

Social Capital: Corporate Personality, Political Campaign Expenditures, and the First Amendment

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Abstract

Shortly after the Supreme Court's controversial decision in *Citizens United v. Federal Election Commission*, then-President Obama declared in his 2010 State of the Union Address that the Court had "reversed a century of law" in overturning limitations on independent corporate expenditures. In one sense, this is clearly true. The Tillman Act, passed in 1907 at the urging of Theodore Roosevelt, marked the first legislative attempt to limit the influence of corporations in political elections.

In a larger sense, however, *Citizens United* served as the culmination of two hundred years of jurisprudence defining the rights of the corporate person. Starting from the ancient origins of corporate personality, this project traces the bases for *Citizens United* through a series of landmark cases, from Chief Justice Marshall's famous description of the corporation in *Trustees of Dartmouth College v. Woodward* (1819) to the twin pillars of *Buckley v. Valeo* (1976) and *First National Bank of Boston v. Bellotti* (1978). Further, in doing so, it seeks to demonstrate that the standards established in *Austin v. Michigan Chamber of Commerce* (1990) were rightly overturned in *Citizens United*, as said standards were fundamentally out-of-step with the principles of corporate rights and First Amendment protection outlined by the Court in centuries prior.

I. Origins of Corporate Personality

- **Artificial personhood:** The idea of operating under a collective identity has origins as old as ancient Assyria but first took hold in Roman law.¹ The term *persona ficta* was later coined by Pope Innocent IV in his canonization of the law on the Roman *collegia*, which he observed had been able to swear oaths on their own behalf.²
- **Perpetual life:** Inspired by the use of a similar tactic by Athenian religious associations,³ the idea of distinct personhood was borrowed and combined with the notion of perpetual life by the English medieval church as a mechanism to maintain its property while still preserving some control over the church body, after the death of church leadership.⁴
- **Limited liability:** The risks and capital-intensive nature of mercantilism during the colonial era ensured that the only way to raise the necessary funds was to ensure investors some protection.⁵

III. First Amendment Corporate Speech

- By the 1930s, it was clear that the freedom of the press also belonged to the *corporate* press.¹⁴
- Shortly thereafter, it was made clear that the freedoms of speech and press were reserved even for *non-citizens*.¹⁵
- During the Civil Rights Era, the NAACP, as a corporation, successfully defended its right to association.¹⁶
- *Bellotti* declared explicitly that corporations have a 1st Amendment right to protected speech. Notably, the Court added that it could find no support "for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation that cannot prove, to the satisfaction of a court, a material effect on its business or property."¹⁷
- However, *Bellotti's* footnote 26 left open the possibility that "Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections," without otherwise approaching the question itself.¹⁸

II. Rights of the Corporate Person

- *Dartmouth College* marked the first expansive judicial attempt to define the corporation, holding it to be "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."⁶
- In the first corporate 14th Amendment case, corporations were determined *not* to be subject to the Privileges and Immunities Clause.⁷
- In a flurry of Gilded Age cases, corporations were determined to have equal protection,⁸ due process,⁹ and search and seizure rights¹⁰ but not a right against self-incrimination¹¹ nor a part in the 14th Amendment right to liberty.¹²
- *Pierce* clarified this lack of a corporate right to liberty to allow for cases involving the "business and property for which they claim protection."¹³

IV. Independent Campaign Expenditures

- The first three occasions corporate (or union) campaign expenditures came before the Court, the Court avoided the question, deciding each case on narrower grounds.¹⁹
- *Buckley* subtly introduced the idea that political campaign-related expenditures were a form of speech, drawing from a judicial tradition of considering various activities as speech equivalents.²⁰
- In doing so, *Buckley* struck down limits on *independent expenditures*—but although corporations were parties to the case, it did not explicitly decide the corporate question.²¹
- A decade later, the Court invalidated restrictions on independent expenditures for a narrow set of non-profit corporate entities.²²
- However, in *Austin*, the Court opted to uphold limits on *for-profit* corporations' independent expenditures, citing the "state-conferred advantages of the corporate structure" and the potential for corruption.²³ This reasoning was later echoed in *McConnell*.²⁴
- In 2010, the Court in *Citizens United* overturned *Austin*, citing the line of precedent prior to it.²⁵

Conclusion

Contrary to the insinuations of its detractors, *Citizens United* marked a faithful return to a longstanding trend in jurisprudence of protecting those rights of the corporate person "confer[red] upon" or "incidental to its very existence" Speech, even beyond any *immediate* interest in preserving property, is one such incidental right, and, as confirmed by *Buckley*, said speech may, in some cases, take the form of independent campaign expenditures.

References

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6. *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819), quotation at 636.
7. *Paul v. Virginia*, 75 U.S. 168 (1869).
8. *Santa Clara County v. Southern Pacific Railroad Co.*, 118 U.S. 394 (1886).
9. *Gulf, Colorado & Santa Fe Railway Co. v. Ellis*, 165 U.S. 150 (1891).
10. *Hale v. Henkel*, 201 U.S. 43 (1906).
11. *Ibid.*
12. *Northwestern National Life Insurance Co. v. Riggs*, 203 U.S. 243 (1906).
13. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), quotation at 535.
14. *Grosjean v. American Press Company, Inc.*, 297 U.S. 233 (1936).
15. *Schneider v. State of New Jersey*, 308 U.S. 147 (1939).
16. *NAACP v. Button*, 371 U.S. 415 (1963).
17. *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).
18. *Id.*, at 787.
19. *United States v. CIO*, 335 U.S. 106 (1948). *United States v. Auto Workers*, 352 U.S. 567 (1957). *Pipefitters v. United States*, 407 U.S. 385 (1972).
20. *Buckley v. Valeo*, 424 U.S. 1 (1976).
21. *Ibid.*
22. *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986).
23. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).
24. *McConnell v. FEC*, 540 U.S. 93 (2003).
25. *Citizens United v. FEC*, 558 U.S. 310 (2010).