</sup> Indeed, in *Bellotti*, the U.S. Supreme Court recognized the need to stick to constitutional interpretation, as opposed to corporate theory: “The proper question therefore is not whether corporations ‘have’ First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the statute] abridges expression that the First Amendment was meant to protect.”<sup>239</sup>

Justice Kennedy could only be construed to make statements about the corporate essence or corporate rights in two places: First, he states that “[c]orporations, like individuals, do not have monolithic views. On certain topics corporations may possess valuable expertise . . . .”<sup>240</sup> This commits no category error; while the former sentence seems to be metaphysical, it does not infer any legal conclusions based on that claim. The latter sentence does not definitively assert any right or trait. Second, Justice Kennedy states: “[W]ealthy individuals and unincorporated associations can spend unlimited amounts on independent expenditures. Yet certain disfavored associations of citizens—those that have taken on the corporate form—are penalized for engaging in the same political speech.”<sup>241</sup> In context, Justice Kennedy is making the point that wealthy individuals are sometimes as influential as corporations and that corporations should be treated as other associations of citizens. This too seems purely functional because Justice Kennedy already asserted that corporations are treated as persons for speech rights, so this only asserts rights already derived from legal precedent—it does not imagine new rights that ought to attach to the corporate citizen due to its form or essence. Therefore, Justice Kennedy’s language appears clear of subscription to any theory for purposes of improperly deriving corporate rights.

Some commentators, however, interpret Justice Kennedy’s language as suggesting the aggregate theory, referring to the majority’s statements about banning “the political speech of

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238. *Id.* at 903.

239. *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776 (1978).

240. *Citizens United v. FEC*, 130 S. Ct. 876, 912 (2010).

241. *Id.* at 908 (citation omitted).

millions of associations of citizens”<sup>242</sup> and penalizing “certain disfavored associations of citizens—those that have taken on the corporate form.”<sup>243</sup> One scholar asserts, “[t]he majority viewed the corporation as fundamentally little more than an association of citizens.”<sup>244</sup> Some of the Court’s claims, however, are trivially true by virtue of the corporate function in society, such as saying a corporation is an association of individuals.<sup>245</sup> This does not reflect any metaphysical claim about the essence of a corporation from which we can deduce rights.<sup>246</sup> To read the opinion as asserting that the corporation is an aggregate retaining the rights of its constituents is problematic: on one hand, if it inherits all of its constituents’ rights, contradictions will arise for those rights a corporation has been said not to possess, such as the right to swear an oath; on the other hand, if the aggregate only gleans some of the personhood rights, the court will still have to determine which rights it retains, which begs the question—it retains precisely those rights that the Court stipulates.<sup>247</sup> The only sense in which the opinion could properly be advocating the aggregate theory, then, is in the metaphorical sense, merely to discuss the corporation, not to deduce functional rights.

Professor Avi-Yonah argues that the majority’s language can only indicate a real-entity view.<sup>248</sup> He arrives at this conclusion by process of elimination among the aggregate and entity theories, and he uses Justice Kennedy’s statement that “the ban on corporate speech was not alleviated by the fact that a PAC organized and controlled by the same corporation could speak freely because [a] PAC is a separate association from the

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242. Padfield, *supra* note 8, at 224 n.82 (quoting *Citizens United*, 130 S. Ct. at 906–07).

243. *Id.* (quoting *Citizens United*, 130 S. Ct. at 908).

244. *Id.* at 224.

245. For example, if several individuals incorporate their business and hang a sign, it would seem to be speech of a corporation—an association of individuals—under any theory.

246. See HART, *supra* note 60, at 42–43 (“Under what conditions do we refer to numbers and sequences of men as aggregates of individuals and under what conditions do we adopt instead unifying phrases extended by analogy from individuals?” (internal quotation marks omitted)).

247. See *id.* (explaining the circularity in deducing corporate characteristics from a corporate form).

248. Avi-Yonah, *supra* note 8, at 39.

corporation.”<sup>249</sup> First, Professor Avi-Yonah asserts that Justice Kennedy does not advocate the aggregate theory because “under the aggregate view both the corporation and the PAC are owned by the same ultimate shareholders,” so they could not both be equivalent with their parts if they are “separate association[s].”<sup>250</sup> Second, Professor Avi-Yonah tackles the artificial–real entity distinction (the corporate-rights dichotomy) to narrow down his interpretation that Justice Kennedy takes an entity position.<sup>251</sup> He rejects that Justice Kennedy assumes an artificial-entity view, which posits that the corporation is an entity with rights to the extent the state grants them.<sup>252</sup> This theory, Professor Avi-Yonah claims, is inconsistent with Justice Kennedy’s statement about a PAC being separate from the corporation because “both the PAC and the corporation are created by the same state” and controlled by the same corporation, so would presumably be the same association of people.<sup>253</sup>

Professor Avi-Yonah presumes he is left with only the real-entity theory, which states that corporations are entities consisting of shareholders with separate management and corporate rights beyond what the legislature prescribes.<sup>254</sup> He mentions John Dewey’s argument that the aggregate and entity theories are circular and “could be deployed to suit any purpose.” Professor Avi-Yonah then briefly considers how Dewey’s argument “dismisses as irrelevant the debate among the aggregate, artificial entity, and real entity views of the corporation.”<sup>255</sup> He acknowledges the credibility of this view but then promptly moves on, stating that, “As a practical matter, . . . the real entity view predominated for

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249. *Id.* (alteration in original) (quoting *Citizens United v. FEC*, 130 S. Ct. 876, 897 (2010)).

250. *Id.* (quoting *Citizens United*, 130 S. Ct. at 897).

251. *See id.* at 33 (defining the real- and artificial-entity theories and the aggregate theory).

252. *Id.* (stating that the artificial entity theory “views the corporation as a creature of the State”)

253. *See id.* at 39 (discussing how the majority adopts the real entity view because it implicitly rejects the aggregate view and “does not even mention the artificial entity view”).

254. *See id.* at 33 (defining the real- and artificial-entity theories and the aggregate theory).

255. *Id.* at 23 (citing Dewey, *supra* note 206, at 673).

large, publicly traded corporations.”<sup>256</sup> Rather than rejecting Dewey’s view, therefore, he merely observes that its popularity faded.<sup>257</sup> In sum, Professor Avi-Yonah rejects that Justice Kennedy aligns with the aggregate or artificial-entity theories but provides no direct language in support of his claim that Justice Kennedy espouses a real-entity theory.<sup>258</sup> This lack of affirmative foundation for the real-entity theory in *Citizens United* does not pair well with Professor Avi-Yonah’s willingness to overlook Dewey’s argument that none of the three theories are on point. To agree with Professor Avi-Yonah, either we are left to our own devices to reject Dewey’s argument or we must defer to general legal scholars’ silence in reaction to Dewey’s theory, which seems to have left them scratching their heads until enough time passed to sweep his point under the rug as too devastating to centuries of corporate-law theories.<sup>259</sup>

In fact, Dewey’s point is not so devastating. Professor Avi-Yonah seems to recognize that his argument may have contributed to a more practical (functional) use of the theories, rather than theoretical (metaphorical).<sup>260</sup> Still, as long as scholars attempt to use metaphor-based theories (such as the corporate-essence theories) to answer questions about corporations’ functional, real rights, Dewey’s point remains cogent: “person’ signifies what law makes it signify.”<sup>261</sup> A court stating that “corporations are people” under one law only means to qualify *people* to include *corporations*—it does not add a trait to the corporate form labeling it as a person.

In other cases, the Court has not been so careful,<sup>262</sup> and the members of the public frequently commit this error.<sup>263</sup> Justice

256. *Id.*

257. *See id.* (“Dewey was influential in that the theoretical debate on corporate personality largely disappeared until the 1970s.”).

258. *See id.* at 39–43 (applying *Citizens United* language to align the justices with corporate-rights theories).

259. *See id.* at 23 (glossing over the failure of Dewey’s theory to catch on).

260. *See id.* (“Dewey was influential in that the theoretical debate on corporate personality largely disappeared until the 1970s. As a practical matter, however, the real entity view predominated for large, publicly traded corporations.”).

261. Dewey, *supra* note 206, at 655.

262. *See, e.g.,* *Hale v. Henkel*, 201 U.S. 43, 76 (1906) (“A corporation is, after all, but an association of individuals under an assumed name and with a

Kennedy, it seems, either has inadvertently avoided a category error by limiting his justification of the corporate person to essentially one sentence (“The Court has recognized that First Amendment protection extends to corporations.”)<sup>264</sup> or, more likely, has properly stayed within the narrow lines of federal jurisdiction by carefully choosing his language to avoid expanding the corporate essence based on a mere image of what a corporation ought to be.<sup>265</sup> Despite his tiptoeing around corporate law, however, he is not off the hook for the confusion surrounding *Citizens United*.<sup>266</sup>

## 2. Justice Scalia’s Concurring Opinion

Justice Scalia offers more debatable language in his concurring opinion. He finds the majority opinion consistent with the Framers’ intent to constitutionalize free speech for individual Americans:

All the provisions of the Bill of Rights set forth the rights of individual men and women—not, for example, of trees or polar bears. But the individual person’s right to speak includes the right to speak *in association with other individual persons* . . . . It is the speech of many individual Americans, who have associated in a common cause, giving the leadership of the [group] the right to speak on their behalf . . . . [A corporation] cannot be denied the right to speak on the simplistic ground that it is not “an individual American.”<sup>267</sup>

To some this may seem like language characteristic of the aggregate view,<sup>268</sup> but Professor Avi-Yonah correctly presumes

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distinct legal entity.”).

263. *See supra* Part II.B (discussing the circularity problem with presuming an inherent truth about some corporate essence and then defining the essence by deriving traits from that essence).

264. *Citizens United v. FEC*, 130 S. Ct. 876, 899 (2010).

265. *See id.* at 886–917 (defending the decision on grounds of constitutional analysis, *stare decisis*, and policy).

266. *See infra* Part V.A (criticizing the opinion for its lack of a clear rationale).

267. *Citizens United*, 130 S. Ct. at 928 (Scalia, J., concurring).

268. *See supra* text accompanying notes 43–44 (describing the aggregate theory as viewing the corporate essence based on an aggregation of its shareholders and other participants).

that Justice Scalia means “corporate management working together as an association of persons” for a common cause.<sup>269</sup> In fact, Justice Scalia’s language, such as referring to the corporation as a “legal entity,”<sup>270</sup> is consistent with Professor Avi-Yonah’s interpretation that Justice Scalia might adopt a real-entity theory,<sup>271</sup> which would be proper so long as Justice Scalia does not transgress into metaphysical notions about corporate nature.

Most telling, however, of Justice Scalia’s use of the entity conception of a corporation is his apparent assumption that the First Amendment applies to corporations insofar as it does not exclude them outright.<sup>272</sup> Because Justice Scalia essentially presumes corporations have the same First Amendment speech rights that people have, he provides no justification for this premise and we are left to wonder if he grounded it in a right derived from the corporate essence or in actual law. If the right comes from his notion of the corporate entity, this is an impermissible category error: obviously an association of people cannot have all of the same rights as the individuals that make it up, such as the right to vote in an election, but the question “Which rights does it derive from its individuals?” cannot be answered with “The same rights that its individuals are entitled to.” Conversely, if Justice Scalia implicitly justified the right using law, he would have had to rely on precedent that interprets the First Amendment to apply to corporations. This presents its own problems, as Part II.C explains: all of the precedent supporting corporate personal constitutional rights traces back to

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269. See, e.g., Avi-Yonah, *supra* note 8, at 40 (arguing that Scalia might appear to adopt the aggregate view, but “what Scalia meant was presumably corporate management working together as an association of persons”).

270. Justice Scalia actually uses the term “artificial legal entity,” but his use of the adjective *artificial* must not be confused with the term used in this Note, which refers to the corporation as a mere creature of the law, whose only rights are those conferred by the state. See *supra* note 38 and accompanying text (defining the artificial-entity theory). Justice Scalia seems to use *artificial* to mean that the legal entity is not a tangible, visible thing but merely one constructed for thinking about the concept of a corporation.

271. See Avi-Yonah, *supra* note 8, at 39–40 (arguing that Justice Scalia adopts the real-entity view).

272. See, e.g., *Citizens United v. FEC*, 130 S. Ct. 876, 926 (2010) (Scalia, J., concurring) (finding no support for “the proposition that the First Amendment excludes conduct of artificial legal entities from the scope of its protection”).

one sentence in one 1886 case, which simply declares the right without any discussion.<sup>273</sup>

### 3. Justice Stevens's Dissenting Opinion

Justice Stevens provides ample language analyzing corporate nature. For example, he argues that “speech can be regulated differentially on account of the speaker’s identity”<sup>274</sup> and that this applies especially to corporations because they raise special concerns, such as the potential for corruptive influence.<sup>275</sup> By concluding this criticism with a list of other avenues for expressing corporate speech, Justice Stevens seems to adopt an entity viewpoint and assume rights based on that notion.<sup>276</sup> He presumes that the corporations are just a “different class[] of speakers,”<sup>277</sup> who are “not natural persons, much less members of our political community.”<sup>278</sup> Justice Stevens also asserts that the Framers “held very different views about the nature of the First Amendment right and the role of corporations in society”<sup>279</sup>—that “it was the free speech of individual Americans that they had in mind”<sup>280</sup> and that “[a] corporation [was thought of as] an artificial being, invisible, intangible, and existing only in contemplation of the law[,] . . . possess[ing] only those properties which the charter of its creation confers upon it.”<sup>281</sup> In particular, he asserts that:

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273. See *supra* notes 89–93 and accompanying text (tracing the precedent back to an unsubstantiated opinion declaring that corporations are people within the meaning of the Fourteenth Amendment).

274. *Citizens United*, 130 S. Ct. at 945 (Stevens, J., dissenting).

275. See *id.* at 947 (“[L]egislatures are entitled to decide that the special characteristics of the corporate structure require particularly careful regulation in an electoral context.” (internal quotation marks omitted)).

276. See *id.* at 943 (“The laws upheld in *Austin* and *McConnell* leave open many additional avenues for corporations’ political speech.”).

277. *Id.* at 946.

278. *Id.* at 947.

279. *Id.* at 949.

280. *Id.* at 950.

281. *Id.* (quoting *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (1 Wheat.) 518, 636 (1819)) (providing, within a citation, language of an 1819 case to represent views of the Framers).



[W]hereas we have no evidence to support the notion that the Framers would have wanted corporations to have the same rights as natural persons in the electoral context, we have ample evidence to suggest that they would have been appalled by the evidence of corruption that Congress unearthed in developing BCRA and that the Court today discounts to irrelevance.<sup>282</sup>

Justice Stevens explains that “corporations are different from human beings” for many reasons, including their properties of limited liability for owners and management, perpetual life, separation of ownership and control, potential for foreign control, an available treasury that reflects economically motivated decisions of investors and customers, and a lack of beliefs, feelings, thoughts, and desires.<sup>283</sup> “[T]heir ‘personhood’ often serves as a useful legal fiction. But they are not themselves members of ‘We the People’ by whom and for whom our Constitution was established.”<sup>284</sup> He continues to evaluate “‘who’ is even speaking when a business corporation places an advertisement,”—not the customers, employees, or shareholders, leaving possibly a few managers who must sometimes overlook even their own personal convictions regarding the message.<sup>285</sup> When a four-Justice dissent continuously criticizes “[t]he majority’s unwillingness to distinguish between corporations and humans,”<sup>286</sup> the public seems more justified in believing that *Citizens United* stands for the claim that corporations are people.

In addition to explicit language, Justice Stevens introduces arguments that rely on an understanding of the majority as adopting an entity viewpoint. For example, he criticizes that the majority considers the statute a categorical ban on speech, when actually “every shareholder of every corporation remains entirely free . . . to do however much electioneering she pleases outside of the corporate form.”<sup>287</sup> This criticism indicates that Justice Stevens views the majority opinion as adopting an entity theory and discerning rights from that notion, but he stops short of

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282. *Id.* at 963.

283. *Id.* at 971.

284. *Id.* at 972.

285. *Id.*

286. *Id.* at 975.

287. *Id.* at 943.

identifying the problem with deducing rights from this metaphorical corporate entity. Justice Stevens argues that the majority “beg[s] the question what types of corporate spending are constitutionally protected and to what extent.”<sup>288</sup> Although Justice Stevens criticizes this as circular,<sup>289</sup> the inference (and thus the circularity) cuts the other way: the Court is charged with saying what types of corporate spending are constitutional when a statute poses the question.<sup>290</sup>

In sum, no *Citizens United* Justices attempt to deny that corporations have some personal constitutional rights under the First Amendment. Justices Kennedy (for the majority), Scalia (concurring), and Stevens (for the dissent) each provide justification for the corporate right to political speech in one of two ways: they either improperly derive the right from a mirage of what they believe a corporation is or ought to be, or else they base the right on unexplained precedent. Which of the two justifications each Justice chooses is unclear.

### C. What *Citizens United* Makes Clear

The U.S. Supreme Court has not been careful to provide the public with a consistent image of the corporate form.<sup>291</sup> In fact, the Court’s previous manifestations of the error, sometimes deriving functional rights from metaphysical notions about inherent corporate form, have tainted the public’s impression of the source of corporate rights.<sup>292</sup> Therefore, the reaction to *Citizens United* makes clear that, due to the Court’s cursory

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288. *Id.* at 934.

289. *Id.* at 930 (“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.”).

290. See Bruner, *supra* note 7, at 1388 (explaining, under Hart’s position, that “we make the rules, and it is only by reference to those rules that the corporation can be said to ‘be’ anything at all” (citations omitted)).

291. See Krannich, *supra* note 36, at 62 (observing that the Court has frequently used the entity or aggregate theories as metaphors to interpret the Constitution in the corporate context, but that the use has been ad hoc and without regard to any simultaneous mutual exclusiveness among the theories).

292. See, e.g., *Hale v. Henkel*, 201 U.S. 43, 76 (1906) (using the aggregate view to justify personal due process protection).

analysis, the public has a misguided notion of the source of the political speech right.

The inference the public often draws has two interrelated flaws, the first logical and the second semantic. First, the reasoning is backwards: the public interprets *Citizens United* as using the premise “corporations are people” to deduce traits, but that should be the conclusion—and only in the particular instances when the law treats corporations as persons. Hart identified this error in his claim that defining a corporation by inherent rights is circular.<sup>293</sup> The corporation only has characteristics to the extent that courts and legislatures stipulate them.<sup>294</sup> The public would be marginally better off by saying, “Corporations have the same speech rights as people, so corporations are people,” but the overly broad conclusion does not follow.<sup>295</sup> In a constitutional analysis of personal rights, then, the only proper way to claim that “corporations are people” is in response to the question “What is the extent of corporate rights pursuant to this particular constitutional provision?” Saying “corporations are people” merely means corporations have the same set of rights as people under the law in question; it is a language tool to understand what law applies. Theorists and even courts join the general public in often overlooking Hart’s point when speaking about corporate personhood,<sup>296</sup> but his point follows clearly from the fact that corporations exist by virtue of statutory law, judicial interpretation, and human participation. The *Citizens United* Justices fail to eradicate this misconception, and they possibly even commit the mistake themselves by assuming what they seek to prove: that corporations are entitled to First Amendment protection to the same extent as individuals.<sup>297</sup>

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293. See HART, *supra* note 60, at 42–43 (explaining the circularity in deducing corporate characteristics from a corporate form).

294. See *id.* (explaining that corporations only have traits explicitly granted by law).

295. Similarly, Hart uses the example of a trick in a card game to show how attempting to define it in one context leads to inconsistencies when that definition is “substituted for [the word trick] whenever it is used.” *Id.* at 33. (internal quotation marks omitted).

296. See *supra* Part II.B (discussing the circularity of using theories to deduce functional rights).

297. See *supra* Part IV.B (providing theoretical hints from each Justice’s

Second, the inference commits a category error by using functional language about a particular corporate right to infer a metaphysical claim about the essence of corporations.<sup>298</sup> John Dewey explained that *person* is merely a term used for convenience to say that, with respect to this particular issue, all the rights of a person apply.<sup>299</sup> Dewey would argue that *person* is merely meant for the functional sense, and using it in the metaphysical sense would be improper and would pack it full of the real implications that come along with the word.<sup>300</sup> The particular category error evident in the public's response to *Citizens United* makes the same move by using functional language to draw a metaphysical conclusion about corporations. Again, the *Citizens United* Justices—more likely in the concurring and dissenting opinions—possibly commit this error themselves by failing to justify the corporate right to speech in functional terms and, instead, deducing certain rights from a vague conception of corporations.<sup>301</sup>

Each flaw—the logical and the semantic—produces the same consequence: corporate personhood cannot be the source of corporate rights and duties.

#### *D. The Real Source of the Corporate Right in Citizens United*

Part of the reason the public misunderstands *Citizens United* as deriving the corporate speech right from corporate personhood is that the opinion itself does not adequately explain how corporations are endowed with the right. Whereas the public itself typically has brought about many corporate rights by virtue of its influence in legislatures, the Supreme Court confuses the public by establishing a corporate right without explaining the source. Further, the public needs to know the source in order to scrutinize the Court; after all, *Citizens United* overturned a

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language).

298. See RYLE, *supra* note 210, at 16 (explaining category mistakes).

299. See Dewey, *supra* note 206, at 655 (arguing that “person” signifies only what the law makes it signify).

300. See *id.* at 660 (differentiating the two uses).

301. See *supra* Part IV.B (providing theoretical hints from each Justice's language).

statute on constitutional grounds, rendering the decision largely immune from future legislative, and thus public, interference. If the corporate personal speech right did not arise from the corporate essence, what is the source?

Obvious sources include statutes or public policy.<sup>302</sup> Or perhaps courts in the past have merely fabricated the right and now courts blindly perpetuate it.<sup>303</sup> The question is, at the moment a right attaches, what is its justification? This question avoids a category error because it is functional, not metaphysical: the justification (if one exists) must be specific and with a legal or social purpose—not abstract or with merely a theoretical purpose. Recall the example of the stork:<sup>304</sup> The stork is just a metaphor to ease discussion; it cannot actually fly because it does not exist. The parents can argue about whether the stork should theoretically be able to fly, but they know it is their discretion—they do not begrudgingly accept some truth that all imaginary storks must fly. In contrast, the reality is that babies are conceived and born; the physical world restricts what they can do, and parents try to keep them in line.

Hiding behind a metaphor allows us to imagine that corporations are exactly what we want them to be in any given circumstance, regardless of contradictions this might pose in reality. We created corporations to be just like people in some ways, but not like people in other ways—often aiming to obtain the best of both worlds, but we forget the inconsistencies a piecemeal nature inevitably brings.<sup>305</sup> When it comes to addressing these inconsistencies or questions about corporate rights, only two boundaries apply: corporations' physical potential to do certain humanlike activities and the rules that we set.

At issue in *Citizens United* is whether corporations should be permitted to speak, in the form of political independent

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302. See, e.g., *FCC v. AT&T, Inc.*, 131 S. Ct. 1177, 1182 (2011) (refusing to find a corporate right of personal privacy when the statute says “person” instead of “personal”).

303. See *Cnty. of Santa Clara v. S. Pac. R.R. Co.*, 18 F. 385, 402–03 (C.C.D. Cal. 1883) (stating, without support, that a corporate personal right exists).

304. See *supra* Part IV.A (discussing the “stork” example).

305. For example, with limited liability, we stand to earn huge rewards if the business prevails, but the potential for devastating loss is limited to our investment; if that is exhausted, other members of society foot the bill.

expenditures, to the extent that persons are permitted to do so. While the public sees this decision as the Court bestowing a major liberty on corporations, they do not see why or how; the Court is virtually silent. The Court's task is to justify the decision and explain—even to the public—why it opines as it does.<sup>306</sup> This is the most important sense in which the Court errs in *Citizens United*—not by its improperly deducing the right from a metaphysical corporate essence but in failing to explain the actual source of the right. The public is left to analyze the decision.

Looking at the moment the Court attaches the personal right of speech to corporations, what must the source be? First, the Court infers the corporate speech right by stating that “First Amendment protection extends to corporations” and citing plenty of cases.<sup>307</sup> Next the Court considers public policy arguments, such as whether the corporate influence in the political sphere might corrupt officials or distort the picture of public opinion.<sup>308</sup> Looking to its predecessor cases, too, indicates public policy justifications.<sup>309</sup> As it appears from the decision, which lacks any explanation for why this personal right extends to corporations, *Citizens United* seems to ground the right in public policy. This presents an irony: the public frames its dissatisfaction around the corporate-rights debate, but as Professor Millon warned, the unnecessary discourse of the corporate-rights debate pushes important policy considerations aside.<sup>310</sup> What makes *Citizens United* important is that the source of the right actually is the party who is most confused about the source of the right—the public. Because the public's traditional avenue to implement preferred policy into law (through the legislatures) has been removed by this Constitution-based decision, criticizing the Court

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306. See Frederick Schauer, *Opinions As Rules*, 62 U. CHI. L. REV. 1455, 1463 (1995) (discussing the idea that the Supreme Court ought to explain its conclusions to the public).

307. *Citizens United v. FEC*, 130 S. Ct. 876, 899–900 (2010).

308. See, e.g., *id.* at 904–05 (considering the antidistortion rationale).

309. See Avi-Yonah, *supra* note 8, at 33–41 (looking at cases preceding *Citizens United*).

310. See Millon, *supra* note 171, at 58 (stating that theoretical discussions may detract from the focus on important policy considerations).

for finding a corporate personal right is not the most useful discourse.

### V. Proper Grounds for Criticizing Citizens United

Per the foregoing discussion, one could criticize the opinion by saying that the U.S. Supreme Court Justices rely on metaphysical language to make a functional claim.<sup>311</sup> The majority opinion in *Citizens United*, however, seems to cleanly remain in the functional category, and even the concurring opinions make no substantial logical or semantic errors.<sup>312</sup> If the public views the opinion as not deducing rights from a corporate essence, as this Note suggests it should, our society might still benefit from a critical look at the opinion.

#### A. Attacking the Court's View of Policy

One proper form of criticism would be that the Court inadequately defended the policy rationale. The public's negative reaction to the opinion indicates that the Court, in relying on public policy as the source of the corporate right, might have ruled improperly by finding no sufficient government interest in policy concerns.<sup>313</sup> Apparently from the language of the majority and concurring opinions and from the public's reaction, the only policy issues with any steam are the antidistortion rationale and the anticorruption rationale.<sup>314</sup>

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311. See, e.g., *Citizens United v. FEC*, 130 S. Ct. 876, 930 (2010) (Stevens, J., dissenting) (arguing that the majority uses a theory as a basis for the right, and that the theory is improper).

312. See *supra* Part IV.A (looking at the Justices' language).

313. See, e.g., Adam Liptak, *Justices, 5-4, Reject Corporate Spending Limit*, N.Y. TIMES, Jan. 21, 2010, <http://www.nytimes.com/2010/01/22/us/politics/22scotus.html?pagewanted=all> (last visited Feb. 29, 2012) (quoting President Obama as denoting *Citizens United* "a major victory for big oil, Wall Street banks, health insurance companies and the other powerful interests that marshal their power every day in Washington to drown out the voices of everyday Americans") (on file with the Washington and Lee Law Review).

314. See *Citizens United*, 130 S. Ct. at 911 (dismissing the shareholder interest and foreign national arguments with little discussion and on several grounds).

With respect to the antidistortion rationale, the decision did not turn on whether there was a real risk of “an unfair advantage in the political marketplace by using resources amassed in the economic marketplace,”<sup>315</sup> but rather on whether the government had a compelling interest in this protection.<sup>316</sup> The grounds for reviving this issue would be the Court’s lack of due consideration for the effect of distortion. The Court relies only on *Buckley* to support a rigid claim that the government never has an interest in this regard.<sup>317</sup> But if corporate law has its basis in utilitarian concerns,<sup>318</sup> the public’s overwhelming dissatisfaction might be a sign that the government does have an interest in permitting checks on corporate power,<sup>319</sup> even if it means overturning precedent or allowing restrictions on political speech.<sup>320</sup>

In considering the anticorruption rationale, the Court has rejected that corporate independent expenditures give rise to corruption or the appearance of corruption.<sup>321</sup> In early 2012, the U.S. Supreme Court, in a one-paragraph per curiam decision,<sup>322</sup> reversed a Montana Supreme Court ruling that upheld a statute restricting corporate political expenditures despite *Citizens United* and despite the fact that it restricted corporate speech.<sup>323</sup>

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315. *Id.* at 904 (citation omitted).

316. *See id.* (“*Buckley* rejected the premise that the Government has an interest in equalizing the relative ability of individuals and groups to influence the outcome of elections.” (citation and internal quotation marks omitted)).

317. *Id.* at 904–05 (stating that the government does not have an interest in equalizing abilities to influence elections and that wealth is not sufficient to limit political speech).

318. *See* Bruner, *supra* note 7, at 1387 (stating that utilitarianism is “corporate law’s implicit moral theory”).

319. *See generally* Hasen, *supra* note 124 (discussing how the antidistortion rationale was improperly orphaned).

320. *See, e.g.*, Editorial, *Montana Takes on Citizens United*, N.Y. TIMES, Jan. 23, 2012, [http://www.nytimes.com/2012/01/24/opinion/montanas-challenge-to-citizens-united.html?\\_r=1](http://www.nytimes.com/2012/01/24/opinion/montanas-challenge-to-citizens-united.html?_r=1) (last visited Nov. 7, 2012) (discussing the aims of a case that petitioned the U.S. Supreme Court to revisit *Citizens United*) (on file with the Washington and Lee Law Review).

321. *See* *Citizens United v. FEC*, 130 S. Ct. 876, 909 (2010) (finding the anticorruption interest insufficient to merit the restrictions on speech).

322. *Am. Tradition P’ship, Inc. v. Bullock*, 132 S. Ct. 2490, 2491 (2012) (stating that the “holding of *Citizens United* applies to the Montana state law”).

323. *See id.* (reversing the judgment that upheld a law contrary to the *Citizens United* holding).



The Montana court found a compelling state interest in “preserving the integrity of its electoral process.”<sup>324</sup> The U.S. Supreme Court initially stayed the decision pending a timely filing and disposition of a petition for a writ of certiorari.<sup>325</sup> In an order written February 17, 2012, Justice Ginsburg stated:

Montana’s experience, and experience elsewhere since this Court’s decision in *Citizens United v. Federal Election Comm’n*, make it exceedingly difficult to maintain that independent expenditures by corporations “do not give rise to corruption or the appearance of corruption.” A petition for certiorari will give the Court an opportunity to consider whether, in light of the huge sums currently deployed to buy candidates’ allegiance, *Citizens United* should continue to hold sway. Because lower courts are bound to follow this Court’s decisions until they are withdrawn or modified, however, I vote to grant the stay.<sup>326</sup>

An anticorruption argument would need to refute the *Citizens United* finding that “independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.”<sup>327</sup> Then, the government would have to prove its interest in preventing quid pro quo corruption or the appearance of it, but this may be a slighter burden than for the antidistortion rationale.<sup>328</sup> Indeed, the Court draws the measure of interest from *Buckley*, which upheld limits on direct contributions on anticorruption grounds.<sup>329</sup>

The Montana Supreme Court proceeded on other grounds, holding that a statute regulating independent corporate expenditures did not violate the corporation’s speech rights and,

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324. *W. Tradition P’ship, Inc. v. Attorney Gen.*, 2011 MT 328, ¶ 38, 363 Mont. 220, 236, 271 P.3d 1, 11 (2011).

325. See *Supreme Court of the United States*, SUPREMECOURT.GOV, <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/11a762.htm> (last visited Nov. 7, 2012) (providing the U.S. Supreme Court docket) (on file with the Washington and Lee Law Review).

326. See *Supreme Court of the United States*, SUPREMECOURT.GOV, <http://www.supremecourt.gov/orders/courtorders/021712zr1.pdf> (providing the U.S. Supreme Court order pending the case (citations omitted)).

327. *Citizens United v. FEC*, 130 S. Ct. 876, 909 (2010).

328. See *id.* at 908 (explaining the government’s interest in preventing quid pro quo corruption).

329. *Buckley v. Valeo*, 424 U.S. 1, 63 (1976) (upholding contribution limits).

even if it did, satisfied a compelling state interest in preserving the integrity of the electoral process.<sup>330</sup> Regardless of its reversal before the U.S. Supreme Court, *Western Tradition* and other cases<sup>331</sup> blatantly refuting *Citizens United* might indicate a need to limit corporate speech via independent expenditures on public policy grounds. From here, perhaps a future Court of a different composition or a constitutional amendment, however unlikely, would serve to protect the public's concerns.

### B. Attacking the Court's Application of Precedent

Another proper form of criticism would be that the Court departed from, or misinterpreted, precedent.<sup>332</sup> It seems virtually impossible for the Court to properly interpret precedent when the Court has never consistently subscribed to one corporate-rights theory.<sup>333</sup> One can criticize the court's application of different metaphors in various corporate-rights cases.<sup>334</sup> With respect to *Citizens United*, one can use this inconsistency to show that the Court has not properly applied precedent because the precedent itself lacked steady footing.<sup>335</sup> Alternatively, one can attack the precedent underlying the decision for its use of metaphysical language. This analysis would likely involve a review of the

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330. *W. Tradition P'ship, Inc. v. Attorney Gen.*, 2011 MT 328, ¶ 48, 363 Mont. 220, 240, 271 P.3d 1, 13 (2011) (stating that when "applying the principles enunciated in *Citizens United*, it is clear that Montana has a compelling interest to impose the challenged rationally-tailored statutory restrictions").

331. *See, e.g.*, *Ognibene v. Parkes*, No. 09-0994-CV, 2012 WL 89358, at \*1 (2d Cir. Jan. 12, 2012) (finding that laws reducing the campaign contribution limits restricting lobbyists' contributions "are closely drawn to address the significant governmental interest in reducing corruption or the appearance thereof").

332. *See, e.g.*, *Citizens United v. FEC*, 130 S. Ct. 876, 930 (2010) (Stevens, J., dissenting) (explaining how the majority rejects precedent).

333. *See Krannich, supra* note 36, at 62 (observing that the Court has frequently used the entity or aggregate theories as metaphors to interpret the Constitution in the corporate context, but that the use has been ad hoc and without regard to any simultaneous mutual exclusiveness among the theories).

334. *See id.* (criticizing the use of metaphors without regard for consistency).

335. *See Avi-Yonah, supra* note 8, at 33–41 (providing support for the real-entity theory in the cases preceding *Citizens United*).

Court's use of statutory construction to interpret precedent or statutory law.<sup>336</sup>

### C. *Attacking Public Policy as a Legal Basis in Itself*

The strongest criticism, if not the lack of a strong policy foundation, might be that the Court's idea of policy is simply not a good reason to rule in this way. Perhaps other options can bypass the reliance on public policy arguments. Some people (humans, no doubt) have advocated for "a constitutional amendment that removes for-profit corporations from the speech protections of the First Amendment."<sup>337</sup> Congress could potentially effect a similar result pursuant to its Commerce Clause authority by requiring a Federal Charter stipulating that corporations do not have constitutional protection of personal rights such as speech. Despite the overwhelming strength of corporations in the lobbying sphere and in electioneering,<sup>338</sup> individuals at least carry the right to vote if the majority opposing *Citizens United* is truly overwhelming.

Although a basis in policy arguments can be weaker than one in case or statutory law, policy can be very important in situations involving the mass public, such as election law.<sup>339</sup> Further, a primary check the public has on the U.S. Supreme Court is to lobby the legislature after an unpopular ruling based on policy or statutory grounds,<sup>340</sup> a concept tainted by the fact

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336. See, e.g., *FCC v. AT&T, Inc.*, 131 S. Ct. 1177, 1185 (2011) (applying a construction analysis of the language in the statute).

337. Robert Weissman, *Let the People Speak: The Case for a Constitutional Amendment to Remove Corporate Speech from the Ambit of the First Amendment*, 83 TEMP. L. REV. 979, 980-81 (2011) (arguing for a constitutional amendment after *Citizens United*).

338. See, e.g., OPENSECRETS.ORG, <http://www.opensecrets.org/> (last visited Feb. 29, 2012) (providing data about lobbying expenditures) (on file with the Washington and Lee Law Review).

339. See, e.g., Robert W. Lee, *Pre-Election Initiative Review in Florida: A Framework for Analysis*, 69 FLA. B.J. 14, 15 (1995) (discussing public policy considerations regarding courts' interfering with the election process).

340. See Darryl K. Brown, *Structure and Relationship in the Jurisprudence of Juries: Comparing the Capital Sentencing and Punitive Damages Doctrines*, 47 HASTINGS L.J. 1255, 1274 (1996) (discussing the legislature as a checking function for the public).

that lobbyists are often corporations or influenced by them. *Citizens United*, however, based its ruling on the Constitution.<sup>341</sup> This ups the ante for legislatures, and hence the public, to challenge the ruling: it essentially requires another Court's decision overturning *Citizens United* or a constitutional amendment.<sup>342</sup> Therefore, if the *Citizens United* Court failed to adequately justify its decision, and if the public's fears materialize, then policy might ultimately be sufficient grounds to challenge the ruling.<sup>343</sup>

### VI. Conclusion

The U.S. Supreme Court has equivocated and even, over time, contradicted itself in its use of corporate-rights metaphors.<sup>344</sup> The Court has at times even succumbed to the error of deducing functional corporate rights from some metaphysical essence of a corporation.<sup>345</sup> This foundation has perpetuated the error because the public resounds the ruling (with the compounded effect of a media spin),<sup>346</sup> and it has alerted the public to rightly question the Court's conception of corporate form. The public's overwhelming criticism of *Citizens United* reveals an important point in the discussion of corporate form: the U.S. Supreme Court has provided inadequate guidance for its

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341. See *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010) (stating that the First Amendment does not give the government the authority to restrict corporate political speech).

342. See Erwin Chemerinsky, *Amending the Constitution*, 96 MICH. L. REV. 1561, 1574–75 (1998) (discussing amendments to overturn Supreme Court decisions).

343. See Weissman, *supra* note 337, at 980–81 (arguing for a constitutional amendment after *Citizens United*).

344. See Krannich, *supra* note 36, at 62 (observing that the Court has frequently used the entity or aggregate theories as metaphors to interpret the Constitution in the corporate context, but that the use has been ad hoc and without regard to any simultaneous mutual exclusiveness among the theories).

345. See, e.g., *Hale v. Henkel*, 201 U.S. 43, 76 (1906) (using the aggregate view to justify personal due process protection).

346. See, e.g., PBS.ORG, *supra* note 183 (headlining an error that corporate contributions are constitutional, as opposed to independent expenditures—to which the anchors correctly refer).

justification of the corporate right to speech.<sup>347</sup> By virtue of the Court's failure to explain the source of the corporate right to political speech, *Citizens United* has the unintended consequence of revealing that corporate-rights theories are altogether ineffective as inherent truths about corporations.<sup>348</sup> (Still, with precise language, commentators can use the theories in the metaphysical sense to articulate justifications for various laws, so long as the theories are not used as the source of those laws.) With respect to independent expenditures, the *Citizens United* Court finds the source of the corporate right not in some metaphysical corporate essence, but rather in public policy.<sup>349</sup> Many voices ought to be heard in the political sphere, and the true protection of the public's voice lies in proper discussion about corporate theory and what we realistically want corporations to be.<sup>350</sup>

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347. See *supra* Part III (discussing *Citizens United* and its public impact).

348. See *supra* Part IV (revealing the error in *Citizens United*).

349. See *supra* Part IV.D (discussing policy as the source of the right).

350. See *supra* Part V (providing proper grounds of criticism).