

No. 08-205

In The
Supreme Court of the United States

—◆—
CITIZENS UNITED, INC.,

Appellant,

v.

FEDERAL ELECTIONS COMMISSION,

Appellee.

—◆—
**On Appeal From The United States District Court
For The District Of Columbia**

—◆—
**AMICUS CURIAE BRIEF OF PROGRAM
ON CORPORATIONS, LAW & DEMOCRACY;
WOMEN'S INTERNATIONAL LEAGUE FOR
PEACE & DEMOCRACY; DEMOCRACY UNLIMITED
OF HUMBOLDT COUNTY; SHAYS2: THE WESTERN
MASSACHUSETTS COMMITTEE ON CORPORATIONS
& DEMOCRACY; AND THE CLEMENTS FOUNDATION**

**IN SUPPORT OF
APPELLEE FEDERAL ELECTIONS COMMISSION
ON SUPPLEMENTAL QUESTION**

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INTEREST OF *AMICI CURIAE*

With the parties' consent, *Amici Curiae* file this brief in support of Appellee Federal Elections Commission.¹

Program on Corporations, Law and Democracy ("POCLAD") has instigated democratic actions concerning issues of corporations and democracy since 1994. POCLAD offers seminars and publishing demonstrating how "corporate rights" doctrines undermine democracy.

Women's International League for Peace and Freedom ("WILPF") works to achieve disarmament, rights for women, racial and economic justice, and an end to violence. WILPF maintains a *Corporations v. Democracy* Issue Committee and a "Challenge Corporate Power, Assert the People's Rights" campaign.

Democracy Unlimited of Humboldt County challenges undue corporate influence on democratic self-government. In June 2006, Humboldt County, California banned financial contributions in local elections from non-local corporations.

¹ Pursuant to Supreme Court Rule 37.6, *Amici* state that no counsel for a party authored this brief in whole or in part and that no person or entity other than *Amici*, their members, or their counsel contributed monetarily to preparation and submission of this brief. Counsel of record received timely notice of the intent to file the brief under Rule 37.2(a), and granted consent. Pursuant to Rule 37.3, letters of consent to the filing of this brief have been filed with the Clerk of Court.

Shays 2: The Western Massachusetts Committee on Corporations & Democracy, through education and peaceful action, challenges legal doctrines under which corporations are believed to undermine self-government.

The Clements Foundation supports non-profit organizations involved in education, environmental responsibility, and the promotion of self-government and freedom.

SUMMARY OF ARGUMENT

The Court should not overrule *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) (“*Austin*”) or the part of *McConnell v. Federal Election Comm’n*, 540 U.S. 93 (2003), addressing the facial validity of Section 203 of the Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 441b (“*McConnell*”). *Austin* and *McConnell* rest on two hundred years of Constitutional jurisprudence.

While campaign finance laws refer to types of speech – “electioneering,” “issue advocacy,” “express advocacy” – the question raised by reconsideration of *Austin* and *McConnell* is not whether States and Congress may regulate a *type of speech* but whether they may regulate a *type of statutory organization* that people may, or may not, use to enhance their speech. Put differently, if the people’s elected representatives create legal structures for economic, charitable or other purposes, are they barred from

preventing misuse of those structures for non-permitted purposes, such as political activity?

Corporations exist as a consequence of government policy, and governments may balance privileges and restrictions that accompany the corporate form. Representative governments best determine whether people may use corporations to influence elections. *Austin* and *McConnell* follow this Court's jurisprudence to that effect, both before and after *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

Moreover, *Austin* implicates Fourteenth Amendment considerations not otherwise present here. Whether a corporation is a "person" under the Amendment is doubtful. The Court should give this issue full consideration when appropriate parties are before the Court.

ARGUMENT

I. *AUSTIN* AND *McCONNELL* REST ON TWO CENTURIES OF CONSTITUTIONAL LAW

A. Corporations Are Subject to Control of the People

People vote. People represent other people by government service. People contest elections. Corporations do none of those things.

For two hundred years, the First Amendment did not preclude restrictions on corporate expenditures

to influence elections.² In 1978, the *Bellotti* Court invalidated a state law limiting corporate political activity, stating: “If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech.” 435 U.S. at 777. The “speakers,” however, *are* corporations. More precisely, some people wish to speak in a corporate capacity while avoiding regulation of that capacity.

A corporation is a structure for doing business, available only by statute. Harry G. Henn & John R. Alexander, *Law of Corporations* (3rd ed.) (West Hornbook Series 1981) at 14-35. The structure has advantages (shareholder limited liability, for instance) and disadvantages (taxation of corporate profits and shareholder dividends, for instance) as compared to other structures. Non-profit corporations have other statutory advantages (such as the ability to raise tax deductible money) and disadvantages (such as restrictions on political activity).

Lawmakers deem a corporation to be a “person” for purposes of transacting business, suing and being sued, and other acts. That policy choice rests on perceived advantages of convenience and economic gains. The Constitution, however, does not enshrine particular policy choices.

² U.S. CONST. amend. I provides: “Congress shall make no law ... abridging the freedom of speech, or of the press....”

The corporate legal form is not fundamentally different today than when Chief Justice Marshall for the Court explained that a corporation, as a “mere creature of law ... possesses only those properties which the charter confers upon it...” *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 636 (1819). Corporations remain creatures of statute. *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 89-91 (1987) (“state regulation of corporate governance is regulation of entities whose very existence and attributes are a product of state law”).

No evidence suggests that the framers of the Constitution or the American people intended to include corporations in the Bill of Rights. Indeed, the evidence is to the contrary. “Those who feel that the essence of the corporation rests in the contract among its members rather than in the government decree ... fail to distinguish, as the eighteenth century did, between the corporation and the voluntary association.” Oscar Handlin and Mary Flug Handlin, *Commonwealth: A Study of the Role of Government in the American Economy, Massachusetts, 1774-1861* at 92 and n.18. *Cf. McConnell*, 540 U.S. at 256 (Scalia, J., dissenting).

During the colonial period, only “a handful of native business corporations carried on business,” and only twenty business corporations were formed by 1787, when the American people convened the Constitutional Convention. Henn & Alexander, *supra*, at 24 and n.2, *citing* E. Dodd, *American Business Corporations Until 1860* (1954); 2 J. Davis, *Essays in*

the Earlier History of American Corporations (1917); Baldwin, *American Business Corporations Before 1789*, 1 Annual Rep't of American Historical Ass'n, 253-274 (1902). See also Handlin, *supra*, at 99, 162. Legislatures soon created more corporations but chartered these only for specific *public* purposes, often with limited time periods. Handlin, *supra*, at 106-133; *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 548-560 (1933) (Brandeis, J., dissenting). Restrictions on corporate purposes were the norm. *Id.*; *Head and Amory v. Providence Insurance Co.*, 6 U.S. (2 Cranch) 127, 166-167 (1804) ("corporation can only act in the manner prescribed by law").

It is difficult to imagine that the Framers believed the Constitution to bar legislation to prevent corporate expenditures to influence politics. James Wilson – signer of the Declaration of Independence, member of the Continental Congress, a drafter of the Constitution, and among the nation's first six Justices – expressed a prevailing view:

A corporation is described to be a person in a political capacity created by the law ... It must be admitted, however, that, in too many instances, those bodies politick have, in their progress, counteracted the design of their original formation ... This is not mentioned with a view to insinuate, that such establishments ought to be prevented or destroyed: I mean only to intimate, that they should be erected with caution, and inspected with care.

Collected Works of James Wilson, Vol. 2. Ch. X, *Of Corporations* (ed. Kermit L. Hall and Mark David Hall) (<http://oll.libertyfund.org/title/2074/166648/2957866>, accessed 2009-07-22).

James Madison viewed corporations as “a necessary evil” subject to “proper limitations and guards.” *Writings of James Madison*, ed. Gaillard Hunt (New York: G.P. Putnam’s Sons, 1900), Vol. 9, To J.K. Paulding (<http://oll.libertyfund.org/title/1940/119324>, accessed 2009-07-22). Thomas Jefferson hoped to “crush in its birth the aristocracy of our moneyed corporations, which dare already to challenge our government to a trial of strength and bid defiance to the laws of our country.” University of Virginia, Thomas Jefferson Digital Archive, To George Logan (<http://etext.virginia.edu/jefferson/quotations/jeff5.htm>, accessed 2009-07-22).

“[T]hroughout the greater part of our history,” the American people, state and federal governments, and this Court knew that corporations remained subject to democratic control. 288 U.S. at 548 (Brandeis, J., dissenting). President Jackson warned of partisan activity by the second Bank of the United States corporation: “[T]he question is distinctly presented whether the people of the United States are to govern through representatives chosen by their unbiased suffrages or whether the money and power of a great corporation are to be secretly exerted to influence their judgment and control their decisions.” 1833 Annual Message to Congress, University of Virginia,

Miller Center of Public Affairs (<http://millercenter.org/scripps/archive/speeches/detail/3640>) (“Miller Center,” all accessed 2009-07-15). President Van Buren spoke “of the dangers to which the free and unbiased exercise of political opinion ... would be exposed by any further increase of the already overgrown influence of corporate authorities.” 1837 Annual Message to Congress, Miller Center (<http://millercenter.org/scripps/archive/speeches/detail/3589>).

These warnings continued as corporations became dominant in our economy. “Corporations, which should be the carefully restrained creatures of the law and the servants of the people, are fast becoming the people’s masters,” wrote President Cleveland. 1888 Annual Message to Congress, Miller Center (<http://millercenter.org/scripps/archive/speeches/detail/3578>). Theodore Roosevelt sought to end “a riot of individualistic materialism” and remediate the “total absence of governmental control [that] led to a portentous growth in the financial and industrial world both of natural individuals and of artificial individuals – that is, corporations.” Theodore Roosevelt, *An Autobiography* (Scribner & Sons, 1913) (1929 ed.), at 423. “Let individuals contribute as they desire; but let us prohibit in effective fashion all corporations from making contributions for any political purpose, directly or indirectly.” 1906 Annual Message to Congress, Miller Center (<http://millercenter.org/scripps/archive/speeches/detail/3778>).

Austin and *McConnell* follow this understanding of the corporation and the practices of the American

people, and follow this Court's jurisprudence over two hundred years holding that corporations do not possess the same rights as people.

B. This Court Recognizes That Corporations Are Creations of Statute And Are Subject to Legislative Restrictions

Austin concluded, "the unique state-conferred corporate structure that facilitates the amassing of large treasuries warrants the limit on independent expenditures." 494 U.S. at 660. The Court upheld Michigan's corporate political influence law based on the "state-created advantages" of the legal form. 494 U.S. at 658-659. Similarly, *McConnell* upheld restrictions of corporate "electioneering communications" based on "legislative judgment that the special characteristics of the corporate structure require particularly careful regulation." 540 U.S. at 205 (quotations and citations omitted). The Court decided both cases correctly.

Since the beginning of the Republic, the Court has affirmed that elected governments of the states and nation may regulate, in an even-handed manner, "the corporate structure" because governments create that structure. *Dartmouth College* described the corporate entity as "an artificial being ... existing only in contemplation of law," and created only for such "objects as the government wishes to promote." 17 U.S. at 636-637.

The Court brought this understanding of the corporation to other Constitutional provisions, such as diversity jurisdiction under Article III and the judiciary statutes.³ In the Founders' era and beyond, the Court considered state citizenship of shareholders, not the corporation, to determine whether people who formed corporations could enter the federal courts in the corporate name. *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 86 (1809) (corporation is a “mere legal entity ... not a citizen”); *Hope Insurance Co. v. Boardman*, 9 U.S. (5 Cranch) 57, 58 (1809); *Sullivan v. Fulton Steamboat Co.*, 19 U.S. (6 Wheat.) 450 (1821); *Breithaupt v. Bank of Georgia*, 26 U.S. (1 Pet.) 238 (1828); *Commercial & Railroad Bank of Vicksburg v. Slocomb*, 39 U.S. (14 Pet.) 60 (1840).

Over time, the Court overruled these cases in part and developed a shortcut strictly limited to diversity jurisdiction. *Carden v. Arkoma Associates*, 494 U.S. 185, 197 (1990) (“special treatment for corporations.”)⁴ *Louisville Railroad Co. v. Letson*, 43 U.S. (2 How.) 497, 557-558 (1844), decreed that a corporation “is to be deemed” a citizen of the state of its creation. Nine years later, the Court followed

³ Article III provides “The judicial Power shall extend ... to Controversies ... between Citizens of different States...” U.S. CONST. art. III, § 2.

⁴ “Special treatment” refers to the fact that the Court and Congress do not extend the same treatment to non-corporate associations.

Letson but reiterated that “an artificial entity cannot be a citizen,” and “State laws by combining large masses of men under a corporate name, cannot repeal the Constitution.” *Marshall v. Baltimore and Ohio Railroad Co.*, 57 U.S. (16 How.) 314, 327 (1853) (quotation and citation omitted).⁵ The Court soon began simply to treat “a suit by or against a corporation in its corporate name, as a suit by or against citizens of the State which created the corporate body...” *Ohio and Mississippi Railroad Co. v. Wheeler*, 66 U.S. 286, 296 (1861). The Court confined this doctrine to diversity jurisdiction, and it has never been defended with enthusiasm for its soundness.⁶

In *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519 (1839), and *Paul v. Virginia*, 75 U.S. 168 (1868), the Court refused to extend “special treatment” for

⁵ *Marshall* reflects grave concern about corporations and rights. See 57 U.S. at 329 (“The right of choosing an impartial tribunal is a privilege of no small practical importance, and more especially in cases where a distant plaintiff has to contend with the power and influence of great numbers and the combined wealth wielded by corporations in almost every State.”); 57 U.S. at 339 (Daniel, J., dissenting) (“citizens only ... men, material, moral, sentient beings, must be parties, in order to give jurisdiction”); 57 U.S. at 351, 352-353 (Campbell, J., dissenting) (courts should “repel[] these pretensions and expose[] [corporations’] perilous character ...”; corporations are “disdainful” of legislators, ready “to make of them a prey; and to accomplish this, to employ corrupting and polluting appliances.”).

⁶ See *Carden*, 494 U.S. 185. See also Frankfurter, *Distribution of Judicial Power between United States and State Courts* 13 CORN. L. Q. 499, 523 (1928).

corporations to the protection of citizen rights under the Privileges and Immunities Clause of Article IV. Repeatedly, the Court has held that corporations are not citizens under that clause, or under the Privileges or Immunities Clause of the Fourteenth Amendment. *Id.*; *Pembina Con. Silver Mining & Milling Co. v. Pennsylvania*, 125 U.S. 181 (1888); *Asbury Hosp. v. Cass County*, 326 U.S. 207 (1945).⁷

As the Industrial Revolution gathered pace, the Court maintained with clarity that “[t]he only rights [a corporation] can claim are the rights which are given to it in that character, and not the rights which belong to its members as citizens of a state....” *Bank of Augusta*, 38 U.S. at 587. The Court did not examine the Constitution to determine rights “given to it in that character” because the Constitution does not create corporate rights. In upholding corporate contracts outside the place of incorporation, *Bank of Augusta* declined to rest on any Constitutional provision, instead applying the law that created the corporation, the law of the state where the corporation wished to enforce a contract, and “comity.” 38 U.S. at 586-590.

This Court has long known of the dominant role of corporations, but generally has not given that development Constitutional significance. *Compare McConnell*, 540 U.S. at 257-258 (Scalia, J. dissenting)

⁷ Unrelated part of *Paul* overruled by *United States v. South-Eastern Underwriters Ass’n*, 322 U.S. 533 (1944).

with Liggett, 288 U.S. at 548 (Brandeis, J., dissenting) (“The prevalence of the corporation in America has led men of this generation to act, at times, as if the privilege of doing business in corporate form were inherent in the citizen; and has led them to accept the evils attendant upon the free and unrestricted use of the corporate mechanism as if these evils were the inescapable price of civilized life, and, hence, to be borne with resignation”).

By 1868, corporations had “multiplied to an almost indefinite extent. There is scarcely a business pursued requiring the expenditure of large capital, or the union of large numbers, that is not carried on by corporations. It is not too much to say that the wealth and business of the country are to a great extent controlled by them.” *Paul*, 75 U.S. at 181-182. The Court denied, however, the claim of corporations to the privileges and immunities of citizenship, as a corporation is “a mere creation of local law.” *Id.* at 181.

The Court, with exceptions during the era defined by *Lochner v. New York*, 198 U.S. 45 (1905), *overruled by Day-Brite Lighting Inc. v. Missouri*, 342 U.S. 421 (1952), continued through the twentieth century to distinguish between the rights of people and corporations. In *Asbury Hosp.*, for example, the Court, citing numerous cases and without dissent, rejected a Constitutional challenge to a state law requiring corporations holding land suitable for farming to sell the land within ten years. 326 U.S. 207. Five years later, the Court again emphasized the

“public attributes” of corporations in turning aside corporate privacy claims:

[C]orporations can claim no equality with individuals in the enjoyment of a right to privacy. They are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities.

United States v. Morton Salt Co., 338 U.S. 632, 652 (1950) (citations omitted).

The Court has recognized, in a limited fashion, assertions of corporate rights. *See infra*. n.8; Carl Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 *Hastings L.J.* 577, 664-667 (1990); *GM Leasing Corp. v. United States*, 429 U.S. 338, 353 (1977) (corporations have “some Fourth Amendment rights”). As the Court has observed, however, a corporation has lesser Fourth Amendment rights because:

Congress may exercise wide investigative power over them, analogous to the visitorial power of the incorporating state, when their activities take place within or affect interstate commerce. Correspondingly it has been settled that corporations are not entitled to all of the constitutional protections which private individuals have in these and related matters.

Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 204-205 (1946) (footnotes omitted).

Accordingly, “it cannot be disputed that the mere creation of a corporation does not invest it with all the liberties enjoyed by natural persons....” *Bellotti*, 435 U.S. at 823 (Rehnquist, J., dissenting) *citing* *United States v. White*, 322 U.S. 694, 698-701 (1944). *See also* *Northwestern Nat. Life Ins. Co. v. Riggs*, 203 U.S. 243, 255 (1906) (“The liberty referred to in that [Fourteenth] Amendment is the liberty of natural, not artificial, persons”).

Nearly a decade after *Bellotti*, the Court rejected a Commerce Clause challenge to an anti-takeover statute. *CTS Corp.*, 481 U.S. 69. Quoting *Dartmouth College* and noting Justice Rehnquist’s dissent in *Bellotti*, the Court concluded: “It thus is an accepted part of the business landscape in this country for States to create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares.” *Id.* at 89-91.

That insight about corporations is correct. The First Amendment and the Commerce Clause implicate different Constitutional interests but nothing in the First Amendment requires that States, Congress, or this Court ignore the capacity of the speaker.

C. First Amendment Speech Cases Involving Corporations Do Not Prohibit the Regulation of Corporate Political Activity

Until *Bellotti*, the First Amendment had never barred regulation of corporate political activity. 435

U.S. at 822-823 (Rehnquist, J. dissenting). In the mid-1970s, however, an unprecedented “commercial speech” doctrine began to emerge. The Court invalidated a state prohibition on abortion advertising, *Bigelow v. Virginia*, 421 U.S. 809 (1975), and “the notion of unprotected ‘commercial speech’ all but passed from the scene.” *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 759 (1976). Justice Rehnquist dissented. 425 U.S. at 784 (“[N]othing in the United States Constitution ... requires the Virginia Legislature to hew to the teachings of Adam Smith ... ”).⁸

Corporations then challenged a Massachusetts prohibition on corporate expenditures to influence ballot questions, except questions “materially affecting any of the property, business or assets of the corporation.” *Bellotti*, 435 U.S. 768. Mindful of *Virginia Pharmacy* and *Buckley v. Valeo*, 424 U.S. 1, 14 (1976), the Massachusetts Supreme Judicial Court nevertheless rejected the challenge, noting, “a

⁸ This new doctrine has led to invalidation of numerous democratically enacted public welfare measures in recent years. See *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557 (1980); *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1 (1986); *Robert E. Rubin, Secretary of the Treasury v. Coors Brewing Company*, 514 U.S. 476 (1995); *44 LiquorMart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); *Greater New Orleans Broadcasting Ass’n, Inc. v. U.S.*, 527 U.S. 173 (1999); *Lorillard v. Reilly*, 533 U.S. 525 (2001); *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002); *International Dairy Foods Association v. Amestoy*, 92 F.3d 67 (2nd Cir. 1996).

corporation does not have the same First Amendment rights to free speech as those of a natural person....” *First Nat. Bank of Boston v. Attorney General*, 371 Mass. 773, 784-785, 359 N.E.2d 1262 (1977).

This Court reversed. Citing First Amendment cases that involved corporations, the Court labeled the Massachusetts arguments “extreme” and “an artificial mode of analysis.” 435 U.S. at 778-779 and n.14. Justice Rehnquist disagreed:

A State grants to a business corporation the blessings of potentially perpetual life and limited liability to enhance its efficiency as an economic entity. It might reasonably be concluded that those properties, so beneficial in the economic sphere, pose special dangers in the political sphere.

435 U.S. at 825-826.

“Corporations” cases are not “speech” cases. None of the First Amendment cases cited in *Bellotti* involved a regulation directed at problems found by a legislature to arise from the corporate form itself. *See* 435 U.S. at 778 and n.14. None concerned a law distinguishing between corporations and people. The speech cases cited in *Bellotti* happened to involve corporate parties but they concerned generally applicable restrictions. In contrast, *Austin* and *McConnell* concern legislative definitions of impermissible activities of corporations *as* corporations.

Judicial deference to elected representatives in corporate regulation cases says nothing about the

“worth” of certain speech. *Cf.* 435 U.S. at 776-777. Where the “speaker” exists only as a result of government policy, regulation based on “what” rather than “who” speaks is commonplace. Municipal corporations – “persons” for some purposes – have no First Amendment right to spend municipal funds to support candidates, oppose perceived enemies, or influence ballot questions. *See Anderson v. City of Boston*, 376 Mass. 178, 380 N.E.2d 628 (1978); *Creek v. Village of Westhaven*, 80 F.3d 186, 192-193 (7th Cir. 1996).

The Hatch Act restricts the political activity of certain government employees. 5 U.S.C. §§ 7321-7326; 5 U.S.C. §§ 1501-1508. Our Armed Forces accept the obligations of political neutrality without complaint. *See* Department of Defense Directive 1344.10, *Political Activities By Members of the Armed Forces*, February 19, 2008 (www.dtic.mil/whs/directives/corres/pdf/134410p.pdf, accessed 2009-07-24).

Corporate capacity, as with other government-created capacities, may carry statutory restrictions on political activity. *Austin* and *McConnell* correctly deferred to “the legislative judgment that the special characteristics of the corporate structure require particularly careful regulation,” *McConnell*, 540 U.S. at 205, and should not be overruled.

II. OVERRULING *AUSTIN* WOULD IMPLICATE SIGNIFICANT FOURTEENTH AMENDMENT ISSUES

Overruling *Austin* would raise significant Fourteenth Amendment issues not otherwise present here. *Bellotti*, 435 U.S. at 826 and n.6 (Rehnquist, J., dissenting). “Neither the history nor the language of the Fourteenth Amendment justifies the belief that corporations are included within its protections.” *Connecticut Life Insurance Company v. Johnson*, 303 U.S. 77, 85-86 (1938) (Black, J., dissenting). The notion that the Fourteenth Amendment can be interpreted to include corporations within the Amendment’s references to “persons” does not stand up to examination. *Id.* See also *Slaughter-House Cases*, 83 U.S. 36 (1872); *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 581 (1949) (Douglas, J. dissenting); Morton J. Horowitz, *The Transformation of American Law (1870-1960)*, Oxford University Press, Inc. (1992); Mayer, *supra*.

Challenges to “corporate rights” doctrines increase. See Constitutional Accountability Center, Correspondence to Senate Judiciary Committee, July 22, 2008 (“the Court’s recent trend toward constraining the right of people to hold corporations accountable ... runs opposite to the text, history, and structure of our Constitution and the ideals upon which our country was founded.” (<http://www.theusconstitution.org/issues.php?id=9>, accessed 2009-07-23); Patton & Barlett, *Corporate ‘Persons’ and Freedom of Speech: The Political Impact of Legal Mythology*, 1981

WIS. L. REV. 494; Richard L. Grossman and Frank T. Adams, *Taking Care of Business, Citizenship and the Charter of Incorporation* (Charter 1993); Dean Ritz (ed.), *Defying Corporations, Defining Democracy: A Book of History & Strategies* (Apex 2001); Charles Derber, *Corporation Nation: How Corporations Are Taking Over Our Lives – And What We Can Do About It* (St. Martin's 1998); Thom Hartmann, *Unequal Protection: The Rise of Corporate Dominance and the Theft of Human Rights* (Rodale 2004); Jane Anne Morris, *Gaveling Down the Rabble: How "Free Trade" is Stealing Our Democracy* (Apex 2008); Ted Nace, *Gangs of America: The Rise of Corporate Power and the Disabling of Democracy* (Berrett-Koehler 2003).

The Fourteenth Amendment corporate "person" doctrine rests on an uncertain foundation. *Bellotti*, 435 U.S. at 822-3 (Rehnquist, J. dissenting). *Santa Clara County v. Southern Pacific Railroad Company*, 118 U.S. 394 (1886), did not decide that or *any* federal Constitutional question. *Id.* at 416 ("As the judgment can be sustained upon this [state law] ground it is not necessary to consider any other questions raised by the pleadings and the facts found by the court").

Following *Santa Clara*, the Court asserted in five cases, without explanation, that a corporation is a person under the Fourteenth Amendment. None found a Fourteenth Amendment violation. See *Pembina*, 125 U.S. at 188-189; *Missouri Pac. Railway Co. v. Mackey*, 127 U.S. 205 (1888); *Minneapolis & S.L. Ry. Co. v. Herrick*, 127 U.S. 210 (1888);

Minneapolis & S.L. Ry. Co. v. Beckwith, 129 U.S. 26 (1889); *Charlotte C & A Railway Co. v. Gibbes*, 142 U.S. 386 (1892). The Court later stated, again without explanation, that corporations could make Fourteenth Amendment claims. See *Covington & L. Turnpike Road Co. v. Sandford*, 164 U.S. 578 (1896); *Gulf C & S.F. Ry. Co. v. Ellis*, 165 U.S. 150 (1897); *Kentucky Finance Corp. v. Paramount Auto Exch. Corp.*, 262 U.S. 544 (1923).

Not until 1938 would an opinion, albeit dissenting, review the issue. Justice Black, dissenting in *Connecticut Life*, carefully reviewed the words, context, and history of the Fourteenth Amendment, and found no basis to find that a corporation is a “person” under the Amendment. Justice Black concluded, “this Court should now overrule previous decisions which interpreted the Fourteenth Amendment to include corporations.” 303 U.S. at 85.

Serious doubt remains about a basis for Fourteenth Amendment restraint on state governments’ regulation of the partisan role of corporations in state elections, and *Austin* should stand.

CONCLUSION

For the foregoing reasons, the Court should not overrule *Austin* or *McConnell* and should affirm the judgment below.

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