

SHIFTED PERSONHOOD: CORPORATIONS, TECHNOLOGY, AND LAW ON THE PATH  
TO CITIZENS UNITED AND CURRENT ELECTORAL POLITICS IN THE U.S.

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*This Article puts its analytic lens directly on the relationship between technology and legal change in an attempt to understand the increasingly prominent role of SuperPACs in American politics. It focuses on the relationship between law, technology, and social change, showing how the Supreme Court’s view of the relationship between television and the provision of information to voters in a mass society shaped its decision to extend the First Amendment’s protection of freedom of political expression to organizations in Citizens United v. Federal Election Commission. The Article makes two key findings: first, that technological development may drive even the most “originalist” law court to underwrite its legal reasoning with normative ideas about technology; and, second, that when technology management questions surface within the bounds of a constitutional case, countermajoritarian judicial answers can easily prevail over those already given by legislative bodies. The Article argues that, under these conditions, personhood has “shifted” between organizations and individuals within the constitutional order of freedom of expression, allowing SuperPACs to rise as prominent players on the American political scene.*

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The single most significant phenomenon in modern American history is the emergence of giant, complex organizations. In the present day it is apparent that bureaucracies of one sort or another dominate our economic system, control the central features of our polity, and shape many of the important aspects of our culture.<sup>1</sup>

## INTRODUCTION

In one of the most widely cited texts on the rise of the corporation in the United States, historian Alan Trachtenberg notes that the concept of “technology” came into usage during the decades following the Civil War, in parallel to the rise in the modern corporate form of ownership.<sup>2</sup> This Article investigates the role of that concept—technology—in decisionmaking by the United States Supreme Court that concerns the constitutional rights of corporations during the nineteenth and twentieth centuries. It uses this investigation to more fully explain the Court’s early twenty-first century decision in *Citizens United v. Federal Election Commission*,<sup>3</sup> and to reason more broadly about the role of corporations in our society as it continues to modernize.

As we approach the next U.S. presidential election in 2016, *Citizens United* passes its fifth anniversary. The decision remains controversial because it is widely viewed as having transformed American politics into a clash of “SuperPACs:” organizations that aggregate money from undisclosed sources and use technologies of mass media to influence the American electorate.<sup>4</sup> After *Citizens United* found “no basis for the proposition that, in the political speech

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<sup>1</sup> LOUIS GALAMBOS, *THE PUBLIC IMAGE OF BIG BUSINESS IN AMERICA, 1880-1940: A QUANTITATIVE STUDY IN SOCIAL CHANGE* 3 (1975).

<sup>2</sup> ALAN TRACHTENBERG, *THE INCORPORATION OF AMERICA: CULTURE AND SOCIETY IN THE GILDED AGE* 54-55 (2007); see also RAYMOND WILLIAMS, *KEYWORDS* 315 (1983) (describing how the word “technology” was used from the seventeenth century to “describe a systematic study of the arts” or “the terminology of a particular art” but it was not until the nineteenth century that the familiar modern definition of technology as the practical application of scientific knowledge emerged), and Leo Marx, *Technology: The Emergence of a Hazardous Concept*, 51 *TECH. & CULTURE*, 561, 562 (2010) (noting the same distinction in the modern emergence of usage of the word “technology”).

<sup>3</sup> *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

<sup>4</sup> Inaugurating the era of the “Super PAC,” the D.C. Circuit Court of Appeals in *Speechnow.org v. Fed. Election Comm’n* relied on *Citizens United* to hold that organizations making independent expenditures in support or opposition of political candidates cannot be restricted in receiving contributions. 599 F.3d 686, 696, 698 (D.C. Cir. 2010). These organizations qualify for tax-exempt status as social welfare groups under § 501(c)(4) of the Internal Revenue Code, as long as their political participation does not constitute their “primary activity.” Raymond Chick & Amy Henchey, *M. Political Organizations and IRC 501(c)(4)*, INTERNAL REVENUE SERV. (1995), <http://www.irs.gov/pub/irs-tege/eotopicm95.pdf>. For examples of the financial and media activities of SuperPACs, see Abdullah Ansari, *Super PACs: Changing the nature of the game*, CAIR-CHICAGO (Aug. 6, 2012), <http://www.cairchicago.org/2012/08/06/super-pacs-changing-the-nature-of-the-game>; Peter Overby, *How to Oust a Congressman, SuperPAC-Style*, NAT’L PUB. RADIO (Nov. 23, 2012, 8:38 AM), <http://www.npr.org/templates/transcript/transcript.php?storyId=165761797>; Jeff Zeleny & Jim Rutenberg, *Obama Yields in Marshaling of ‘Super PAC,’* N.Y. TIMES, Feb. 6, 2012, [http://www.nytimes.com/2012/02/07/us/politics/with-a-signal-to-donors-obama-yields-on-super-pacs.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/02/07/us/politics/with-a-signal-to-donors-obama-yields-on-super-pacs.html?pagewanted=all&_r=0); Matea Gold, *Koch-backed political network, built to shield donors, raised \$400 million in 2012 elections*, WASH. POST, Jan. 5, 2014, <http://www.washingtonpost.com/politics/koch-backed-political-network-built-to-shield-donors-raised-400-million-in-2012-elections/2014/01/05/9e7cfd9a-719b-11e3-9389->

context, the [g]overnment may impose restrictions on certain disfavored speakers,” even if the speaker is a corporation or similar organization,<sup>5</sup> campaign spending in the United States increased by nearly two billion dollars between the presidential elections of 2008 and 2012.<sup>6</sup> In the latter election, SuperPACs alone spent one billion dollars.<sup>7</sup>

This Article links *Citizens United* and the rise of the SuperPAC to what it argues is a jurisprudential evolution in the legal status of corporations in the United States, beyond their nineteenth century designation as “mere creature[s] of the law.”<sup>8</sup> It identifies technology as an important medium that afforded corporations new capacities to exercise different kinds of freedom of action beyond simply executing contracts and other financial transactions, the purposes for which “corporate personhood” originated in law and had long served prior to the emergence of the SuperPAC.<sup>9</sup> It then analyzes the Supreme Court’s interpretation of technology within key corporate rights decisions in order to better understand the outcome of rulings that have brought corporations and similar organizations more fully under the protection of constitutional law.

The relevance of this kind of inquiry can be illustrated at the outset by considering the subject matter of the dispute in *Citizens United*. A nonprofit corporation “dedicated to restoring government to citizens’ control,”<sup>10</sup> Citizens United sought to tell voters during the 2008 Democratic primary that Hillary Clinton was a “Machiavellian” presidential candidate.<sup>11</sup> It did not hire groups of canvassers, however, to disseminate that idea, or publish it in a newspaper; instead, it produced a documentary it wanted to make available “on-demand” to cable television subscribers.<sup>12</sup> This action ran afoul of the Bipartisan Campaign Reform Act of 2002, popularly

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09ef9944065e\_story.html; Peter Overby, *Political Groups Aim Early Attacks at New Hampshire Senator*, NAT’L PUB. RADIO (Jan. 14, 2014, 3:35 AM), <http://www.npr.org/templates/transcript/transcript.php?storyId=262191075>.

<sup>5</sup> *Citizens United*, 558 U.S. at 312.

<sup>6</sup> Evan Osnos, *Embrace the Irony*, THE NEW YORKER, Oct. 13, 2014, <http://www.newyorker.com/magazine/2014/10/13/embrace-irony> (describing data concerning the rise in spending after *Citizens United*, while reporting about Professor Lawrence Lessig’s SuperPAC in opposition to the decision).

<sup>7</sup> *Id.*

<sup>8</sup> Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat) 518, 636 (1819), *discussed infra*, Part I, pp. 407-421.

<sup>9</sup> See MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 109 (1977).

By the end of the eighteenth century, the new American states had become involved in the process of promoting economic development by granting corporate charters and franchises to private investors. Though this pattern has often been portrayed as economically inevitable, it actually seems to have arisen out of conscious considerations of policy.

See, e.g., Paul v. Virginia, 75 U.S. 168, 177-78 (1868) (emphasizing that corporate rights are limited other than “where contracts or rights of property are to be enforced”), *overruled by* United States v. Se. Underwriters Ass’n., 322 U.S. 533 (1944).

<sup>10</sup> *Who We Are*, CITIZENS UNITED, <http://www.citizensunited.org/who-we-are.aspx> (last visited Jun. 13, 2015).

<sup>11</sup> *Citizens United*, 558 U.S. at 325 (2010) (internal citation omitted).

<sup>12</sup> *Id.* at 320.

known as “McCain-Feingold.”<sup>13</sup> McCain-Feingold aimed to curb what legislators described as an “ad war” driven by a “flow of negative ads” produced by outside groups in American politics—groups that were neither political parties nor campaigns.<sup>14</sup> It did so by restricting corporations and unions from using their general treasury funds to make independent expenditures for broadcast, cable, or satellite “electioneering communication” that was capable of reaching fifty thousand or more persons in a state in which a primary election was being held within thirty days, or a general election within sixty days.<sup>15</sup>

McCain-Feingold combined a focus on *specific kinds of organizations* with a focus on *specific technologies of mass media*, and left untouched traditional political parties, low-tech means of communication like the newspaper, and outside group expenditures on things other than mass broadcast communication. This represented a distinct departure from previous regulations of campaign finance that were focused on restricting political contributions and expenditures, and which characterized the entire previous century of electoral regulation.<sup>16</sup>

Understood properly as a regulation of technology, McCain-Feingold’s constitutional undoing in *Citizens United* can be more clearly associated with strong statements that the Court made about television in that opinion. These statements countered Congress’ view of a toxic electoral climate produced by the “ad wars,” with a robust technological optimism about organization-funded mass media in contemporary democracy. Justice Kennedy, writing for the majority, described television as “society’s most salient media” and one of “the most important means of mass communication in modern times.”<sup>17</sup> He concluded that “[r]apid changes in technology—and the creative dynamic inherent in the concept of free expression—counsel against upholding a law that restricts political speech in certain media or by certain speakers,” whether organizations or individuals.<sup>18</sup>

We can see here the articulation of a specific judicial understanding of the relationship between technology and freedom of expression, in which the latter accommodates the former, not the reverse. Science, technology, and society (STS) scholars call this a “technological imperative.”<sup>19</sup> It views technology as bringing to political discourse certain permanent and one-

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<sup>13</sup> Bipartisan Campaign Reform Act of 2002 (McCain-Feingold Act), Pub. L. No. 107-155, 116 Stat. 81 (codified as amended at 2 U.S.C. § 441(b)(2), § 434(f)(3)(A) (2006); 11 C.F.R. § 100.29(a)(2) § 100.29(b)(3)(ii) (2014).

<sup>14</sup> 148 Cong. Rec. S2117 (daily ed. Mar. 20, 2002) (statement of Sen. Cantwell) (“This bill is about slowing the ad war. . . . It is about . . . making sure the flow of negative ads by outside interest groups does not continue to permeate the airwaves.”).

<sup>15</sup> Bipartisan Campaign Reform Act of 2002 (McCain-Feingold Act), Pub. L. No. 107-155, 116 Stat. 81 (codified as amended at 2 U.S.C. § 441(b)(2), § 434(f)(3)(A) (2006); 11 C.F.R. § 100.29(a)(2), § 100.29(b)(3)(ii) (2014)).

<sup>16</sup> Compare McCain-Feingold Act with Tillman Act of 1907, Pub. L. No. 59-36, 34 Stat. 864 (codified as amended at 2 U.S.C. § 441b (2006)), and Federal Election Campaign Act of 1971 (FECA), Pub. L. No. 92-225, 86 Stat. 3 (1972) (current version at 52 U.S.C.A. § 30101 (2002)).

<sup>17</sup> *Citizens United*, 558 U.S. at 353.

<sup>18</sup> *Id.* at 364.

<sup>19</sup> Technological determinism, or the idea of a technological “imperative,” is common to an oversimplified analysis of the role of technology in society. See R.L. Heilbroner, *Do Machines Make History?*, in DOES TECHNOLOGY DRIVE HISTORY? THE DILEMMA OF TECHNOLOGICAL DETERMINISM 53, 54 (Merritt Roe Smith & Leo Marx eds., 1994) (quoting Karl Marx for the proposition that “[t]he hand-mill gives you society with the feudal lord; the steam-mill, society with the industrial capitalist”).

directional changes to which the constitutional order of freedom of expression must adapt. Thus: “Rapid changes in technology. . . counsel against upholding a law that restricts political speech.”<sup>20</sup> This Article reveals that this kind of thinking did not originate with *Citizens United*, however; it instead extended from a series of First Amendment cases that began to address questions about the role of television in American society, beginning in the middle of the twentieth century.<sup>21</sup>

These earlier cases show a distinctive progression. First, the Court noted that television was exceptionally expensive as a medium for expression, but had become necessary to communicate across the wide swaths of “today’s mass society.”<sup>22</sup> Under this rationale, it held in *Buckley v. Valeo*, in some sense the *Citizens United* of its time,<sup>23</sup> that the expenditure of money on political advocacy was itself a form of expressive activity protected under the First Amendment.<sup>24</sup> During this same period, the Court determined that the listener’s “right to receive” information<sup>25</sup> within a “marketplace of ideas”<sup>26</sup> was of equal constitutional importance as the traditional speaker’s right to self-expression.

As conceptual tools, both the marketplace of ideas and the listener’s right to receive them were prerequisite to shifting the legal paradigm governing the constitutional protection of freedom of expression towards the inclusion of organizations. They provided room within the First Amendment to protect cheap listening by individuals, for whom television was a receiver, and expensive speech by organizations, for whom it was a transmitter. As long as the airwaves were unobstructed, it did not matter whether one was a “seller” or a “buyer” in this marketplace. *Citizens United* is therefore the capital on a pillar of reasoning about television that the Supreme Court built up within its First Amendment jurisprudence after the technology emerged around the middle of the twentieth century. Under this reasoning, McCain-Feingold was problematic because it regulated precisely those kinds of technology (broadcast, satellite, and cable communication) that the Court had already deemed necessary to disseminate ideas to a primarily listening population in contemporary mass society, and it regulated precisely those kinds of speakers (corporations and unions) that could afford to produce it.

This Article argues that conclusion is driven as much by corporations’ relationship, as

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<sup>20</sup> *Citizens United*, 558 U.S. at 364.

<sup>21</sup> See discussion *infra*, Part II, pp. 421-432.

<sup>22</sup> *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (explaining that “virtually every means of communicating ideas in today’s mass society requires the expenditure of money . . . . The electorate’s increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.”); *c.f.* *United States v. Cong. of Indus. Orgs.*, 335 U.S. 106, 146 (1948) (Rutledge, J., concurring) (“Unions can act and speak today only by spending money, as indeed is true of nearly every organization and even of individuals if their action is to be effective.”).

<sup>23</sup> *Buckley*, like *Citizens United*, brought outside groups more fully into American politics than ever before; see *infra*, Part II.C, pp. 427-432.

<sup>24</sup> *Buckley*, 424 U.S. at 51.

<sup>25</sup> *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943); see also *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976) (“[T]he protection afforded is to the communication, to its source and to its recipients both.”); *Constitutional Law*, 60 VA. L. REV. 1490, 1491 (1974) (describing the *Va. Pharmacy* decision and noting, “[t]he first amendment ‘right to know’ asserted by the plaintiffs is a relatively recent development.”).

<sup>26</sup> *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 390 (1969).

aggregators of capital, to the changes in communication brought about by new technology as it is about their relationship to the Constitution. Reviewing a series of much earlier cases concerning railroad corporations, it shows that relationship, too, has origins far older than *Citizens United*. Precisely the same relationship between corporations and capital drove the Supreme Court to alter the way it determined the jurisdiction of corporations under Article III in response to new technologies of movement during the nineteenth century.<sup>27</sup>

With its historical arc and interdisciplinary lens, the Article is able to reframe our recent debate over “corporate personhood” as not just about technologies of mass communication and “SuperPACs” in the twenty-first century, but about the role of collective activity in a society undergoing modernization more broadly. Thus the Article links cases across doctrinal categories to a larger sociological phenomenon: the rise of organizations as a dominant form of social and economic order in the industrial and post-industrial United States. It thereby reconciles what seem at first blush to be two disparate things—the “oldness” of corporate personhood and the “newness” of rulings like *Citizens United*—by reading together two strains of social theory, also one old and one new. First, it notices that the rise of organizations in modern societies, which thinkers like Max Weber began to investigate at the turn of the last century, runs in parallel to the rise in constitutional disputes concerning their freedom of action.<sup>28</sup> Next, drawing perspectives from the field of science, technology, and society studies, it notices that judicial views about technology are instrumental to the legal reasoning in key cases, but are greatly overshadowed by the “rights talk” within them. What results is a conflation of reasoning about technology and reasoning about rights that has placed organizations squarely within the countermajoritarian protection of our federal courts.<sup>29</sup>

This Article untangles that reasoning. Its central argument is that a complex mix of “technologies”—new jurisprudence, new organizational forms, and new technology—has driven contemporary corporations into a more full form of “shifted personhood” under the Constitution than these organizations possessed during the nineteenth century.<sup>30</sup> It has *shifted* because in the

<sup>27</sup> See discussion *infra* Part I, pp. 407-421.

<sup>28</sup> See, e.g., MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 337 (Talcott Parsons ed., A.M. Henderson trans., 1947). Early twentieth-century sociologist Max Weber noted the emergence of organizations across almost all sectors of human activity in the highly populous and technological societies of the twentieth century, describing the “development of the modern form of the organization of corporate groups in all fields” regardless of differences in the type of political economy. *Id.* He observed that organizations were taking center stage in industrial societies not only in business, but also in “church and state, of armies, political parties . . . organizations to promote all kinds of causes, private associations, clubs, and many others.” *Id.*

<sup>29</sup> Probably the most obvious explanation for the conflation of reasoning about technology with reasoning about rights is that it serves institutional values within law as a profession (however this does not exculpate us within academic legal thought for missing the role of technology in these decisions). Law and society scholars describe the function of the kind of legal formalism that shades the technological reasoning in the cases that follow as allowing the elaboration of systems of logically ordered and conceptually coherent doctrines on which lawyers can make predictions about the outcomes of legal arguments. Carroll Seron & Susan S. Silbey, *Profession, Science, and Culture: An Emergent Canon of Law and Society Research*, in THE BLACKWELL COMPANION TO LAW AND SOCIETY 30-60, 33 n.2 (Austin Sarat ed., 2004).

<sup>30</sup> See, e.g., *Dartmouth Coll.*, 17 U.S. at 543 (“Being the mere creature of law, [a corporation] possesses only those properties which the charter of its creation confers upon it . . . .”); *Paul v. Virginia*, 75 U.S. (1 Wall) 168, 177 (1868) (“[Corporations are] artificial persons created by the legislature, and possessing only those attributes which the legislature has prescribed. . . .”), *overruled by United States v. Se. Underwriters Ass’n. et al.*, 322 U.S. 533 (1944); as discussed *infra*, Part I, pp. 407-421.

Court's own language corporate rights originate from the human beings who are intrinsically endowed with them.<sup>31</sup> Thus Justice Scalia, concurring with the majority in *Citizens United*, described a corporation as “speak[ing] on behalf of the human beings who have formed that association;”<sup>32</sup> and, Justice Alito wrote for the majority in *Hobby Lobby* that protecting the religious free-exercise rights of corporations “protects the liberty of the humans who own and control those companies.”<sup>33</sup>

We face important questions concerning technology and social ordering in our age. This Article shows how the Supreme Court has answered some of those questions in its jurisprudence concerning the constitutional rights of organizations. While it has reflected a well-documented shift in the United States towards an “organizational society,”<sup>34</sup> this activity raises two critical issues: first, regarding the institutional capacity of courts versus legislatures to reason about the technologies that enable the exercise of particular freedoms of action by organizations; and second, regarding the reversability of social orders based on such reasoning when they are set into motion by countermajoritarian bodies versus popularly-accountable ones.

### I. BEFORE CITIZENS UNITED

In law during most of the nineteenth century, preindustrial economic conditions underwrote a focus on protecting individual freedom of action. Preindustrialism's distinctive credo was not a belief in organizations, but a “belief in the effectiveness of individual effort”<sup>35</sup> and a conviction in “the dignity of labor and the moral worth of those who worked.”<sup>36</sup> The corporate form was but one among many legal tools for individuals to advance their aims; the partnership was much more widely used. During the first half of the nineteenth century, the Supreme Court recognized corporate rights to hold and transfer property,<sup>37</sup> to make contracts,<sup>38</sup> and to sue and be sued,<sup>39</sup> yet it continued to hew to a view, articulated by James Madison in a

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<sup>31</sup> The Framers absorbed an understanding of the Magna Carta (1215) as a declaration of natural rights from the theories of John Locke, who reasoned in his *Second Treatise of Civil Government* that individuals possessed rights in a “state of nature,” and carried those rights into the social compact out of which the state emerged. See PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 25, 147, 152 (5th ed., 2006).

<sup>32</sup> *Citizens United* at 392 n.7 (2010) (Scalia, J., concurring).

<sup>33</sup> *Burwell v. Hobby Lobby Stores, No. 13-354*, slip op. at 18 (U.S. June 30, 2014).

<sup>34</sup> <sup>34</sup> I do not know the origin of the term “organizational society,” but have traced an early significant use to Kenneth Thompson, *The organizational society*, in CONTROL AND IDEOLOGY IN ORGANIZATIONS 3 (Graeme Salaman & Kenneth Thompson eds., 1980). The phenomena is discussed at length in Part I.C., *infra*, pp. 416-421.

<sup>35</sup> THOMAS C. COCHRAN, BUSINESS IN AMERICAN LIFE: A HISTORY 170 (1972).

<sup>36</sup> DANIEL T. RODGERS, THE WORK ETHIC IN INDUSTRIAL AMERICA, 1850-1920, at 6 (2d ed. 2014). Of the era's prominent “works on work,” Benjamin Franklin's biography and “Poor Richard” aphorisms are best known for emphasizing individual occupation as both the principal source of happiness and the foundation of national greatness. See, e.g., BENJAMIN FRANKLIN, POOR RICHARD: THE ALMANACKS FOR THE YEARS 1733-1758 (Bonanza Books 1979) (1739) (offering practical advice from business and scientific perspectives).

<sup>37</sup> *Dartmouth Coll.*, 17 U.S. at 526.

<sup>38</sup> *Bank of Augusta v. Earle*, 38 U.S. (1 Pet.) 519, 526 (1839).

<sup>39</sup> *Louisville, Cincinnati & Charleston R.R. v. Letson*, 43 U.S. (2 How.) 497, 497 (1844).

1791 speech before Congress, that corporations received “rights and attributes” from government that, unlike a natural person’s, “could not otherwise be claimed.”<sup>40</sup>

At the beginning of the twentieth century, however, the technological transformations of industrialism channeled most human activity into new modern organizational forms to meet the needs of large-scale producers. Corporations came to dominate the economic sector,<sup>41</sup> and as the century wore on, similar types of organizations arose in government (with the rise of the administrative state),<sup>42</sup> in advocacy (with the emergence of nonprofit and nongovernmental organizations),<sup>43</sup> in work (with the formation of unions and professional associations),<sup>44</sup> and in leisure (with the rise of mass membership organizations).<sup>45</sup> Society at large thus became increasingly “organizational” during the twentieth century.<sup>46</sup>

In parallel, the Supreme Court’s view of corporations began to shift. By the end of the twentieth century, it would describe James Madison’s view that corporations, “as creatures of the State,”<sup>47</sup> had only those rights granted to them by it, as “an extreme position.”<sup>48</sup> By the early twenty-first century, the Court would signal that organizations possessed something closer to the personal liberty of individual citizens. This section covers the nineteenth century portion of that evolution, looking in particular at the impact of the earliest corporations on the legal doctrine of jurisdiction.

#### *A. Corporate Personhood is Not New, It’s Old*

From the nature of things, the artificial person called a corporation, must be created, before it can be capable of taking any thing.<sup>49</sup>

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<sup>40</sup> JAMES MADISON, Speech in Congress Opposing the National Bank (Feb. 2, 1791), in WRITINGS 480, 487 (Jack N. Rakove ed., 1999). Compare the debate conducted during the drafting and ratification of the 1787 Constitution, concerning whether adding a Bill of Rights to the Constitution risked suggesting, wrongly, that government had *granted* them. THE FEDERALIST NO. 84, at 515 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

<sup>41</sup> See generally ALFRED D. CHANDLER, JR., THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS (1977) (arguing that management supplanted market forces as the most influential factor in the economy).

<sup>42</sup> See JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 7 (1938).

<sup>43</sup> See LESTER M. SALAMON, PARTNERS IN PUBLIC SERVICE: GOVERNMENT-NONPROFIT RELATIONS IN THE MODERN WELFARE STATE 243 (1995).

<sup>44</sup> FRANCIS FUKUYAMA, THE GREAT DISRUPTION: HUMAN NATURE AND THE RECONSTITUTION OF SOCIAL ORDER 54 (1999) (counting 201,000 nonprofit organizations, unions, groups, and clubs in the U.S. in 1949, and 1.14 million nonprofit organizations in 1989).

<sup>45</sup> See ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 59, 63 (2001).

<sup>46</sup> See Thompson, *supra* note 34.

<sup>47</sup> JAMES MADISON, Speech in Congress Opposing the National Bank (Feb. 2, 1791), in WRITINGS 480, 487 (Jack N. Rakove ed., 1999).

<sup>48</sup> First Nat’l Bank of Boston v. Bellotti, 435 U.S. 765, 778 n.14 (1978).

<sup>49</sup> *Dartmouth Coll.*, 17 U.S. 518, 575 (1819) (Story, J., concurring).



“Corporate personhood” is not a modern concept but a centuries-old legal fiction designed to free economic actors from the inefficiencies of personal mortality and liability in their business transactions.<sup>50</sup> *Dartmouth College v. Woodward* illustrates this principle.<sup>51</sup> Established in 1769, Dartmouth College was set up as a private educational institution to be managed by an incorporated board of trustees. After the Revolutionary War, the legislature of New Hampshire passed an act converting the college into a quasi-public institution to be overseen by appointees of the governor.<sup>52</sup> The board of trustees sued, claiming that New Hampshire had violated its rights as an incorporated organization.<sup>53</sup>

The case came before the U.S. Supreme Court in 1819.<sup>54</sup> Chief Justice John Marshall, whose legal reasoning greatly dominated the Court’s formative early decades, wrote the opinion.<sup>55</sup> He began by defining a corporation:

A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of the 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>56</sup>

Among the most important of these properties was “immortality, and, if the expression may be allowed, individuality.”<sup>57</sup> Marshall explained that these properties allow “a perpetual succession of many persons” to be “considered as the same” and to “act as a single individual.”<sup>58</sup>

This legal fiction served pragmatic ends. It allowed “a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand.”<sup>59</sup> The need for “perpetual conveyances” was due to the mortality of human beings, which required the transfer of their property upon death through legal instruments. The corporate form resolved this difficulty by conveying a kind of “immortal” personhood on individuals associating together in a business form that would indefinitely survive them. Justice Marshall noted that “[i]t is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities, that

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<sup>50</sup> See generally Pauline Maier, *The Revolutionary Origins of the American Corporation*, 50 WM. & MARY Q. 3D 51 (1993) (discussing early history of the American corporation).

<sup>51</sup> *Dartmouth Coll.*, 17 U.S. at 526.

<sup>52</sup> *Id.* at 526, 585-586.

<sup>53</sup> *Id.* at 518.

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

<sup>55</sup> John Marshall served as Chief Justice from 1801–1835. See *John Marshall Biography*, BIOGRAPHY.COM, <http://www.biography.com/people/john-marshall-9400148> (last visited Jun. 13, 2015) (noting that John Marshall was “largely responsible for establishing the Supreme Court’s role in federal government”).

<sup>56</sup> *Dartmouth Coll.*, 17 U.S. at 543. Justice Story, concurring in the judgment, gives a fuller but analogous definition. *Id.* at 561 (Story, J., concurring).

<sup>57</sup> *Id.* at 543.

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

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

corporations were invented, and are in use.”<sup>60</sup>

However, incorporation gave to an organization “not mere naked powers . . . but powers coupled with an interest.”<sup>61</sup> This comported with nineteenth-century metaphysics, which was described as a uniquely *human* trait the capacity to pursue goals beyond their utilitarian value.<sup>62</sup> With no existence apart from its ends, therefore, the corporation was simply a utilitarian tool, “created by law, for the purpose of being employed by . . . individuals.”<sup>63</sup> *Dartmouth College* backstopped this conclusion with familiar nineteenth century reasoning about the obligation of contracts—not with a theory about the corporation as a rights possessing entity, a theory the Court would reach by the end of the century.<sup>64</sup>

*McCulloch v. Maryland*, the better-known Supreme Court case of that year, also concerned the nature of incorporated organizations.<sup>65</sup> During the Jackson administration, Congress had incorporated a national bank to aid in the collection of taxes, the administration of public finance, and the repayment of Revolutionary War debt.<sup>66</sup> The question of the bank’s constitutionality arose. Finding it well within the scope of the Necessary and Proper Clause, Justice Marshall emphasized its essentially utilitarian nature, writing in *McCulloch* that incorporation was only “a means by which other objects are accomplished . . . never used for its own sake, but for the purpose of effecting something else.”<sup>67</sup> Marshall analogized, “No city was ever built with the sole object of being incorporated, but is incorporated as affording the best means of being well governed.”<sup>68</sup> Regarding Congress’ lack of express power to incorporate a bank under the Constitution, Marshall wrote, “being considered merely as a means, to be employed only for the purpose of carrying into execution the given powers, there could be no motive for particularly mentioning it.”<sup>69</sup> Thus, it was not fatal that the word “incorporation” did not appear in the text.

The Supreme Court continued to emphasize that a corporation was only “a person, for certain purposes in contemplation of law” through the middle of the nineteenth century.<sup>70</sup> In the

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

<sup>61</sup> *Id.* at 580 (Story, J., concurring).

<sup>62</sup> See, e.g., IMMANUEL KANT, *THE METAPHYSICS OF MORALS* (Mary Gregor trans., Cambridge University Press 2d ed. 1996) (1797).

<sup>63</sup> *Dartmouth Coll.*, 17 U.S. at 544.

<sup>64</sup> See *id.* at 548 (“This is plainly a contract to which the donors, the trustees and the crown, (to whose rights and obligations New-Hampshire succeeds,) were the original parties.”); *id.* at 553 (“[The college’s founders] contracted for a system, which should, so far as human foresight can provide, retain forever the government of the literary institution they had formed, in the hands of persons approved by themselves.”); *id.* at 551-52 (“The opinion of the court, after mature deliberation, is, that this is a contract, the obligation of which cannot be impaired, without violating the constitution of the United States.”).

<sup>65</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

<sup>66</sup> BREST, *supra* note 31, at 28, (citing BRAY HAMMOND, *BANKS AND POLITICS IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR* 114-15 (1957)).

<sup>67</sup> *McCulloch*, 17 U.S. at 476.

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

<sup>69</sup> *Id.* at 482.

<sup>70</sup> *Bank of Augusta v. Earle*, 38 US (13 Pet.) 519, 588 (1839).

1839 case of *Bank of Augusta v. Earle*, the Court held that a corporation could make a contract enforceable in a state other than the one in which it was incorporated because the purpose of a corporation was to carry out economic transactions.<sup>71</sup> These economic freedoms, however, did not entitle a corporation to the broader privileges of the body politic. Almost thirty years later, in *Paul v. Virginia*, the Court excluded corporations from the privileges and immunities of Article IV.<sup>72</sup> It emphasized that corporate rights were limited other than “where contracts or rights of property are to be enforced.”<sup>73</sup> Therefore, the privileges and immunities of citizens did not extend to corporations, because the term *citizen* applied “only to natural persons, members of the body politic, owing allegiance to the State, not to artificial persons created by the legislature, and possessing only those attributes which the legislature has prescribed.”<sup>74</sup>

As incorporated organizations began to dominate the economies of industrializing societies during the second half of the nineteenth century, however, this conception of corporations as the tools of individuals—not “entities” in their own right—would shift.

### *B. When the Railroads Changed Jurisdiction*

The corporation, in short, was the most powerful and prominent example of the emergence of non-individualistic or, if you will, collectivist legal institutions [during the nineteenth century.]<sup>75</sup>

In his study of how the “visible hand” of managerial capitalism overtook what Adam Smith famously described as the “invisible hand” of market forces, historian Alfred Chandler noted that during most of the nineteenth century “the volume of economic activity was not yet large enough to make administrative coordination more productive and, therefore, more profitable than market coordination.”<sup>76</sup> The resulting absence of large corporations in the United States provided a cultural underlay for the Supreme Court’s nineteenth century description of them as “invisible, intangible, and existing only in contemplation of law.”<sup>77</sup>

Most nineteenth century business organizations were local, familial enterprises: if they assumed a legal form at all, “it was that of a partnership.”<sup>78</sup> Unlike a corporation, a partnership existed only as long as its founders lived and, when not self-financed, relied on a local credit

<sup>71</sup> *Id.* at 588-89

<sup>72</sup> *Paul v. Virginia*, 75 U.S. (1 Wall.) 168, 177 (1868), *overruled by* *United States v. Se. Underwriters Ass’n. et al.*, 322 U.S. 533, 543 (1944). The case concerned a Virginia law requiring agents of insurance companies not incorporated in the state to obtain a license and deposit a large money bond to transact business there. *Id.* at 168. An agent of several insurers argued that the law violated the Privileges and Immunities Clause by treating his corporate employer differently simply because it was incorporated in New York. *Id.* at 169-70.

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

<sup>74</sup> *Paul*, 75 U.S. at 177.

<sup>75</sup> MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY*, at 72 (1992).

<sup>76</sup> CHANDLER, *supra* note 41, at 485.

<sup>77</sup> *Dartmouth Coll.*, 17 U.S. at 543.

<sup>78</sup> CHANDLER, *supra* note 41, at 8, 50.

system that used individual instruments like “the promissory note and the bill of exchange.”<sup>79</sup> Goods were made slowly and moved slowly through the economy; there was little need for large-scale distribution other than in imperial overseas trading.<sup>80</sup> Telegraph and radio were in early development, and there were no mass media organizations of which to speak beyond newspapers. The large corporate establishment remained a rarity: rather, “the home, farm, and workshop still ruled the early nineteenth-century economy.”<sup>81</sup>

At the end of the eighteenth-seventies, however, technological development and fossil fuel extraction inaugurated industrialism by freeing production and distribution from the limits of human, animal, wind, and waterpower.<sup>82</sup> Consequently, average daily business activity began to exceed what small, personally owned and managed enterprises could easily handle.<sup>83</sup> Successful adaptors were those businesses that could “vertically integrate” production and distribution under one managerial apparatus.<sup>84</sup> Incorporation was particularly suited to this type of organizational growth: it could tie multiple business operations—purchasing, production, marketing, and distribution—together under one corporate umbrella and meet expanding capital needs through the sale of stock.<sup>85</sup> The small firm of the nineteenth century was unable to do these tasks with any economy of scale; and, by the beginning of the twentieth century, the partnership form of organization was obsolete. The “integrated industrial enterprise,” in comparison, had “become the most powerful institution in American business and, indeed, in the entire American economy.”<sup>86</sup>

Railroad firms were the prototypes of these modern complex organizations. They arose earlier than in industrial production because of the particular capital demands of infrastructure expansion by rail.<sup>87</sup> Although government bonding had facilitated the creation of a canal system among the inland waterways of the east coast during the early nineteenth century, this manner of financing infrastructure fell far short of the capital outlays needed to build a national network of railroads.<sup>88</sup> Railroads had to be financed in New York City through the sale of corporate bonds and stock.<sup>89</sup> By 1859, investment in the securities of railroad corporations exceeded \$1,100 million, and by the start of 1870 there were 70,000 miles of track in operation in the United States; by 1900, close to 200,000 miles.<sup>90</sup>

<sup>79</sup> *Id.* at 22.

<sup>80</sup> *Id.* at 17.

<sup>81</sup> RODGERS, *supra* note 36, at 20.

<sup>82</sup> CHANDLER, *supra* note 41, at 17, 285-86, 485, 76 (discussing the opening of the anthracite coal fields in eastern Pennsylvania).

<sup>83</sup> *See* CHANDLER, *supra* note 41, at 348, 363-64.

<sup>84</sup> *See id.*

<sup>85</sup> *Id.* at 1, 285-86.

<sup>86</sup> *Id.* at 286.

<sup>87</sup> CHANDLER, *supra* note 41, at 81-121 (discussing the rise of the railroad).

<sup>88</sup> The total expenditures for canals between 1815 and 1860 was \$188 million, of which seventy-three percent was supplied by state and municipal bonds; the New York Central alone, a regional railroad, had over \$28 million invested in road and equipment by 1855. GALAMBOS, *supra* note 1, at 6; CHANDLER, *supra* note 41, at 90.

<sup>89</sup> CHANDLER, *supra* note 41, at 91.

<sup>90</sup> *Id.* at 88-90.

The rise of the railroads threw into disarray a prevailing legal paradigm for determining where corporations could sue and be sued. That situation is illustrated by an early nineteenth century case, *Bank of the United States v. Deveaux*.<sup>91</sup> Deveaux, a lawyer acting with Georgia officials, forcibly collected two thousand dollars in payment of state taxes from a branch of the incorporated national bank located in Savannah.<sup>92</sup> The bank sued for damages in federal court despite Deveaux's crimes of trespass and theft being matters of state law. Deveaux responded that the bank was not a "citizen" within the meaning of Article III of the Constitution and was thereby not entitled to diversity jurisdiction of the federal courts.<sup>93</sup>

Justice Marshall, again writing for the Court, reasoned that an organization "indeed, cannot be an alien or a citizen; but the persons whom it represents may be the one or the other."<sup>94</sup> This directed the jurisdictional inquiry to the residences of a corporation's shareholders "as a subject which the court can inspect."<sup>95</sup> If the shareholders were foreign aliens or citizens of a different state from the opposing party in a suit by or against a corporation in which they held shares, the controversy came "within the spirit and terms of the jurisdiction conferred" by Article III.<sup>96</sup> If they were citizens of the same state, it did not. Since no shareholder of the national bank resided in Georgia, Justice Marshall found that the bank was diverse to Deveaux and its suit against him could proceed in federal court.<sup>97</sup>

Railroad corporations, however, substantially problematized this method for determining jurisdiction. They operated thousands of miles of track over the boundaries of several states and, to raise capital for this vast infrastructure, sold stock on national exchanges, scattering their shareholders across the nation. Under *Deveaux*, in suits concerning a corporation and a resident of a state, federal diversity jurisdiction was destroyed in any state in which a single shareholder resided. Thus, insofar as railroad development was contingent on litigation outcomes, as the land practices that railroad corporations employed suggest,<sup>98</sup> *Deveaux* consigned the fate of these organizations to precisely those state courts unlikely to favor a national imperative for westward expansion over their own state interests.

As the railroads became more prominent, however, the Supreme Court began to link these national interests to its reasoning about organizational freedom of action. In 1839, it described railroad corporations as advancing "[o]ne of the most important objects and interests for

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<sup>91</sup> *Bank of U.S. v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809), *overruled by* *Louisville, Cincinnati, & Charleston R.R. v. Letson*, 43 U.S. (1 How.) 497 (1844).

<sup>92</sup> *Deveaux*, 9 U.S. at 62.

<sup>93</sup> Article III provides that the Supreme Court shall have jurisdiction over disputes arising between citizens of different states. U.S. CONST. art. III, § 2.

<sup>94</sup> *Deveaux*, 9 U.S. at 87.

<sup>95</sup> *Id.* at 90.

<sup>96</sup> *Id.* at 87-88.

<sup>97</sup> *Id.* at 91-92.

<sup>98</sup> *See, e.g.,* JAMES DABNEY MCCABE, HISTORY OF THE GRANGE MOVEMENT; or, THE FARMER'S WAR AGAINST MONOPOLIES: BEING A FULL AND AUTHENTIC ACCOUNT OF THE STRUGGLES OF THE AMERICAN FARMERS AGAINST THE EXTORTIONS OF THE RAILROAD COMPANIES 132-65 (1873) (giving an account of the ability of "railroad men" to capture and use the court system to their benefit).

the preservation of the Union.”<sup>99</sup> It explained that “associated capital” was “essentially necessary” for infrastructure development in the United States, which lacked the “large individual accumulations” found in Europe consequent to longstanding generational wealth.<sup>100</sup> Under this reasoning, the Court held bills of exchange drawn by railroad corporations to be contracts enforceable in any state.<sup>101</sup> To do otherwise, it explained, would be “injurious . . . to the operations of commerce, and the creation and improvement of the facilities of intercourse.”<sup>102</sup> Thus the Supreme Court linked a technological imperative for infrastructure development to its legal reasoning about the scope of railroad corporations’ freedom of action in a westward-expanding United States. We will see a similar type of linkage with technology in its jurisprudence about organizational freedom of political speech in the twentieth century.<sup>103</sup>

In 1844, the Court overturned *Deveaux*, the railroad-obstructive case, in *Louisville, Cincinnati, and Charleston Railroad Company v. Letson*, which articulated what scholars would later identify as a new “entity theory” of the corporation.<sup>104</sup> The *Letson* Court rejected the view that a corporation was a mere legal fiction—artificial, intangible, and existing only in contemplation of law—stating instead that a corporation was “capable of being treated as a citizen of [a] state, as much as a natural person,” and thus its residence for jurisdictional purposes could be determined by simply looking at the state of its incorporation.<sup>105</sup> The law of jurisdiction, the Court admonished, must “comprehend citizens universally, in all the relations of trade,” and not only in the increasingly obsolete forms of the earlier part of the century: “such relations of business as may arise from their *individual* or *partnership* transactions.”<sup>106</sup> Later, in *Marshall v. Baltimore and Ohio Railroad Company*, the Court reaffirmed that “a citizen who has made a contract, and has a ‘controversy’ with a corporation . . . [does] not deal with a mere metaphysical abstraction” akin to that described by Justice Marshall in the earlier part of the century.<sup>107</sup>

The entity theory was not without its detractors, however. One in particular keenly identified a technological imperative as driving the theory forward on the Court. A Virginia lawyer nominated to the Court by Martin Van Buren,<sup>108</sup> Justice Daniel vigorously criticized *Letson* in *Marshall v. Baltimore and Ohio Railroad Company*, ominously warning that it would create a “new class of citizen corporations” and, by a “rite of judicial baptism,” set them free from “the thralldom of constitutional restriction.”<sup>109</sup> Daniel associated the Court’s shift towards the

<sup>99</sup> *Bank of Augusta*, 38 U.S. (1 Pet.) at 526.

<sup>100</sup> *Id.* at 524.

<sup>101</sup> *Id.* at 525-26.

<sup>102</sup> *Id.* at 524.

<sup>103</sup> See *infra* Part II, pp. 421-432.

<sup>104</sup> *Louisville, Cincinnati, & Charleston R.R. v. Letson*, 43 U.S. (1 How.) 497 (1844). See HORWITZ, *supra* note 9, at 71-72.

<sup>105</sup> *Letson*, 43 U.S. at 558.

<sup>106</sup> *Id.* at 553 (emphasis added).

<sup>107</sup> 57 U.S. 314, 327 (1853); compare *Dartmouth Coll.*, 17 U.S. at 543.

<sup>108</sup> *Biographies of the Robes: Peter Vivian Daniel*, PBS.ORG, [http://www.pbs.org/wnet/supremecourt/personality/robes\\_daniel.html](http://www.pbs.org/wnet/supremecourt/personality/robes_daniel.html) (last visited Jun. 13, 2015).

<sup>109</sup> *Marshall v. Baltimore & Ohio R.R.*, 57 U.S. (1 How.) 314, 343-44 (1853) (Daniel, J., dissenting). Daniel

entity theory with the technological drive towards railroad expansion. *Deveaux*, in his view, was therefore not rejected for being constitutionally flawed, but for being “wholly behind the sagacity and requirements of the age.”<sup>110</sup> Thus where the majority of the Court had before emphasized the importance of corporations for “the creation and improvement of the facilities of [commercial] intercourse,”<sup>111</sup> Daniel charged it with placing a “new morality” at the center of its jurisprudence: one by which it was willing to modify “the mandates or axioms of the Constitution, when found obstructing the way to power” in a new technological age.<sup>112</sup>

Thus the oft-cited 1886 case “establishing” corporate personhood, *Santa Clara v. Southern Pacific Railroad*, is but a mile-marker in the history of judicial accommodation of new forms of organization within constitutional jurisprudence, because the mid-century railroad cases well-preceded *Santa Clara* in establishing the entity theory.<sup>113</sup> In *Santa Clara*, the Supreme Court would therefore simply direct a functionary (its court reporter) to dispense with the challenge that railroad corporations were not entitled to constitutional guarantees aimed to benefit former slaves after the Civil War. The reporter dutifully wrote:

The court does not wish to hear argument on the question of whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to corporations. We are all of the opinion that it does.<sup>114</sup>

*Letson* marks an elemental phase in what this Article describes as “shifted personhood” between organizations and individuals within the constitutional order: *Santa Clara* is merely evidence the shift had already occurred. This is apparent in other cases of that era, as in the 1891 transit case *Crutcher v. Kentucky*, in which the Supreme Court held that “the accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving [the incorporators] of. . . [a] right.”<sup>115</sup> Although it was speaking not of the individuals but of the organization, the Court noted that “[t]o carry on interstate commerce, is not

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wrote that *Letson*’s holding carried the word *citizen* “beyond either its philological, technical, political, or vulgar acceptation,” when there were reasonable alternatives, such as viewing a corporation as the equivalent of a legal alien: endowed with certain rights but constrained in others. *Id.* at 339-40.

<sup>110</sup> *Id.* at 346 (Daniel, J., dissenting).

<sup>111</sup> *Bank of Augusta*, 38 U.S. at 524.

<sup>112</sup> *Marshall*, 57 U.S. at 346.

<sup>113</sup> *Santa Clara v. S. Pac. R.R.*, 118 U.S. 394 (1886).

<sup>114</sup> *Santa Clara*, 118 U.S. at 396. The case concerned the Atlantic & Pacific Railroad, which was incorporated in 1866 by an act of Congress to “construct and maintain, by certain designated routes, a continuous railroad and telegraph line from Springfield, Missouri, to the Pacific,” for the purpose of “securing the safe and speedy transportation of mails, troops, munitions of war, and public stores.” The Southern Pacific undertook to extend the A&P line; however, by 1875, it was indebted for large sums of money secured by a mortgage on over eleven million acres of land. It failed to pay taxes on three thousand acres located in Santa Clara County and argued that the provisions of California tax law imposed “unequal burdens” in violation of the equal protection guarantee of the Fourteenth Amendment. *Id.* at 398, 401-05, 409.

<sup>115</sup> *Crutcher v. Kentucky*, 141 U.S. 47, 54 (1891) (finding a state requirement that common carriers file proof of a certain value in capital stock when travelling through the state unconstitutional).

a franchise or a privilege granted by the state; it is a right which every citizen of the United States is entitled to exercise under the constitution and laws of the United States.”<sup>116</sup>

This kind of reasoning drives the holding concerning religious freedom a century later in *Hobby Lobby*, for example, where the Court articulated that “[w]hen rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people [the incorporators].”<sup>117</sup> Similarly, in 2010, the Court used a biological metaphor to explain *Letson*’s jurisdictional calculus, instructing litigants to look for a corporation’s “nerve center” to determine where that organization could be sued, and suggested its features are as intrinsic to it as to a living being.<sup>118</sup> The same year, the Court in *Citizens United* equated the speech rights of corporations to individuals, finding “no basis for the proposition that, in the context of political speech, the government may impose restrictions on certain disfavored speakers.”<sup>119</sup>

The only way to commensurate these statements with their holdings is by concluding that a fuller complement of the rights of personhood has “shifted” from individuals to organizations since the time that Alexander Hamilton described corporations’ rights as limited to only those granted by the state.<sup>120</sup> It is the widening of what has shifted, from contractual freedoms (the subject of the nineteenth century cases), to freedoms of conscience, such as of political expression (in *Citizens United*) and religious free exercise (in *Hobby Lobby*), that would make the relatively old and established concept of “corporate personhood” reappear as something new and controversial in the early twenty-first century.

### C. The Supreme Court, the Organizational Society, and the Technological Imperative

By the end of the twentieth century, nearly six million corporations had come into existence in the United States.<sup>121</sup> These corporations brought with them managerial capitalism: they employed hundreds and even thousands of middle and top managers who supervised the work of dozens and often hundreds of operating units, consisting of tens and often hundreds of thousands of employees.<sup>122</sup> These employees had largely no stake in the organization other than their wages, and, by that definition, they were easily replaceable.<sup>123</sup> This was one of the facts about industrialism that would bring about an organizational transformation of government in the United States during the twentieth century, rivaling that which had occurred in the private sector.

<sup>116</sup> *Id.*

<sup>117</sup> *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751, 2769 (2014).

<sup>118</sup> *Hertz Corp. v. Friend*, 559 U.S. 77, 93 (2010) (concluding that “in practice it should normally be the place where the corporation maintains its headquarters—provided that the headquarters is the actual center of direction, control, and coordination, *i.e.*, the ‘nerve center’”).

<sup>119</sup> *Citizens United*, 558 U.S. at 314.

<sup>120</sup> *See supra*, note 40 and associated text. For an extensive treatment of the shift from the “grant” to “entity” theory in American legal thought, *see* HORWITZ, *supra* note 75 [1870-1960 volume], at 70-76 (and particularly, Chapter 3).

<sup>121</sup> There were approximately 5.85 million corporate federal income tax filers in 2008. U.S. CENSUS BUREAU, *Statistical Abstract of the United States: 2012* 491 tbl.744 (2012).

<sup>122</sup> CHANDLER, *supra* note 41, at 1-3 (concluding that “modern business enterprise . . . employs a hierarchy of middle and top salaried managers to monitor and coordinate the work of the units under its control.”).

<sup>123</sup> *See, e.g., id.* at 8 (noting in part that “[m]en came and went. The institution and its offices remained”).



Industrialism called into question the “Jeffersonian conviction that political liberty was safe only where no man was economically beholden to another.”<sup>124</sup> While it spread employment widely, working conditions were typically egregious.<sup>125</sup> Whole industries relied on child labor.<sup>126</sup> Labor unrest produced strikes, riots, and fertile grounds for anarchism by the turn of the century; President McKinley was assassinated in 1901 in association with suppression of a workers’ strike at the American Steel and Wire Company.<sup>127</sup> Financial markets were deeply unstable and the Great Depression was among a series of major economic crises experienced in the United States after 1880.<sup>128</sup> Control of the new industrial organizations via governmental regulation of workplace safety, ages of employment, wages, hours, pensions, and speculation in the market became a central domestic policy issue in the United States during the first decades of the twentieth century.

Advocating for a new “administrative process” to regulate the market and workplace, New Deal bureaucrat James Landis argued that the Jeffersonian ideal was obsolete, due to technological modernization:

The rise of industrialism . . . brought new and difficult problems to government. A world that scarcely a hundred years ago could listen to Wordsworth’s denunciation of railroads because their building despoiled the beauty of his northern landscapes is different, very different, from one that in 1938 has to determine lanes and flight levels for air traffic.<sup>129</sup>

In place of Wordsworth’s ideals (and Jefferson’s), Landis described the emergence among the American public of a “view which conceives it to be a function of government to maintain a continuing concern with and control over the economic forces which affect the life of the community.”<sup>130</sup> Landis and other proponents of the organizational transformation of government urged that it was the only thing that could counterbalance the great power and effectiveness of the organizations that had emerged in society at large, exercising what economist John Kenneth Galbraith would later call “countervailing power.”<sup>131</sup>

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<sup>124</sup> RODGERS, *supra* note 36, at 33. Also, this is the thesis of Professor Reich’s widely-cited article. *See generally* Charles Reich, *The New Property*, 73 YALE L.J. 733 (1964).

<sup>125</sup> *See, e.g., 141 Men and Girls Die in Waist Factory Fire; Trapped High Up in Washington Place Building; Street Strewn with Bodies; Piles of Dead Inside*, N.Y. TIMES, Mar. 26, 1911, at 2 (describing the infamous Triangle Shirtwaist Factory fire).

<sup>126</sup> *See generally* American Academy of Political and Social Science, *Child Employing Industries*, in ANNALS AM. ACAD. POL. & SOC. SCI. (Vol. 35 & Supp. Mar. 1910).

<sup>127</sup> *See* GALAMBOS, *supra* note 1, at 222; MARSHALL EVERETT, COMPLETE LIFE OF WILLIAM MCKINLEY AND STORY OF HIS ASSASSINATION (1901).

<sup>128</sup> There were panics in 1873, 1893, 1903, and 1907, and depressions in 1885, 1893-97, and 1913-14. *See* HORWITZ, *supra* note 75, at 65-66; GALAMBOS, *supra* note 1, at 117, 222.

<sup>129</sup> LANDIS, *supra* note 42, at 7.

<sup>130</sup> LANDIS, *supra* note 42, at 8. Landis served as a member of the Federal Trade Commission, chairman of the Securities and Exchange Commission, and dean of Harvard Law School. *See generally* THOMAS MCCRAW, PROPHETS OF REGULATION: CHARLES FRANCIS ADAMS, LOUIS D. BRANDEIS, JAMES M. LANDIS, AND ALFRED KAHN (1984).

<sup>131</sup> JOHN KENNETH GALBRAITH, AMERICAN CAPITALISM 108-23 (1952) (describing countervailing power);

Professionally insulated from the emergent conditions of industrial working life, the Supreme Court continued to embrace *laissez faire* economic theory in its constitutional interpretation, blocking implementation of the managed society policies of the New Deal until the 1930s.<sup>132</sup> After it dropped this resistance, from 1930 to 1935, Congress built a formidable stable of administrative organizations in government to address such issues as monopolization, securities fraud, market speculation, public services, utilities, dangerous industries, and social welfare. To staff these organizations, it expanded the total workforce of the federal government by nearly two hundred percent between 1930 and 1950.<sup>133</sup> In 1946, the Administrative Procedure Act laid a statutory framework for the creation of further organizations to meet the needs of contemporary times as they arose,<sup>134</sup> and by 1970, non-defense agencies within the federal government employed almost three million people and accounted for more than one-fifth of the gross domestic product.<sup>135</sup> That year the Department of Agriculture alone employed more persons than had worked for the entire federal government in 1881.<sup>136</sup>

Yet the idea of organizational formation as a new way to power was not limited to government alone. The extensive rise of nonprofit and “nongovernmental” organizations during the twentieth century formed yet another “associational revolution” rivaling the earlier development of the nation state, in the assessment of some historians.<sup>137</sup> The formation of unions, professional associations, and other kinds of mass membership organizations for advocacy, and the widespread emergence of clubs for leisure (satirically portrayed by Sinclair Lewis in 1922’s *Babbitt*),<sup>138</sup> were twentieth-century vehicles for the progressive new middle class minted by industrialism to “fulfill its destiny through bureaucratic means.”<sup>139</sup> Later twentieth-century

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*see also* MICHAEL SANDEL, PUBLIC PHILOSOPHY: ESSAYS ON MORALITY IN POLITICS 170 (2005) (“If democracy was to survive, the concentration of economic power would have to be met by a similar concentration of political power.”).

<sup>132</sup> Compare *Lochner v. New York*, 198 U.S. 45 (1905) (invalidating New York’s regulation of maximum hours in the baking industry to sixty per week and ten per day), with *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (upholding a state minimum wage regulation for women), and *United States v. Darby*, 312 U.S. 100 (1941) (upholding the federal Fair Labor Standards Act of 1938, setting maximum working hours and minimum wages). Much has been made of Roosevelt’s “court packing” threat in the Judicial Procedures Reform Bill of 1937; however, the bill never passed for a variety of reasons that appear to have little to do with the fabled “switch in time that saved nine.” See MARIAN C. MCKENNA, FRANKLIN ROOSEVELT AND THE GREAT CONSTITUTIONAL WAR: THE COURT-PACKING CRISIS OF 1937 435-36 (2002). In particular, the Senate majority leader charged with the bill’s passage, and a likely appointee to an expanded Court, died unexpectedly. *Id.* at 505.

<sup>133</sup> COCHRAN, *supra* note 35, at 320.

<sup>134</sup> Administrative Procedure Act, Pub. L. 79-404, 60 Stat. 237 (codified as amended at 5 U.S.C. § 500 (2012)).

<sup>135</sup> GALAMBOS, *supra* note 1, at 3-4.

<sup>136</sup> *Id.* People who grew up in Washington, as I did, know that the entire administration of the federal government was once housed in the Eisenhower Executive Office Building, next to the White House. Now the grand buildings of Constitution Avenue all contain administrative agencies, as do extensive parts of Washington, and Maryland and Virginia surrounding.

<sup>137</sup> SALAMON, *supra* note 43, at 243.

<sup>138</sup> SINCLAIR LEWIS, *BABBITT* 155 (Dover Thrift ed., Dover Publications) (2003) (describes the protagonist’s “clubs and associations” as “food comfortable to his spirit”).

<sup>139</sup> ROBERT H. WIEBE, *THE SEARCH FOR ORDER, 1877-1920* 166 (Donald David ed., 1967); *see also*

scholars widely confirmed the observation of early twentieth-century sociologist Max Weber: organizations were taking center stage across all the industrializing societies of the twentieth century—not only in business, but also in “church and state, of armies, political parties . . . organizations to promote all kinds of causes, private associations, clubs, and many others.”<sup>140</sup> Empirical work showed how as these societies urbanized and became more populous,<sup>141</sup> they increasingly relied on organizations for social cohesion,<sup>142</sup> security,<sup>143</sup> governance,<sup>144</sup> and economic growth.<sup>145</sup> Historian Robert Wiebe summed up the cause of this much organizational formation as a new kind of “bureaucratic orientation”<sup>146</sup> that found organizations “peculiarly suited to the fluidity and impersonality of an urban-industrial world.”<sup>147</sup> By 1974, forty-nine of the one hundred largest economic units in the world were nations and fifty-one were international corporations,<sup>148</sup> and by the end of the twentieth century, the growth of nonprofit corporations outstripped the growth of the population in the United States.<sup>149</sup> Organization studies emerged as a whole new field of social science dedicated to the study of these new, collective actors in human society.<sup>150</sup>

Thus, between the time of *Dartmouth College* and *Citizens United*, a deep preindustrial

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PUTNAM, *supra* note 45.

<sup>140</sup> MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 337 (Talcott Parsons ed., A.M. Henderson trans., 1947).

<sup>141</sup> See LEWIS MUMFORD, THE CULTURE OF CITIES 225-26 (1938) (“In 1800, not a city in the Western World had over a million in population . . . . [B]y 1900, eleven metropolises with more than a million inhabitants had come into existence . . . . Thirty years later . . . . there were twenty-seven [such] cities.”); UNITED NATIONS POPULATION FUND, THE STATE OF WORLD POPULATION 2011 121 (2011) (reporting that an equal portion of the world’s population resided in urban and rural environments during the first decade of the twenty-first century).

<sup>142</sup> See PUTNAM, *supra* note 45, at 59-64 (2000) (describing the decline of local civic clubs and rise of mass membership organizations during the second half of the twentieth century).

<sup>143</sup> See ULRICH BECK, RISK SOCIETY: TOWARDS A NEW MODERNITY 21, 131-32 (Mike Featherstone ed., Mark Ritter trans., 1992) (describing modernity’s particular hazards and insecurities as producing specific forms of post-industrial organization).

<sup>144</sup> See LANDIS, *supra* note 42, at 14 (describing the need for a twentieth-century administrative state characterized by specialized organizations: “administrative agencies”).

<sup>145</sup> See generally CHANDLER, *supra* note 41 (describing the emergence of new organizational forms of managerial capitalism at the turn of the last century).

<sup>146</sup> See WIEBE, *supra* note 139, at 295.

<sup>147</sup> *Id.* at 145.

<sup>148</sup> TRACHTENBERG, *supra* note 2, at 5.

<sup>149</sup> FUKUYAMA, *supra* note 44, at 54 (citing a Department of Commerce survey counting 201,000 nonprofit organizations, unions, groups, and clubs in the U.S. in 1949, and 1.14 million nonprofit organizations in 1989).

<sup>150</sup> See, e.g., W. G. Astley & A. H. Van de Ven, *Central Perspectives and Debates in Organization Theory*, 28 ADMIN. SCI. Q. 2 (1983). (discussing various debates surrounding four basic views that represent different concepts of organizational theory); see also Graeme Salaman & Kenneth Thompson, *Editors’ Introduction to CONTROL AND IDEOLOGY IN ORGANIZATIONS* vii, vii (Graeme Salaman & Kenneth Thompson eds., 1980) (describing an introduction to the analysis of modern organizations and the processes of organizational control).

connection between individual activity and work, governance, advocacy, and even leisure was severed in the United States. By the end of the twentieth century, historian Louis Galambos would conclude that “[m]ost of the things that most of us do each day are either accomplished directly within this type of administrative network or are indirectly dependent upon the activities of the great modern organizations surrounding us.”<sup>151</sup> Analyzing shifts in the content of eleven special interest magazines over sixty years, Galambos reported that the new “emphasis in this value system was on organizational achievement” and success was increasingly looked upon as organizational, not as individual.<sup>152</sup> That represented a marked shift from the individualist outlook of the nineteenth century, which was organized, to the contrary, around an “optimistic belief in the effectiveness of individual effort.”<sup>153</sup>

Like the culture surrounding it, the Supreme Court solved the crisis the widespread rise of organizations posed for a constitutional jurisprudence grounded in liberal individualism, by shifting to accommodate the new organizational forms.<sup>154</sup> In the law of jurisdiction (or “in jurisdictional analysis”), this occurred during a period of mid- to late-nineteenth century American progress deeply entwined with new technologies of movement.<sup>155</sup> To determine where an incorporated organization could sue and be sued in the early nineteenth century, the Supreme Court looked to the physical location of the shareholders,<sup>156</sup> but this concept proved unworkable by mid-century with the rise of new kinds of organizations—vertically-integrated corporations—that undertook the long-range movement of people and goods across several states using technologies like the steam engine. Railroad corporations’ presence in American life was undeniably more than “artificial:” they had a tangible infrastructure of tens of thousands of miles of track, an employment of thousands, and a capitalization of millions of dollars in stock held by tens of thousands of shareholders across the nation. Basing jurisdiction on the location of these shareholders was deeply problematic for the forward progress of westward expansion, because it meant that railroads had to litigate primarily in state courts.

Incorporated organizations and railroad technology were closely aligned because of the particular need to aggregate large sums of capital to develop this kind of infrastructure. Noting the lack in the United States of large aristocratic fortunes, the Supreme Court remarked that only an antiquated view would recognize citizens only in obsolete forms like individual or partnership

<sup>151</sup> GALAMBOS, *supra* note 1, at 3.

<sup>152</sup> *Id.* at 221; *but see* J. Morgan Kousser, *Louis Galambos’s The Public Image of Big Business in America 1880-1940: A Quantitative Study in Social Change*, 63 J. AMER. HIST. 437-38 (1975) (book review) (critiquing Galambos’s methodology as “pseudo-statistical,” “impressionistic,” and underwritten by the assumption that his published sources “reflect rather than produce mass attitudes.”).

<sup>153</sup> COCHRAN, *supra* note 35, at 170.

<sup>154</sup> *See* HORWITZ, *supra* note 9, at 72 (“The corporation, in short, was the most powerful and prominent example of the emergence of non-individualistic, or if you will, collectivist legal institutions . . . . In all the Western countries, therefore, the sudden focus on theories of corporate personality was associated with a crisis of legitimacy in liberal individualism arising from the recent emergence of powerful collective institutions.”). *See generally* Bank of Augusta v. Earle, 38 U.S. (1 Pet.) 519 (1839); Louisville, Cincinnati, & Charleston R.R. v. Letson, 43 U.S. (1 How.) 497 (1844); Marshall v. Baltimore and Ohio R.R., 57 U.S. (1 How.) 314 (1853); Santa Clara v. S. Pac. R.R., 118 U.S. 394 (1886); all discussed *supra* pp. 401-420.

<sup>155</sup> For a visual illustration of this shift *see* John Gast’s artwork, *American Progress* (1872), available at <https://aras.org/sites/default/files/docs/00043AmericanProgress.pdf> (last visited Dec. 26, 2014).

<sup>156</sup> *Deveaux*, 9 U.S. at 61, discussed *supra* p. 412-416.

transactions by which they had no possibility of accumulating the capital necessary to build modern infrastructures. By 1906, it would extend this conclusion to the economy as a whole, simply stating: “Corporations are a necessary feature of modern business activity, and their aggregated capital has become the source of nearly all great enterprises.”<sup>157</sup>

Thus we see a complex relationship between technology, organizations, and law emerging in disputes about jurisdiction concerning railroad corporations. In this context, jurisprudence can prove as plastic as technological shifts. The Supreme Court solved the problem that railroads posed for jurisdiction by adopting the organizational consciousness that was emerging in the United States during industrialism in place of its earlier narrative of self-sufficient individualism. The Court determined that an incorporated organization was no longer something “immaterial” or “intangible” per John Marshall’s conception, but an entity in its own right.<sup>158</sup> This response can be understood as part of what Professor Horwitz described as a broader cultural effort to “express the reality of groups” in an increasingly populous, technological, and organizational society in during the late nineteenth and early twentieth century.<sup>159</sup>

## II. HERE COMES TELEVISION

As Thomas Kuhn found in the case of scientific revolutions, a shock to the assumptions on which an analytic paradigm is based will result in a paradigm shift to accommodate newly discovered realities once enough new facts accumulate to make prior paradigmatic explanations implausible.<sup>160</sup> This section identifies an analogous shift in law, similar to the one we have just seen concerning the railroads and jurisdiction. This shift responds to new realities for political discourse posed by an era of technologically mediated communication and the organizations that could afford to participate in it.

The emergence of mass media, and particularly television, undercut an assumption of the Founding period that individuals and the expressly named “press” of the First Amendment would function as the primary discursive units of the body politic.<sup>161</sup> This section reads a line of Supreme Court cases that respond over a half-century to the emergence of television in political discourse. These cases show how the Court came to believe that society had become dependent on television to inform its viewpoints, recognized that primarily only organizations could afford to produce mass technologically mediated speech under these conditions, and reflexively adapted the legal paradigm for constitutional protection of political expression to include them. This is analogous to its earlier adaptation of the paradigm for jurisdiction to accommodate corporations based on the Court’s perception of their necessity for infrastructure development by rail.

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<sup>157</sup> Hale v. Henkel, 201 U.S. 43, 76 (1906).

<sup>158</sup> Dartmouth Coll., 17 U.S. at 543.

<sup>159</sup> HORWITZ, *supra* note 9 [1870-1960 volume], at 101 (describing “the most powerful of these early efforts to express the reality of groups” as Ernst Freund’s *The Legal Nature of Corporations* (1897)); *see also id.*, at 71 (discussing questions regarding “the reality of groups”).

<sup>160</sup> *See generally* THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962) (arguing that scientific progress is not always a story of accumulation but rather of discovering anomalies and challenging old ways of thinking).

<sup>161</sup> U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech, or of the press.”).

To historically associate the modern corporate form of ownership with the technological development of mass communication, we must begin with the problem of the early industrial producers. The development of continuous-process machinery in the 1880s exponentially increased the speed and quantity of production in nearly every industry.<sup>162</sup> The absence of a correlate culture of mass consumption, however, meant that producers' problem was not one of output, but of sales.<sup>163</sup> The U.S. workforce was largely mass employed and wage-earning by the early twentieth century, yet it needed an education in how to spend its newly discretionary income on ready-made goods. It received this education from advertising. Radio, and later, television, enabled sellers to reach consumers in their homes without ever having to send a salesman to knock on their doors.<sup>164</sup>

Television's uptake was particularly rapid. In 1945, there were seven thousand television sets in U.S. homes, by 1952, twenty million sets, and before the close of the century, at least one television in ninety-eight percent of homes and two or more in greater than half.<sup>165</sup> In comparison to nineteenth-century mechanization, therefore, which made its primary impact on the workplace, twentieth-century mass media was culturally much more impactful on the activities of entertainment, leisure, and consumption at home.

For this reason, political persuaders quickly adopted television.<sup>166</sup> In 1952, Dwight Eisenhower became the first presidential contender to air political advertisements on television. *New Yorker* writer George Trow described the effect of Eisenhower's unprecedented "electronic campaign," stating that "[t]he power shifted . . . from General Eisenhower to someone called Ike, who embodied certain aspects of General Eisenhower and certain aspects of affection for General Eisenhower."<sup>167</sup> Presidential candidate Adlai Stevenson, who refused to appear on television to "merchandise" himself "like breakfast cereal," described it as "the ultimate indignity to the democratic process."<sup>168</sup> Nonetheless, after being defeated by Eisenhower in 1952, Stevenson went

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<sup>162</sup> CHANDLER, *supra* note 41, at 289 (exploring the "most dramatic examples of mass production and mass distribution").

<sup>163</sup> *Id.* at 335 (arguing that output sourcing became a challenge and citing an industry executive who stated that, "[k]nowing that we had something that the consumer wanted, we had to advise the consumer of its existence. We did this by extensive advertising.").

<sup>164</sup> Of the pioneers of early twentieth century industrial production and advertising, many maintain the status of "household names" today, such as Heinz, Campbell, Ivory, and Pillsbury. *Id.* at 297, 335 (listing well-known brands in the rise of public consumption of cigarettes, matches, flour, breakfast cereals, canned milk and soup).

<sup>165</sup> The uptake of television has not slowed. In 1996, the eighteen-inch digital satellite dish became the most sold electronic device in history after the VCR. *History of Television*, HISTORY OF FILM, TELEVISION, & VIDEO, <http://www.high-techproductions.com/historyoftelevision.htm> (last visited Jun. 13, 2015).

<sup>166</sup> See DAN NIMMO, *THE POLITICAL PERSUADERS: THE TECHNIQUES OF MODERN ELECTION CAMPAIGNS* 137 (1970) (arguing that despite use of other forms of media, "it is television that distinguishes modern campaign communication" from prior campaigns); See generally JAY G. BLUMLER & DENIS MCQUAIL, *TELEVISION IN POLITICS: ITS USES AND INFLUENCES* (1968) (exploring the role of television in elections and political campaigns).

<sup>167</sup> GEORGE TROW, *WITHIN THE CONTEXT OF NO CONTEXT* 46 (1981).

<sup>168</sup> Adlai Stevenson, U.S. Presidential Candidate, Speech at the Democratic National Convention (Aug. 18, 1956). Stevenson's "breakfast cereal" prediction was accurate. See Jeff Zeleny, *The Up-Close-and-Personal Candidate? A Thing of the Past*, N.Y. TIMES, Nov. 30, 2011, at A22, available at <http://www.nytimes.com/2011/12/01/us/politics/presidential-candidates-make-fewer-in-person-appearances.html> (describing how recent political candidates have used "their campaigns as promotional tours for books, movies, and their

on to produce television ads to challenge Eisenhower's incumbency in 1956.<sup>169</sup> Television became mainstream in political campaigning.

The most significant change that television made in politics was to substantially increase the cost of running for public office. As early as 1955, the premium rate for a network advertisement was four thousand dollars per minute,<sup>170</sup> and by 1960, presidential contenders were spending tens of millions of dollars on televised campaigning.<sup>171</sup> This figure nearly tripled before the end of the decade, and by 2012, it was sixteen-fold after only three weeks of advertising during the presidential contest.<sup>172</sup>

Certainly, money in politics was nothing new. The question for the second half of the twentieth century was whether longstanding regulations of financial contributions and expenditures could continue to control influence-peddling in politics in spite of new technologies for mass communication.

#### *A. Money in Politics is Not New; It's Old*

The concentration of wealth consequent upon the industrial expansion in the post-Civil War era had profound implications for American life . . . . [A]ggregated capital unduly influenced politics, an influence not stopping short of corruption.<sup>173</sup>

Congress passed the first legislation regulating aggregated capital in politics in 1907, when it made it unlawful for "any corporation whatever to make a money contribution in connection with any election . . . ."<sup>174</sup> This was a direct reaction to the concentration of wealth in industrial corporations during the early twentieth century. In the 1921 case of *Newberry v. United States*, for example, Truman Newberry was indicted for exceeding federal campaign expenditure limits by ten-fold while competing against the automobile manufacturer Henry Ford in Michigan's 1918 Democratic Senate primary.<sup>175</sup> Newberry spent this sum hiring detectives to investigate Ford, compensating obstructionist candidates to run against him, and bribing election

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own personal brands").

<sup>169</sup> Larry J. Sabato, *Help! I'm Drowning in TV Ads!*, POLITICO (Apr. 28, 2014), [http://www.politico.com/magazine/story/2014/04/help-im-drowning-in-tv-ads-106114\\_full.html?IEDc8EAw#.VKIEkM8EAw](http://www.politico.com/magazine/story/2014/04/help-im-drowning-in-tv-ads-106114_full.html?IEDc8EAw#.VKIEkM8EAw).

<sup>170</sup> *History of Television*, *supra* note 165.

<sup>171</sup> *See id.* (noting that presidential campaign advertising in 1968 was \$27 million).

<sup>172</sup> *See* Wesleyan Media Project, *2012 Shatters 2004 and 2008 Records for Total Ads Aired* (Oct. 24, 2012), <http://mediaproject.wesleyan.edu/2012/10/24/2012-shatters-2004-and-2008-records-for-total-ads-airod/> (reporting the total amount spent from October 1-21 by candidates, parties, and outside groups on presidential advertising in 2012 as \$164,575,210).

<sup>173</sup> *United States v. UAW-CIO*, 352 U.S. 567, 570 (1957).

<sup>174</sup> Corporations were subject to fines of up to five thousand dollars, and corporate directors faced up to one year in prison. Tillman Act of 1907, Pub. L. No. 92-225, 34 Stat. 864 (codified as amended at 2 U.S.C. § 441b (2006)).

<sup>175</sup> *See* *Newberry v. United States*, 256 U.S. 232, 247-49, n.2 (1921) (explaining that Newberry willfully violated election law by contributing and expending more money than lawfully allowed in a political campaign).

officials and voters.<sup>176</sup> At the same time, Ford also ran in the Republican primary, reducing the general election to mere form if he were victorious in both.<sup>177</sup>

The Supreme Court dismissed Newberry's indictment yet expressed serious concern about unregulated money in politics.<sup>178</sup> That concern was central to *Burroughs v. United States*, which involved a failure to report \$58,000 in campaign contributions received during the 1928 contest for the Democratic presidential nomination.<sup>179</sup> The Court described this corruption, if recurrent, as "giv[ing] omen of danger" and stated that "the free use of money in elections, arising from the vast growth of recent wealth . . . present[ed] equal cause for anxiety."<sup>180</sup> Congress, the Court emphasized, bore a responsibility to preserve the purity of elections: "To say that Congress is without power to pass appropriate legislation to safeguard such an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self-protection."<sup>181</sup>

The 1944 presidential election demonstrated that political influencers could circumvent such safeguards by making expenditures on behalf of favored candidates and parties, instead of making contributions directly to them.<sup>182</sup> Congress prohibited such expenditures as "indirect contributions" in 1947.<sup>183</sup> The first challenge came in 1948 in *United States v. Congress of Industrial Organizations* ("CIO").<sup>184</sup> The CIO, a labor union, was indicted for urging its members to vote for a specified candidate for Congress on the front page of its weekly newsletter.<sup>185</sup> The union argued that calling this newsletter an "indirect contribution" to the candidate infringed its "rights of free speech, free press and free assemblage, guaranteed by the Bill of Rights."<sup>186</sup> The

<sup>176</sup> *Id.* (listing the "purposes, objects and things" Newberry spent his money on).

<sup>177</sup> *Id.* at 269 (White, J., dissenting) (stating that "[if Ford] had been successful as to both [primaries], the subsequent election would have been reduced to the merest form").

<sup>178</sup> The majority found that the regulation of primary contests was not within Congress's power. *Id.* at 258. The dissenters, while acknowledging that primaries were unknown when the Constitution was framed, pointed out that primaries had become the most determinative part of elections. *See id.* at 266-68 (White, J., dissenting); *id.* at 285 (Pitney, J., concurring in part). This view prevailed by mid-century. *See, e.g.,* *United States v. Classic*, 313 U.S. 299, 317 (1941) (stating that primaries "are a step in the exercise by the people of their choice of representatives in Congress.").

<sup>179</sup> *See Burroughs v. United States*, 65 F.2d 796, 798 (D.C. Cir. 1933).

<sup>180</sup> *Burroughs v. United States*, 290 U.S. 534, 547 (1934) (quoting *The Ku Klux Cases*, 110 U.S. 651, 666-67 (1884)).

<sup>181</sup> *Id.* at 545.

<sup>182</sup> For a discussion of how the word "contribution" was interpreted in investigations of the 1944 presidential campaign, see *United States v. Cong. of Indus. Org.*, 335 U.S. 106, 115 (1948).

<sup>183</sup> *See War Labor Disputes Act (Smith-Connally Act)*, ch. 144, 57 Stat. 167 (1943) (limiting the amount of money that can be contributed "in connection with any election"); *Labor Management Relations Act (Taft-Hartley Act)*, Pub. L. No. 80-101, 61 Stat. 136 (codified as amended within 29 U.S.C. §§ 151-166 (1947)). For a review of this history, see *Automobile Workers*, 352 U.S. at 577-79 (describing the historical antecedents to the Labor Management Relations Act of 1947).

<sup>184</sup> *See Cong. of Indus. Org.*, 335 U.S. 106.

<sup>185</sup> *Id.* at 108 (urging all members of the CIO to vote for Judge Ed Garmatz, then a candidate for Congress in Maryland at a special election to be held July 15, 1947).

<sup>186</sup> *Id.* at 108-09.



Supreme Court reasoned that, because there were no allegations of free distribution beyond union membership, the endorsement was unlikely to persuade anyone who did not already voluntarily affiliate with the union.<sup>187</sup> Thus it found the CIO's newsletter not to be an indirect contribution to the candidate.<sup>188</sup>

Shortly thereafter, television came to occupy a central position in American life. Regularly scheduled broadcasts began in New York in 1938 and became widespread after the war.<sup>189</sup> During the 1954 congressional elections, another union was indicted for making a candidate endorsement by paying "a specific amount from its general treasury fund to Luckoff and Wayburn Productions, Detroit, Michigan, to defray the costs of certain television broadcasts sponsored by the Union from commercial television station WJBK."<sup>190</sup> On appeal in *United States v. International Union of United Automobile Workers* ("UAW"), the Supreme Court compared this activity to the political corruption cases of the earlier part of the century, stating that "what is involved here is the integrity of our electoral process, and, not less, the responsibility of the individual citizen for the successful functioning of that process. This case thus raises issues not less than basic to a democratic society."<sup>191</sup>

Dissenting from that holding, Justice Douglas noted an inconsistency:

The opinion of the Court places [the televised UAW broadcast] in the setting of corrupt practices. The opinion generates an environment of evildoing and points to the oppressions and misdeeds that have haunted elections in this country.

Making a speech endorsing a candidate for office does not, however, deserve to be identified with antisocial conduct. Until today political speech has never been considered a crime.<sup>192</sup>

To explain why *Automobile Workers* belonged in the setting of corrupt practices, the majority drew a distinction based on the technology used to disseminate the endorsement. Where the CIO had "merely distributed its house organ to its own people,"<sup>193</sup> the UAW had "used union dues to sponsor commercial television broadcasts designed to influence the electorate to select

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<sup>187</sup> *Id.* at 111 ("We do not read the indictment as charging an expenditure by the CIO in circulating free copies to nonsubscribers, nonpurchasers or among citizens not entitled to receive copies of 'The CIO News,' as members of the union."); *but see id.* at 131-32 (Rutledge, J., concurring in the result) (calling into question whether the newsletter was freely distributed).

<sup>188</sup> *Id.* at 123-24. Despite using statutory construction to avoid the constitutional issue, the majority of the Court nonetheless suggested, in dicta, that if the law were extended to publications like the CIO's newsletter, "gravest doubt would arise in our minds as to its constitutionality." *Id.* at 121. Five justices asserted that the indictment should be dismissed directly on this basis. *Id.* at 124-26 (Frankfurter, J., concurring); *id.* at 129-30 (Rutledge, J., concurring in the result, joined by Black, Douglas, & Murphy, JJ.).

<sup>189</sup> *See Telecasts Here and Abroad*, N.Y. TIMES, Apr. 24, 1938, at 10 (providing the operating schedule for a television station in New York).

<sup>190</sup> *United States v. UAW-CIO*, 138 F. Supp. 53, 54 (E.D. Mich. 1956).

<sup>191</sup> *Automobile Workers*, 352 U.S. at 570.

<sup>192</sup> *Id.* at 594 (Douglas, J., dissenting).

<sup>193</sup> *Id.* at 589 (considering the decision of *United States v. Cong. of Indus. Orgs.*, 335 U.S. 106 (1948)).

certain candidates for Congress.”<sup>194</sup> Though this distinction highlighted the reach of mass media—the televised mass broadcast versus the printed in-house newsletter—the Court dismissed it as “an irrelevant difference in the medium of communication employed.”<sup>195</sup> This illustrates the kind of “blackboxing” of reasoning about technology that we will see as the century goes on.

Presaging what would become the majority opinion in *Citizens United*, dissenting Justice Douglas urged that all manner of speech are fungible in a marketplace of ideas, whether technologically mediated or not:

It would make no difference under this construction of the [Corrupt Practices] Act whether the union spokesman made his address from the platform of a hall, used a sound truck in the streets, or bought time on radio or television . . . . [T]he size of the audience has heretofore been deemed wholly irrelevant to First Amendment issues. One has a right to freedom of speech whether he talks to one person or to one thousand.<sup>196</sup>

Yet these comments overlook concerns about persuasive new forms of mass media that began to emerge at end of the 1950s. In 1957, when *Automobile Workers* was decided, the average U.S. viewer watched approximately two hundred minutes of television daily, a fact that led then FCC chairman Newton Minow to declare television a “vast wasteland,” filled with “endless hours of mediocrity.”<sup>197</sup> In 1971, networks transitioned from sixty- to thirty-second commercial segments, doubling the amount of advertising within programming and deepening their involvement with corporate sponsors. During the 1970s, network profits surpassed \$7.5 billion annually, while concern for public welfare relative to product sales led Congress to ban televised cigarette advertising, and to obtain networks’ agreement to reduce commercial time in children’s programming.<sup>198</sup>

### *B. You Can’t Afford to Speak? You Have a Right to Listen*

Prior to the advent of cable, licensed television broadcasters were viewed as public

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<sup>194</sup> *Id.* at 585.

<sup>195</sup> *Id.* (comparing the televised UAW broadcast to a radio advertisement by the Brotherhood of Railway Trainmen and the printed newsletter distributed by the CIO); *see also id.* at 587 n.1 (quoting Senator Taft, sponsor of the expenditures ban: “I want to make the point that we are not raising any new questions here. Those same questions could have been raised with respect to corporations during the past 25 years. It is a question of fact: Was the corporation using its money to influence a political election?”).

<sup>196</sup> *Id.* at 594-95 (Douglas, J., dissenting); *see also id.* at 593 (Douglas, J., dissenting) (“It is . . . important—vitaly important—that all channels of communication be open . . . during every election . . .”).

<sup>197</sup> Newton N. Minow, Chairman, FCC, Television and the Public Interest, Address Before the National Association of Broadcasters (May 9, 1961), <http://www.americanrhetoric.com/speeches/newtonminow.htm>. Interestingly, Minow worked on the electoral campaign staff of Adlai Stevenson, who was also deeply skeptical about the merits of television. *See Stevenson, supra* note 160. Opinions varied, however; on the same day Minow made his “wasteland” comment, Vice President Hubert Humphrey described television as “the greatest single achievement in communication that anybody or any area of the world has ever known.” *History of Television, supra* note 165.

<sup>198</sup> *Id.*

trustees of a limited resource: the “airwaves.”<sup>199</sup> Under this conception, Congress instituted the Fairness Doctrine in 1949, mandating that broadcasters allocate “reasonable opportunity for the discussion” of opposing viewpoints on public issues or risk revocation of their license to broadcast.<sup>200</sup>

The Supreme Court upheld this regulation in *Red Lion Broadcasting v. Federal Communication Commission*, with three lines of reasoning tailored to television. First, it noted that “there are substantially more individuals who want to broadcast than there are frequencies to allocate.”<sup>201</sup> Then it described a “right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences,” and identified as a “purpose of the First Amendment to preserve an uninhibited *marketplace of ideas* in which truth will ultimately prevail.”<sup>202</sup> In 1974, the Court struck down a statute substantially similar to the Fairness Doctrine that required the provision of equal time in newspapers.<sup>203</sup> It clarified that because newspapers are not “broadcast,” they do not raise the kind of technology-specific issues that legislatures have a compelling interest to address concerning television.<sup>204</sup>

Like the marketplace of ideas, the listeners’ “right to receive” also became more prominent in the Supreme Court’s reasoning about the First Amendment as communications technology spread. In 1943, the Court held that the First Amendment “necessarily protects the right to receive” information.<sup>205</sup> In 1969, it announced: “It is now well established that the Constitution protects the right to receive information and ideas.”<sup>206</sup> In 1976, it explained that “the protection afforded is to the communication, to its source and to its recipients both.”<sup>207</sup>

Both of these conceptual tools were necessary for shifting the legal paradigm governing the constitutional protection of freedom of expression towards the inclusion of organizations. Once discourse is viewed as having been transformed by technology into a matter of bandwidth to which not everyone has access, producing a “marketplace of ideas” for those who must listen becomes essential. This reasoning features prominently in the holding in *Citizens United*.<sup>208</sup>

<sup>199</sup> See Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 213-17 (1982) (discussing the origins of the concept of broadcasters as community trustees).

<sup>200</sup> The Fairness Doctrine was described at 47 C.F.R. § 73.1910 (1983), removed by Broadcast Applications and Proceedings, 76 Fed. Reg. 55,817 (Sept. 9, 2011). See generally Thomas G. Krattenmaker & L.A. Powe, Jr., *The Fairness Doctrine Today: A Constitutional Curiosity and an Impossible Dream*, 1985 DUKE L.J. 151 (1985); see also HUGH CARTER DONAHUE, THE BATTLE TO CONTROL BROADCAST NEWS: WHO OWNS THE FIRST AMENDMENT? 45 (1989).

<sup>201</sup> *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 388 (1969).

<sup>202</sup> *Id.* at 390 (emphasis added).

<sup>203</sup> *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 244, 258 (1974).

<sup>204</sup> See Krattenmaker & Powe, *supra* note 200, at 156-57. In *CBS v. FCC* in 1981, the Court distinguished *Red Lion* and *Tornillo* by explaining that *Red Lion* had to do with “broadcasting.” *Id.*

<sup>205</sup> *Martin*, 319 U.S. at 143.

<sup>206</sup> *Stanley*, 394 U.S. at 564.

<sup>207</sup> *Va. Bd. Of Pharm. v. Va. Citizens Consumer Council*, 425 U.S. 748, 756 (1976).

<sup>208</sup> *Citizens United*, 558 U.S. at 354 (“*Austin* interferes with the ‘open marketplace’ of ideas protected by the First Amendment.”) (citing *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008)).

Strikingly, this history of broadcast technology and its treatment in other sorts of cases (such as Fairness Doctrine ones) has not yet been read alongside the history of campaign finance reform; notably, it runs in parallel.

### C. Money-as-Speech in the “Marketplace of Ideas”

The same year as networks transitioned from sixty to thirty-second advertising segments (greatly increasing the amount of advertising on television, and the financial power of broadcasters), Congress overhauled the campaign finance system with the Federal Election Campaign Act of 1971 (FECA).<sup>209</sup> To create more transparency, it strengthened requirements for disclosure of contributions and expenditures by campaigns, parties, and outside groups.<sup>210</sup> To address the high costs of campaigning, it established a public fund for national party nominees and presidential candidates who agreed to limit fundraising during the general election.<sup>211</sup>

However, FECA failed to deter campaign finance abuses during the 1972 presidential contest between Richard Nixon and George McGovern, in which some of the largest U.S. corporations made illegal contributions.<sup>212</sup> Congress therefore amended the law in 1974 and created a new regulatory agency, the Federal Election Commission, to enforce it.<sup>213</sup> These amendments were challenged during the next presidential election. In a *per curiam* opinion of considerable length in *Buckley v. Valeo*, the Supreme Court upheld FECA’s limits on campaign contributions but struck its expenditure limits as unconstitutional. In doing so it accepted the argument of Senator James Buckley, presidential candidate Eugene McCarthy, a number of political parties, political action committees, and a political newspaper, that monetary expenditures are at the very core of political speech, and that the Act’s limitations thus constitute restraints on First Amendment liberty.<sup>214</sup>

*Buckley* is a particularly significant placeholder in the shifting of the First Amendment

<sup>209</sup> Federal Election Campaign Act of 1971 (FECA), Pub. L. No. 92-225, 86 Stat. 3 (1972) (current version at 52 U.S.C.A. § 30101 (2002)).

<sup>210</sup> 52 U.S.C.A. § 30120(a)(3), (d)(2) (originally enacted as FECA, 2 U.S.C. § 318) (requiring televised electioneering communications funded by anyone other than a candidate to include a disclaimer identifying the person or entity responsible for the content of the advertising); 11 C.F.R. § 100.29. The disclaimer requirement is the only piece of McCain-Feingold’s regulation of electioneering communication that survived *Citizens United*.

<sup>211</sup> See *Presidential Election Campaign Fund (PECF)*, FED. ELECTION COMM’N, <http://www.fec.gov/press/bkgnd/fund.shtml> (last visited Jun. 13, 2015); Party nominees can access a public fund gathered from taxpayer contributions if they raise a minimum of \$5,000 from individual donors in at least twenty states and agree to overall spending limits of \$10 million plus an indexed inflation offset (in 2012, the limit was approximately \$45 million). *Id.* Presidential candidates are eligible for \$20 million in public funding if they agree to cease fundraising during the general election. *Id.*; see generally COSTAS PANAGOPOULOS, PUBLIC FINANCING IN AMERICAN ELECTIONS (2011) (discussing current issues in campaign finance practices).

<sup>212</sup> Ben A. Franklin, *Inquiries Into Nixon’s Re-election Funds Turning Up a Pattern of High Pressure*, N.Y. TIMES, July 15, 1973, at L35 (noting conviction of American Airlines for making illegal contributions to Nixon’s campaign); *The Nation: Corporations Had a Lot to Spend on Campaigns*, N.Y. TIMES, Mar. 16, 1975, at E4 (eighteen corporations in total were convicted of violating the law).

<sup>213</sup> Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified as amended at 52 U.S.C.A. § 30106).

<sup>214</sup> *Buckley*, 424 U.S. at 15, 19, 45.

paradigm to accommodate organizations, because it links reasoning about aggregated capital to the changes brought to communication by technologies of mass media. The Court therefore rejected the argument “that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment,” and did so explicitly on grounds that using expensive technology had become an inevitable aspect of speaking to vast populations in a modern age:

A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today’s mass society requires the expenditure of money . . . . The electorate’s increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.<sup>215</sup>

Here again we see a technological imperative driving jurisprudence. The statement that “virtually every means of communicating ideas in today’s mass society requires the expenditure of money” suggests that high-cost political speech must be accepted because technology has irreversibly modified the way we receive information. Thus the Court quipped in *Buckley* that “[b]eing free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline.”<sup>216</sup> Yet this underplays precisely the problem that Congress sought to address with FECA: that most people could not afford to “debate on public issues” at a cost of four thousand dollars per minute.<sup>217</sup> Rather than allowing technology to simply ratchet up the cost of running for public office, Congress decided to publicly finance the presidential election and to limit expenditures in an attempt to diminish the importance of material wealth as a prerequisite to effective campaigning. Here we see two different views of technology—one legislative, one judicial—driving two different interpretations of whether governmental action is required vis-à-vis capital expenditures, made mostly by corporations, in a high-cost environment for political communication.

Finding instead that “restricting the voices of people and interest groups who have money to spend” impedes constitutionally protected expressive rights, *Buckley* equated the expenditure of money to speech.<sup>218</sup> Thus, the Court reframed FECA as Congress’ choice of a redistributive versus *laissez faire* policy for political expression, describing its expenditure restrictions as attempting to equalize people and groups of different *ex ante* “financial ability to engage in public discussion”<sup>219</sup> by “placing a ceiling on expenditures for political expression” *ex*

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<sup>215</sup> *Id.* at 16, 19 (footnote omitted).

<sup>216</sup> *Id.* at 19 n.18.

<sup>217</sup> *Id.* at 14 (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

<sup>218</sup> *Id.* at 17, 19.

<sup>219</sup> *Id.* at 49.

*post.*<sup>220</sup> *Citizens United* would adopt precisely this same framing, relying on *Buckley* to cast McCain-Feingold's regulation of corporate and union "electioneering communication" as simply a regulation of the capital required to produce it.<sup>221</sup>

After *Buckley* eliminated restrictions on their expenditures, outside groups increasingly functioned as the media arm of campaigns and parties, still subject to FECA's contribution limits, during the 1980s.<sup>222</sup> In 1984, an organization called the National Conservative Political Action Committee ("NCPAC") produced a widely viewed advertisement called "Morning in America," extolling the incumbent Reagan's contributions to U.S. prosperity and strength during the Reagan-Mondale presidential contest.<sup>223</sup> The Democratic National Committee ("DNC") charged that NCPAC had expended money on this ad as candidate advocacy, in violation of the public financing scheme established by FECA, which made it a criminal offense to spend more than \$1,000 to further the election of a candidate who had already chosen to receive public financing.<sup>224</sup> Relying on *Buckley*, the Supreme Court affirmed in *Federal Election Commission v. NCPAC* that outside group expenditures "produce speech at the core of the First Amendment."<sup>225</sup> As long as NCPAC's expenditures on "Morning in America" were "uncoordinated with the candidate or his campaign," the Court found "no tendency" for corruption or the appearance of corruption, which were the "only legitimate and compelling interests thus far identified for restricting campaign finances."<sup>226</sup>

*NCPAC* is significant because, as *Buckley* had collapsed the distinction between money and speech, it collapsed the difference between speakers and listeners. It did this by reading together the constitutional concept of freedom of association with the concept of freedom of expression. The Court described PACs as "mechanisms" by which "large numbers of individuals of modest means can join together in organizations that serve to 'amplif[y] the voice of their adherents.'"<sup>227</sup> However, as the dissent pointed out, the donation of money does not transform contributors into speakers; it transforms the recipient organization into one.<sup>228</sup> *NCPAC*'s majority

<sup>220</sup> *Id.* at 17.

<sup>221</sup> *Citizens United*, 558 U.S. at 350 (2010) ("*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.')" (quoting *Buckley*, 424 U.S. at 48).

<sup>222</sup> See KENNETH M. GOLDSTEIN, INTEREST GROUPS, LOBBYING, AND PARTICIPATION IN AMERICA 24, 125 (1999).

<sup>223</sup> *Ronald Reagan It's Morning In America 1984*, YOUTUBE, <https://www.youtube.com/watch?v=fa8Qupc4PnQ> (last visited Jun. 13, 2015).

<sup>224</sup> *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 482-83 (1985) [hereinafter *NCPAC*]. The Democratic National Committee's standing to make a claim against NCPAC on that basis was disputed, however the Federal Election Commission, a regulator clearly empowered by Congress to enforce the statute, joined the suit. *Id.* at 489-90.

<sup>225</sup> *NCPAC*, 470 U.S. at 493.

<sup>226</sup> *Id.* at 496-97; but see *id.* at 511 (White, J., dissenting, joined by Marshall, J. & Brennan, J.) (noting a pattern of "significant contacts between an organization like NCPAC and candidates for, and holders of, public office," including the exchange of personnel).

<sup>227</sup> *Id.* at 494 (quoting *Buckley*, 424 U.S. at 22).

<sup>228</sup> *Id.* at 512-13 (White, J., dissenting)

equivocated by reasoning that individual “contributors obviously like the message they are hearing from these organizations and want to add their voices to that message; otherwise they would not part with their money.”<sup>229</sup> Yet contributors have no control over a PAC’s messaging; if they do not like what they hear, they have no recourse other than to withhold funding for its *future* speech.

Despite this hazy logic, *NCPAC*’s “associational” theory of political speech was a logical outgrowth of *Buckley*’s recognition that television and other mass media had made the expenditure of large sums of money an “essential ingredient” of contemporary political advocacy.<sup>230</sup> The next step was to note that, in a “marketplace of ideas” mediated through expensive technologies, individuals were no longer the primary discursive units of the body politic because they could not afford to be. *NCPAC* noted exactly this: “The PACs in this case, of course, are not lone pamphleteers or street corner orators in the Tom Paine mold; they spend substantial amounts of money in order to communicate their political ideas through sophisticated media advertisements.”<sup>231</sup>

In 1986, the Supreme Court made a clearer articulation of the premise behind its ruling in *NCPAC* by describing listener contributions as a “market signal” of support for the organization’s ideas.<sup>232</sup> It therefore seemed to reach the same conclusion about contemporary public discourse as media theorist Tarleton Gillespie: “The means by which we produce, circulate, and consume information in a complex society must necessarily be handled through the division of labor: some produce and select information, and the rest of us, at least in that moment, can only take it for what it’s worth.”<sup>233</sup> We can see in this comment the relevance of all of the key concepts that the Supreme Court developed to accommodate technologically-mediated mass communication within its First Amendment jurisprudence during the second half of the twentieth century: particularly, the listener’s right to receive information in a marketplace of ideas (“consume information”), and the right of organizations to spend unlimited amounts to produce that marketplace (“circulate information”). Under this rubric, consumption of a PACs’ ideas by

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The majority never explicitly identifies whose First Amendment interests it believes it is protecting. However, its concern for rights of association and the effective political speech of those of modest means . . . indicates that it is concerned with the interests of the PACs’ contributors. But the ‘contributors’ are exactly that—contributors, rather than speakers . . . . Even if spending money is to be considered speech, I fail to see how giving money to an independent organization to use as it wishes is also speech . . . . [A]ppellees are not simply mouthpieces for their individual contributors.  
*Id.*

<sup>229</sup> *Id.* at 495. Professor Batchis points to the same equivocation in *Citizens United*. Wayne Batchis, *Citizens United and the Paradox of “Corporate Speech”*: *From Freedom of Association to Freedom of the Association*, 36 N.Y.U. REV. L. & SOC. CHANGE 5, 8-9 (2012).

<sup>230</sup> Further, as a more academic and historical than doctrinal matter, it is worth noting that *NCPAC*’s link between freedom of association and freedom of speech expresses a version of “group theory” of the kind that legal thinkers in the United States and Europe were struggling to develop during the later nineteenth century. See HORWITZ, *supra* note 9, at 185.

<sup>231</sup> *NCPAC*, 470 U.S. at 493.

<sup>232</sup> *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 258 (1986).

<sup>233</sup> Tarleton Gillespie, *The Relevance of Algorithms*, in *MEDIA TECHNOLOGIES: ESSAYS ON COMMUNICATION, MATERIALITY, AND SOCIETY* 191 (Tarleton Gillespie, Pablo J. Boczkowski, & Kirsten A. Foot, eds., 2014).

contributing money to it serves as a “market signal” of support that becomes the twentieth-century constitutional equivalent to speaking itself.

Consequently, by the late 1970s the Supreme Court had determined that high-cost, technologically-mediated mass media constituted a new normal with which the First Amendment must catch up or, as it said *per curiam* in *Buckley*, risk “reduc[ing] the quantity of expression . . . the number of issues discussed, the depth of their exploration, and the size of the audience reached.”<sup>234</sup> The Court concurrently portrayed these circumstances as non-novel, because “[t]he distribution of the humblest handbill or leaflet” also entails costs.<sup>235</sup> Thus the Court elided an assertion that technology was constitutionally neutral and an assertion that it was a maximizing factor in democratic discourse, measured quantitatively. Importantly, this allowed the Court to be both technologically *deterministic* in its reasoning—“we must adapt the First Amendment to mass media because it has already changed public discourse”—and technologically *optimistic*—“in any case, it’s a good thing and not unlike anything that has come before.” We will see these typologies again in *Citizens United*.

### III. ANTIDISTORTION MEETS THE TECHNOLOGICAL IMPERATIVE

After *Buckley*, influential television ads produced by outside organizations continued to figure prominently in U.S. elections during the 1980s and 1990s. In 1988, an ad known as “Willie Horton” juxtaposed the image of a convicted felon with that of the Democratic presidential nominee Michael Dukakis, above the text “Kidnapping, Stabbing, Raping.”<sup>236</sup> The ad was produced by a Republican organization known as the National Security PAC to associate Dukakis’ governorship in Massachusetts with the story of Horton, who committed the listed crimes while granted weekend furlough from a life sentence in the state. During the 1990s, outside organizations spent heavily on behalf of the Democrats; labor unions, for example, spent \$2.7 million on media communication in support of Bill Clinton during his 1996 presidential race against Bob Dole.<sup>237</sup>

The next overhaul of electoral regulation was clearly the product of weariness on the part of both parties with these “ad wars.” In debate over the Bipartisan Campaign Reform Act of 2002, legislators described the ads as “poison politics,” “air pollution,” “drive by shootings,” “crack cocaine,” “brutal,” and “a nightmare.”<sup>238</sup> Sponsored by Democrat Russ Feingold and Republican

<sup>234</sup> *Buckley*, 424 U.S. at 19.

<sup>235</sup> *Id.*

<sup>236</sup> Llehman84, *Willie Horton 1988 Attack Ad*, YOUTUBE (Nov. 3, 2008) <https://www.youtube.com/watch?v=Io9KMSSEZOY>.

<sup>237</sup> See David E. Rosenbaum, *In Political Money Game, the Year of Big Loopholes*, N.Y. TIMES, Dec. 26, 1996, at A1; Anthony Corrado, *Financing the 1996 Presidential General Election*, in FINANCING THE 1996 ELECTION 63, 83 (John C. Green ed., 1999).

<sup>238</sup> 144 Cong. Rec. 1601 (1998) (statement of Sen. Daschle) (analogizing attack ads to “crack cocaine”); *id.* at 1613 (statement of Sen. Durbin) (describing them as “drive by shooting[s]”); 145 Cong. Rec. 20505 (1997) (statement of Sen. Dorgan) (describing them as “air pollution”); *id.* at 2051-52 (statement of Sen. McCain) (describing “how to raise the tenor of the debate in our elections and give people real choices”); 145 Cong. Rec. 20746 (1997) (statement of Sen. Boxer) (“They directly attack candidates without any accountability. It is brutal . . . We have an opportunity in the McCain-Feingold bill to stop that . . .”); 145 Cong. Rec. S12606-S12607 (daily ed. Oct. 14, 1999) (statement of Sen. Wellstone) (“I think these issue advocacy ads are a nightmare. I think all of us should hate them . . . [By passing the



John McCain, the new law aimed directly at minimizing the ads by barring corporate and union-funded “electioneering communication” distributed by broadcast, cable, or satellite transmissions that could be received by 50,000 or more persons during periods shortly before primary and general elections.<sup>239</sup>

A. *One of these Things is not Like the Others: Austin, McConnell, and Citizens United*

A year after it was enacted, McCain-Feingold was challenged in *McConnell v. Federal Election Commission*.<sup>240</sup> In a 5-4 decision announced in an opinion of over one hundred pages, the Supreme Court upheld the law as furthering the government’s interest in counteracting the “corrosive and distorting effects of immense aggregations of wealth . . . accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”<sup>241</sup> *McConnell*’s majority cited a legislative record of \$135 to \$150 million in spending by outside organizations on televised “issue” advertisements during the 1996 electoral cycle, followed by \$270 to \$340 million during the mid-term election of 1998, and exceeding \$500 million during the presidential election of 2000, which featured over one thousand different issue advertisements.<sup>242</sup> The Court noted that “[c]orporations and unions spent hundreds of millions of dollars of their general funds” to produce these ads, which were “specifically intended to affect election results . . . confirmed by the fact that almost all of them aired in the 60 days immediately preceding a federal election.”<sup>243</sup>

Congress, the Court found, was not only concerned by the close nexus between corporations and unions and political parties and candidates, but by the power of television to effectively mask those connections. *McConnell*’s majority cited a legislative record indicating that candidates had been able “to work closely with friendly interest groups to sponsor so-called issue ads when the candidates themselves were running out of money,” while using “misleading names to conceal their identity.”<sup>244</sup> Citizens for Better Medicare, for example, was “not a grassroots organization of citizens, as its name might suggest, but was instead a platform for an association of drug manufacturers.”<sup>245</sup>

Both the majority and dissenting justices in *McConnell* therefore identified the public policy issue addressed by McCain-Feingold as a technology management question. The law did

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legislation, we] could get some of this poison politics off television”); 148 Cong. Rec. S2117 (daily ed. Mar. 20, 2002) (statement of Sen. Cantwell) (“This bill is about slowing the ad war . . . and making sure the flow of negative ads by outside interest groups does not continue to permeate the airwaves.”).

<sup>239</sup> Bipartisan Campaign Reform Act of 2002 (BCRA, McCain-Feingold Act), Pub L. No. 107-155, 116 Stat. 81 (codified as amended at 2 U.S.C. § 432); 11 C.F.R. § 100.29(1)(2), (b)(3)(ii) (2009).

<sup>240</sup> *McConnell v. FEC*, 540 U.S. 93 (2003), *overruled by Citizens United*, 558 U.S..

<sup>241</sup> *Id.* at 274-75 (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990)).

<sup>242</sup> *Id.* at 127 n.20.

<sup>243</sup> *Id.* at 127.

<sup>244</sup> *Id.* at 128.

<sup>245</sup> *Id.* For more recent examples, see Fredreka Schouten, Christopher Schnarrs & Gregory Korte, *Naming names behind slew of super PAC ads*, USA TODAY (Feb. 1, 2012, 10:03 AM), <http://usatoday30.usatoday.com/news/politics/story/2012-01-31/super-pacs-campaign-finance-reports/52907890/1>.

“not apply to advertising in the print media or on the Internet,” the majority pointed out, but to the “virtual torrent of televised election-related ads during the periods immediately preceding federal elections.”<sup>246</sup> Justice Scalia, dissenting, also referred to the legislative record: “[L]et us not be deceived. While the Government’s briefs and arguments before this court focused on the horrible ‘appearance of corruption,’ the most passionate floor statements during the debates on this legislation pertained to so-called attack ads . . . .”<sup>247</sup>

*McConnell* identified the governmental interests advanced McCain-Feingold’s regulation of mass-broadcast “electioneering communication” as both an interest in “anticorruption” and an interest in “antidistortion.”<sup>248</sup> The latter was introduced by the 1990 case of *Michigan Chamber of Commerce v. Austin*.<sup>249</sup> *Austin* upheld the Michigan Campaign Finance Act, which, similar to FECA, prohibited corporations from using their general treasury funds to make independent expenditures on behalf of candidates for state office.<sup>250</sup> Michigan argued that corporations receive “special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets—that enhance their ability to attract capital” and “present the potential for distorting the political process,” because the capital accumulation has “little or no correlation to the public’s support for the corporation’s political ideas.”<sup>251</sup> The Supreme Court found Michigan’s interest in preventing this “distortion” sufficiently different from the interest in preventing corruption that it found inadequate to justify a similar ban on expenditures in *Buckley*.<sup>252</sup> *McConnell*’s majority extended this reasoning to McCain-Feingold’s regulation of corporate- and union-funded mass-broadcast “electioneering communication.”<sup>253</sup>

Both *Austin* and *McConnell* were challenged when a nonprofit organization called “Citizens United” sought to release what it described as a “documentary film” critical of candidate Hillary Clinton on cable television within thirty days of the Democratic primary for the presidential election.<sup>254</sup> The organization preemptively challenged McCain-Feingold’s prohibited period for “electioneering communication” as abridging its right to freedom of speech protected by the First Amendment.<sup>255</sup> In yet another 5-4 decision of considerable length in *Citizens United v. Federal Election Commission*, the Supreme Court determined that the film was indeed an “electioneering communication” on the basis of its thesis that Senator Clinton was unfit for the presidency, but found regulation of such communication to violate the free speech protections of

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<sup>246</sup> *McConnell*, 540 U.S. at 207.

<sup>247</sup> *Id.* at 260 (Stevens, J., concurring).

<sup>248</sup> *Id.* at 136, 167-70, 205 (discussing the “distorting effect” of ads).

<sup>249</sup> *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990).

<sup>250</sup> *Id.* at 654.

<sup>251</sup> *Id.* at 658-59, 661-62.

<sup>252</sup> *Id.* at 659-60, 666 (describing “the State’s decision to regulate only corporations [as] precisely tailored to serve the compelling state interest of eliminating from the political process the corrosive effect of political ‘war chests’ amassed with the aid of the legal advantages given to corporations.”).

<sup>253</sup> *McConnell*, 540 U.S. at 205 (citing *Austin*, 494 U.S. 652 at 660).

<sup>254</sup> *Citizens United*, 558 U.S. at 310, 319.

<sup>255</sup> *Citizens United*, 530 F. Supp. 2d at 277.

the First Amendment.<sup>256</sup> Reversing both *McConnell* and *Austin*, the majority relied on *Buckley*, quoting from that case to describe McCain-Feingold as “necessarily reduc[ing] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.”<sup>257</sup> The law therefore harmed “society as a whole, which is deprived of an uninhibited marketplace of ideas.”<sup>258</sup>

As we have seen, the “marketplace of ideas” migrated from the dissenting periphery to the majority center of the Supreme Court’s interpretation of the First Amendment’s core values, parallel to the rise of television in American life.<sup>259</sup> Conceptually, it made room within the amendment for valuing not only freedoms of speech and of the press, but for preserving a wide spectrum of ideas for listeners to hear, and for viewing listeners’ financial contributions to organizations as equivalent to the exercise of either freedom of speech (*Buckley*) or freedom of speech-qua-association (*NCPAC*). This allowed the Court to accommodate within its traditional First Amendment protection a political conversation dominated by expensive mass media, in which most individuals could not afford to participate as anything other than listeners. Using these concepts, *Citizens United* reframed the political “ad war” as a phenomenon not only beneficial but *necessary* to create a “marketplace of ideas” in contemporary American politics. This view replaced an extensive legislative history, barely mentioned in *Citizens United*, in which Congress found televised ads distortive of American politics.<sup>260</sup>

Under its optimistic view of television, *Citizens United*’s majority would characterize McCain-Feingold’s regulation of corporate and union-funded mass broadcast electioneering communication as “analogous to licensing laws implemented in 16th- and 17th-century England,” and permitting the FEC to do nothing less than “use censorship to control thought.”<sup>261</sup> “[T]he most important means of mass communication in modern times,” the majority asserted in *Citizens United*, to the contrary carried a constitutional imperative: “The First Amendment was certainly not understood to condone the suppression of political speech in society’s most salient media.”<sup>262</sup> The Court’s obligation, like Congress’, was to step aside: “We must decline to draw, and then re-draw, constitutional lines based on the particular media or technology used to disseminate

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<sup>256</sup> *Citizens United*, 558 U.S. at 324, 368.

<sup>257</sup> *Id.* at 339 (quoting *Buckley*, 424 U.S. at 19).

<sup>258</sup> *Id.* at 335 (quoting *Virginia v. Hicks*, 539 U.S. 113, 119 (2003)).

<sup>259</sup> Compare *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (stating “the ultimate good desired is better reached by free trade in ideas . . . the power of the thought to get itself accepted in the competition of the market”), with *Red Lion*, 395 U.S. at 390 (asserting “the purpose of the First Amendment [is] to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail”), *Mass. Citizens for Life*, 479 U.S. at 257 (noting “the wisdom of Justice Holmes’ observation that the ‘ultimate good desired is better reached by free trade in ideas’”), and *Citizens United*, 558 U.S. at 354 (declaring “*Austin* interferes with the ‘open marketplace’ of ideas protected by the First Amendment.”).

<sup>260</sup> Compare *McConnell*, 540 U.S. at 127 (quoting extensively legislators’ negative remarks about televised ads), with *Citizens United*, 558 U.S. at 353 (describing television as “society’s most salient media” and one of “the most important means of communication in modern times”).

<sup>261</sup> *Citizens United*, 558 U.S. at 335, 356 (describing McCain-Feingold as requiring corporations and unions to “ask a governmental agency for prior permission to speak”).

<sup>262</sup> *Id.* at 353 (stating “television networks and major newspapers owned by media corporations have become the most important means of mass communication in modern times.”).

political speech from a particular speaker.”<sup>263</sup> This was because “[r]apid changes in technology—and the creative dynamic inherent in the concept of free expression—counsel against upholding a law that restricts political speech in certain media or by certain speakers.”<sup>264</sup>

This kind of reasoning suggests that the “concept of free expression” and “rapid changes in technology” are borne from the same source: from a “creative dynamic” inherent in the First Amendment. Yet it is the Court’s own technologically-optimistic interpretation of these technologies as facilitating citizens’ “freedom to experiment and create in the realm of thought and speech,” that is driving this conclusion.<sup>265</sup> As in *Buckley*, the logic is technologically deterministic: it allows what is technologically *possible* to draw the line for what is constitutionally *permissible*. Congress cannot impose a quiet period prior to elections on “electioneering communications” funded by corporations and unions because “society as a whole” will be “deprived of an uninhibited marketplace of ideas.”<sup>266</sup> This calibrates the protections of the First Amendment to judges’ normative assessment of a society they perceive to be reliant on technology to generate political discourse. As Justice Stevens noted in dissent in *Citizens United*, this generates a technological change-driven jurisprudence “in which novel First Amendment standards must be devised on an ad hoc basis . . . .”<sup>267</sup>

Thus we can view *Citizens United* as a kind of *Lochner* for the Information Age: it exhibits the same kind of hubris regarding legislative management of technologies of mass communication that *Lochner* exhibited regarding legislative management of the economy.<sup>268</sup> Its majority portrayed McCain-Feingold’s regulation of the “ad wars” as heavy-handed Luddism against a creative and technologically adept citizenry. This view depends on overlooking an imbalance in power between organizations and individuals in a mass media-dominated “marketplace of ideas,” just as *Lochner* depended heavily on optimistic views of *laissez faire* capitalism that overlook a similar power imbalance in the labor market.<sup>269</sup>

Like *Lochner*’s majority, *Citizens United*’s majority portrayed Congress’ regulation of “electioneering communication” as an attempt to reorder economic relationships already justly

<sup>263</sup> *Id.* at 326.

<sup>264</sup> *Id.* at 364.

<sup>265</sup> *Id.* at 372 (quoting *McConnell*, 540 U.S. at 341) (internal quotation marks omitted); *see also id.* (“Citizens must be free to use new forms, and new forums, for the expression of ideas.”) (quoting *McConnell*, 540 U.S. at 341) (internal quotation marks omitted)).

<sup>266</sup> *Id.* at 335 (quoting *Hicks*, 539 U.S. at 119 (internal quotation marks omitted)).

<sup>267</sup> *Id.* at 400 (Stevens, J., dissenting).

<sup>268</sup> This idea owes its provenance to Professor David Super, who commented about the similarity of my argument to Justice Holmes’ dissent in *Lochner* during a summer faculty colloquium at Georgetown University Law Center, where I presented early versions of this work consequent to a visiting researcher affiliation during 2012-13. For that I would like to thank Gregory Klass, Julie O’Sullivan, and Dr. Eric L. Motley.

<sup>269</sup> *See* EDWARD S. HERMAN & NOAM CHOMSKY, *MANUFACTURING CONSENT: THE POLITICAL ECONOMY OF THE MASS MEDIA 2* (1988) (describing “huge inequality in command of resources, and its effect . . . on access to a private media system”); *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting) (reasoning “[t]his case is decided upon an economic theory which a large part of this country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law.”).

determined by the flow of capital. However, this portrayal was only possible because its reliance on *Buckley* allowed it to misconstrue McCain-Feingold as equivalent to a direct regulation of expenditures, and therefore failed to properly distinguish *Austin* and *McConnell*. Yet one of these things is not like the others: McCain-Feingold's ban applied only to corporations and unions using their general treasuries to make "electioneering communication" with the ability to reach fifty thousand people or more during periods proximate to elections; *Austin* involved a regulation of expenditures, comparable to FECA, sustained based on arguments about the distortive effects on elections of corporate "war chests." *McConnell*, in contrast, upheld McCain-Feingold as a regulation "of . . . expression," citing a legislative record heavily focused on televised ads and correctly identifying the law as a regulation of the technological *means* of expression, not only the capital used to access it.<sup>270</sup>

Failing to analytically distinguish *Austin* and *McConnell* based on the object of their regulations explains why government lawyers ultimately abandoned arguments based on "antidistortion" in *Citizens United*.<sup>271</sup> Once it was clear that the Court would rely on *Buckley*, then-Solicitor General Elena Kagan disclaimed any reliance on antidistortion in relation to *Austin*, and did not distinguish *McConnell* on the basis that it concerned a regulation of technologies of mass broadcast "electioneering communication."<sup>272</sup> This was a missed opportunity to extend the "antidistortion interest" to McCain-Feingold, whose legislative history so clearly showed Congress' concern with "distortion" of the electoral process by the "ad wars" produced by technologies of mass media and those who could afford to use them.<sup>273</sup>

"Shifted personhood" is the new paradigm for freedom of expression because *Citizens United* rested its ultimate conclusion not on the many statements the Court made about mass media, but on a statement about the suppression of political speech based on the speaker's identity.<sup>274</sup> The majority described McCain-Feingold as a "categorical distinction[] based on the corporate identity of the speaker" that targeted "certain disfavored associations of citizens—those that have taken on the corporate form."<sup>275</sup> It recast the entire jurisprudential history of legislative attempts to reform the electoral system within this frame as simply "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."<sup>276</sup> Framed thusly, the law was easy to strike

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<sup>270</sup> *McConnell*, 540 U.S. at 204.

<sup>271</sup> For an explanation not related to technology see generally Richard L. Hasen, *Citizens United and the Orphaned Antidistortion Rationale*, 27 GA. ST. U. L. REV. 989 (2010).

<sup>272</sup> Transcript of Oral Argument at 47-48, *Citizens United*, 558 U.S. 310 (No. 08-205) (asserting "where we talk about the distortion of the electoral process that occurs when corporations use their shareholders' money who may or may not agree . . . [w]e do not rely at all on *Austin* to the extent that anybody takes *Austin* to be suggesting anything about the equalization of a speech market.").

<sup>273</sup> See 144 Cong. Rec. 1601 (1998).

<sup>274</sup> *Citizens United*, 558 U.S. at 346 ("[T]he Government cannot restrict political speech based on the speaker's corporate identity."), (citing *Bellotti*, 435 U.S. 765). *Bellotti* struck down a Massachusetts law prohibiting corporations from spending money to advocate during referenda on public questions that did not concern the corporation's property, business, or assets. See generally *Bellotti*, 435 U.S. 765 (1978). *McConnell* distinguished the regulation at issue in *Bellotti* from McCain-Feingold's regulation of "electioneering communications." See *McConnell*, 540 U.S. at 206 n.88.

<sup>275</sup> *Citizens United*, 558 U.S. at 364, 356.

<sup>276</sup> *Id.* at 348.

down:

If the First Amendment has any force, it prohibits Congress from fining or jailing citizens . . . for simply engaging in political speech. If the antidistortion rationale were to be accepted, however, it would permit Government to ban political speech simply because the speaker is an association that has taken on the corporate form.<sup>277</sup>

This placed the Court's reasoning, including its reasoning about technology, squarely within the frame of a traditionally understood justification for the Court's existence as a countermajoritarian institution: to protect unpopular political minorities.<sup>278</sup> Incorporation here appears as simply a phase change of one kind of entity, "citizen," into an organizational form better suited to doing things in a modern society—for example, one needs to use the mass media to communicate to the mass public. While this significantly downplays the resources involved in taking on the corporate form, and the real differences between organizations and actual members of the body politic, it reflects the strong position that organizations have already obtained in society at large within First Amendment jurisprudence.

#### B. Chief Justice Rehnquist and Virginia Pharmacy

The majority's comments in *Citizens United* about television as society's "most salient media" highlight the significance of technological optimism concerning mass media in the case decision. As this section will explore, we can provisionally associate this optimism with the death of Chief Justice Rehnquist in 2005. This connection helps explain the Court's abrupt about-face concerning the constitutionality of McCain-Feingold in the short span between *McConnell* in 2003 and *Citizens United* in 2010. While verifying this conclusion requires deeper treatment of First Amendment jurisprudence than there is space for here, Chief Justice Rehnquist's 1976 dissent in *Virginia Board of Pharmacy v. Virginia Citizens Consumer Counsel* will suffice.<sup>279</sup>

The *Virginia Pharmacy* dissent suggests Justice Rehnquist's deep skepticism regarding technologies of mass media.<sup>280</sup> Decided the same year as *Buckley v. Valeo*, the Court in *Virginia Pharmacy* struck down a state law that sanctioned pharmacists for unprofessional conduct if they advertised prices directly to consumers.<sup>281</sup> Dissenting from the holding, the Chief Justice was the

<sup>277</sup> *Id.* at 349; *see also id.* at 392 (Scalia, J., concurring) ("[A] corporation . . . cannot be denied the right to speak on the simplistic ground that it is not 'an individual American.'").

<sup>278</sup> *See* ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-33 (2d. ed. 1986); *but see* Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 *YALE L.J.* 153, 158 (2002) ("[I]t is in this disjuncture between public opinion and academic concern that we can see the countermajoritarian problem for what it is—an obsession that grips the academy even when it fails to describe reality.").

<sup>279</sup> *Va. Pharmacy*, 425 U.S. at 781-90 (Rehnquist, J., dissenting).

<sup>280</sup> *See id.* I am certainly not the first to note Chief Justice Rehnquist's significant divergence from the other conservative members of the Court regarding corporate free speech. *See, e.g.,* Mark Tushnet, *Corporations and Free Speech*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 253, 254 (David Kairys ed., 1982).

<sup>281</sup> *Va. Pharmacy*, 425 U.S. at 770.

only member of the Court to mention television.<sup>282</sup> He described its potentially distortive effects on patients' perception of complex issues related to medication, and argued that "[t]he very real dangers that general advertising for such drugs might create in terms of encouraging, even though not sanctioning, illicit use of them by individuals for whom they have not been prescribed . . . are simply not dealt with in the Court's opinion."<sup>283</sup> He likened a pharmaceutical price regulation to legislative regulation of liquor and cigarette advertising already found constitutional: "Nothing we know about the acquisitive instincts of those who inhabit every business and profession . . . gives any reason to think that such persons will not do everything they can to generate demand for these products in much the same manner and to much the same degree as demand for other commodities has been generated."<sup>284</sup>

We can see from these comments how Chief Justice Rehnquist's interpretation of the constitutional scope of protection for freedom of expression was in at least one instance underwritten by his skepticism about the technology of television and about the "acquisitive instincts" of organizations.<sup>285</sup> His concerns, in fact, are strikingly similar to those that led Congress to enact McCain-Feingold, whose regulation of corporate and union "electioneering communication" Justice Rehnquist would vote to uphold in *McConnell*.<sup>286</sup> Like Congress in that piece of legislation, Justice Rehnquist distinguished in *Virginia Pharmacy* between different types of communication, noting that "the challenged statute does not prohibit anyone from receiving . . . information [about pharmaceutical prices] either in person or by phone."<sup>287</sup>

<sup>282</sup> *Id.* at 789 (Rehnquist, J., dissenting).

<sup>283</sup> *Id.* at 788-89 (Rehnquist, J., dissenting). Rehnquist gave examples of the kind of advertisements he predicted the holding would generate:

"Pain getting you down? Insist that your physician prescribe Demerol. You pay a little more than for aspirin, but you get a lot more relief."

"Can't shake the flu? Get a prescription for Tetracycline from your doctor today."

"Don't spend another sleepless night. Ask your doctor to prescribe Seconal without delay." *Id.* at 788.

*Id.* at 788 (Rehnquist, J., dissenting).

Pharmaceutical companies have aired advertisements that are strikingly similar to those predicted above. See, e.g., Zolof, *Original Zolof Commercial*, YOUTUBE (Mar. 12, 2009), <https://www.youtube.com/watch?v=twhtzd6gXA> (last visited Jun. 13, 2015).

<sup>284</sup> *Va. Pharmacy*, 425 U.S. at 789 (Rehnquist, J., dissenting). For an example of the Court's jurisprudence surrounding regulation of liquor advertising, see, e.g., *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996).

<sup>285</sup> *Id.* at 789. We can perhaps better understand Justice Rehnquist's skepticism about pharmaceutical advertising given the posthumous revelation that he was addicted to a prescription sleeping aid. See Pete Yost, *Rehnquist Drug Dependency Detailed*, WASH. POST, (Jan. 5, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/01/05/AR2007010500521.html>.

<sup>286</sup> *McConnell*, 540 U.S. at 110 (Rehnquist, J., dissenting), *overruled in part by Citizens United*, 558 U.S. 310 (overruling portions of McCain-Feingold except for those concerning the regulation of "electioneering communication").

<sup>287</sup> *Va. Pharmacy*, 425 U.S. at 782 (Rehnquist, J., dissenting) (discussing the pharmaceutical consumer's "right to receive information" in the context of standing, and noting that not all avenues to receive information had been

There was little change in the ideological orientation of the justices who came to replace their predecessors during the period between *McConnell* and *Citizens United*; however, after Chief Justice Rehnquist died between the two decisions, John Roberts replaced him at fifty years old, having lived his entire life in the era of television.<sup>288</sup> Chief Justice Roberts joined with the majority in *Citizens United*, finding McCain-Feingold unconstitutional under the optimistic view of television that Justice Kennedy articulated in the majority opinion.

### C. Deepening the Antidistortion Interest

[W]here is it written that someone who is good on television is necessarily also a good politician?

Václav Havel, Former President of Czechoslovakia<sup>289</sup>

Between *Automobile Workers* and *Citizens United*, the Supreme Court grounded its increasingly permissive approach to the involvement of non-party organizations in U.S. politics in a technologically optimistic theory about the ability of such organizations to make the most effective use of modern communications technologies to generate a “marketplace of ideas.”<sup>290</sup> The Court suggested that, without organizational speech, public debate would stall, and it predicted that other emergent forms of communication, such as web-based social media, would eventually allow individuals to compete with organizational speakers.<sup>291</sup> Relying on these points of view, the Court rejected concerns voiced by the people’s elected representatives in Congress about the distortive effects of specific kinds of mass media and specific kinds of organizations on the democratic process.<sup>292</sup>

The “antidistortion interest” that was abandoned in *Citizens United* can be deepened by using social theory to gain a richer understanding of the interactions between the material, informational, and subjective inputs that influence voters during elections. This is a novel but not unprecedented approach to legal scholarship.<sup>293</sup> It refers to a body of knowledge overlooked by

foreclosed).

<sup>288</sup> In 2005, John Roberts (in the majority in *Citizens United* majority) was appointed by George H.W. Bush to replace William Rehnquist (in the *McConnell* majority regarding McCain-Feingold Title II); in 2006, Samuel Alito (in the majority in *Citizens United* majority) was appointed by George H.W. Bush to replace Sandra Day O’Connor (in the majority in *McConnell*); in 2009, Sonia Sotomayor (in the dissent in *Citizens United*) was appointed by President Barack Obama to replace David Souter (in the majority in *McConnell*). See *McConnell*, 540 U.S. at 110, *Citizens United*, 558 U.S. at 316. Justices Thomas, Scalia, and Kennedy were in the dissent in *McConnell* regarding Title II of McCain-Feingold, maintaining that opinion in the majority in *Citizens United*. See *McConnell*, 540 U.S. at 110-11; *Citizens United*, 558 U.S. at 316.

<sup>289</sup> Vaclav Havel, Former President of Czechoslovakia, Commencement Address at Harvard University (May 12, 1995) (transcript available at <http://www.humanity.org/voices/commencements/vaclav-havel-harvard-university-speech-1995>).

<sup>290</sup> *Citizens United*, 558 U.S. at 335.

<sup>291</sup> *Id.* at 364 (“Soon, however, it may be that Internet sources, such as blogs and social networking Web sites, will provide citizens with significant information about political candidates and issues.”).

<sup>292</sup> See *id.* at 349-60.

<sup>293</sup> See generally STEVEN L. WINTER, A CLEARING IN THE FOREST: LAW, LIFE, AND MIND (Univ. of Chi.



the Supreme Court as it crafted its own theory about the interaction between mass media and democratic discourse, one heavily leavened with technological optimism and technological determinism, and then ascribed that theory to the Constitution itself.

The primary way we differ from the organizations we create can be labeled “psyche,” “self,” and “soul,” depending on the discourse. Here, I use the term “consciousness,” following philosopher Daniel N. Robinson and Nobel Prize-winning neurophysiologist Sir John C. Eccles, who found consciousness to be personhood’s most distinctive trait.<sup>294</sup> Consciousness remains a scientific mystery, and to animate it in artificial intelligence is one of the great projects of our time.<sup>295</sup> The philosopher René Descartes reasoned that consciousness constitutes more than the physical mechanics that take place in the brain, and contemporary scientists continue to make this assertion.<sup>296</sup> Anesthesiologists can significantly alter consciousness but cannot explain the mechanism by which brain physiology produces it.<sup>297</sup> Evolutionary biologists cannot explain its existence without a discrete physical aspect that could have been subject to selective evolution.<sup>298</sup>

The American social compact was formed to protect “life, liberty, and property,”<sup>299</sup> which have material qualities, yet are qualitatively more when possessed in the context of conscious self-awareness. As Justice Brandeis articulated in *Olmstead v. United States*:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man’s spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things.<sup>300</sup>

Thus the Supreme Court has found that the First Amendment protects speech irrespective of whether it has material worth as truthful information, because it seeks to promote a society that has self-expressive individuals, regardless of the merit of what they articulate.<sup>301</sup> Similarly, the Court has found that the Fourth Amendment protects against unlawful searches and seizures because to invade privacy has not only material consequences, but is also an affront to what

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Press 2001) (using philosophy, anthropology, linguistics, and literary theory to understand how legal actors reason and decide).

<sup>294</sup> SIR JOHN ECCLES & DANIEL N. ROBINSON, *THE WONDER OF BEING HUMAN: OUR BRAIN & OUR MIND* 25-26 (1984).

<sup>295</sup> See, e.g., A. M. Turing, *Computing Machinery and Intelligence*, 59 *MIND* 433, 433 (1950) (asking the rhetorical question of whether machines can think).

<sup>296</sup> See, e.g., S. Zeki, *The Disunity of Consciousness*, 7 *TRENDS IN COGNITIVE SCI.* 214 (2003).

<sup>297</sup> Stuart R. Hameroff, *The Entwined Mysteries of Anesthesia and Consciousness*, 105 *ANESTHESIOLOGY* 400 (2006) (“Unlike other receptor-mediated pharmacologic targets, consciousness is ill-defined, [and] cannot be measured . . .”).

<sup>298</sup> Alexander Marshack, *Some Implications of the Paleolithic Symbolic Evidence for the Origin of Language*, 280 *ANNALS N.Y. ACAD. SCI.* 289, 310 (1976).

<sup>299</sup> U.S. CONST. pmb1. (1787).

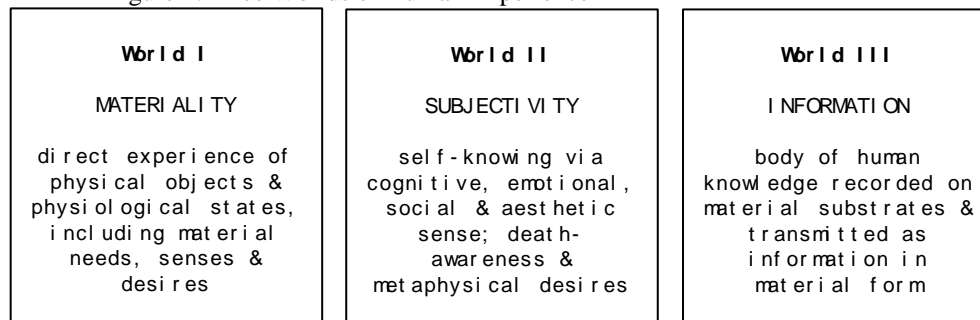
<sup>300</sup> *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

<sup>301</sup> *But see, e.g.,* *Königsberg v. State Bar of Cal.*, 366 U.S. 36 (1961) (recognizing there is no absolute protection for factual communications that cause private injury).

Samuel Warren and Louis Brandeis referred to as the “inviolability of personality.”<sup>302</sup> Thus, it is not only because of the material harm done to women’s bodily autonomy posed by restrictions on contraception that they are unconstitutional, but also because of the subjective harm done to women’s sense of privacy over reproductive decision-making.<sup>303</sup>

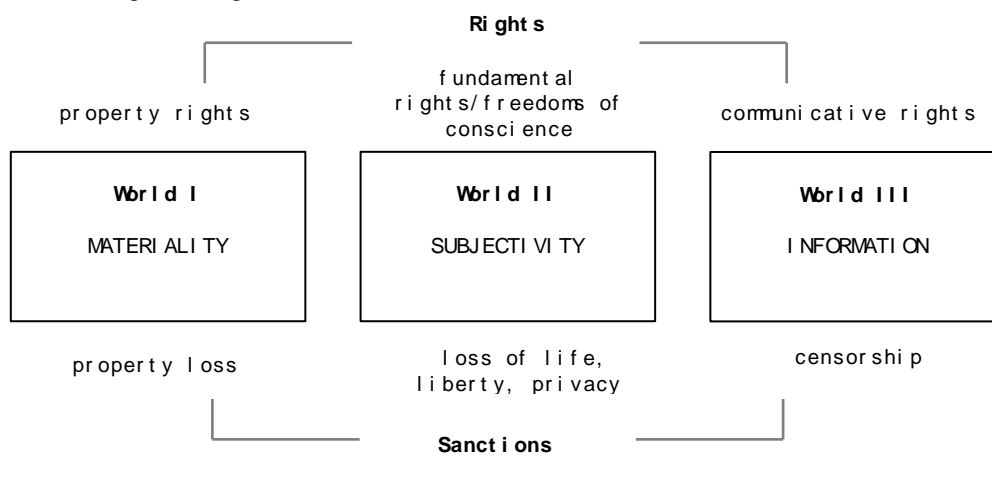
To further the idea that human consciousness is central to systems of law, we can use philosopher Karl R. Popper’s description of three worlds of human experience.<sup>304</sup> Popper distinguishes three worlds: (I) a world of physical objects and states that is the objective reality we physically experience, (II) a world of subjective interpretation that hinges upon consciousness, and (III) a world of knowledge and information that is transferable (Figure 1):

Figure 1. Three Worlds of Human Experience



Rudimentarily, we can associate Popper’s three worlds of human experience with our system of legal rights and penalties (Figure 2):

Figure 2. Legal Protections and Sanctions



<sup>302</sup> See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (1890).

<sup>303</sup> See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (holding that marital privacy is a protected right under the Constitution).

<sup>304</sup> KARL R. POPPER, *OBJECTIVE KNOWLEDGE: AN EVOLUTIONARY APPROACH* 153 (1972).

Law operates on conscious subjectivity. We fear death and imprisonment, and appreciate life and liberty for more than what they do to our physical bodies. The philosopher Descartes described our perception of certain nonphysical entities such as morals, justice, virtues, and truth as consciously “real,” and evolutionary biologist Theodosius Dobzhansky named their “somber companions” as fear, anxiety, and death awareness.<sup>305</sup> These produce the deterrent effect of legal sanctions vis-à-vis conscious subjectivity in World II.

In *Citizens United*, the Supreme Court found McCain-Feingold unconstitutional by portraying organizations as simply another form that citizens could take to exercise their speech rights.<sup>306</sup> In *Hobby Lobby*, similarly, the Court that, “protecting the free-exercise rights of corporations like Hobby Lobby . . . protects the religious liberty of the humans who own and control those companies.”<sup>307</sup> By contrast to human beings, however, organizations have no inner life or associated subjective self-consciousness by which to exercise these rights. Organizations have only a material existence in World I;<sup>308</sup> yet World II subjectivity acts both as a filter of experience that carries with it the possibility of empathy, and as the locus of fear that enhances the deterrent effect of legal sanctions in the world of human beings.

This substantially explains why corporate crime is estimated to be far more common than any other kind of crime.<sup>309</sup> It is a form of empathy failure stemming from organizations’ lack of subjectivity; or, more precisely, from their lack of what Otto Neurath called “intersubjectivity,” with human beings consequent to having an entirely different kind of existence.<sup>310</sup> Thus, Professor Reich observed of corporate polluters during the early environmental rights movement that their combination of “vital factors of bureaucracy, organization, and technology” had produced “a powerful momentum of their own” that was simply “indifferent” to the interests held by entire classes of people.<sup>311</sup>

In contrast, citizenship in the modern liberal state defines the formal relationship between human beings in political community with each other. It is a combination of material aspects, such as rights of residence, and subjective ones, such as participation in deliberation over a common destiny by voting.<sup>312</sup> We can in fact note this same distinction between subjective and

<sup>305</sup> ECCLES & ROBINSON, *supra* note 279, at 121 (quoting Descartes), 25 (quoting Dobzhansky).

<sup>306</sup> *Citizens United*, 558 U.S. at 372.

<sup>307</sup> *Hobby Lobby*, 134 S.Ct. at 2768.

<sup>308</sup> Organizations are therefore fundamentally changed by alteration of their assets; a person, in contrast, experiences a continuity of self from birth until death despite undergoing significant material changes. *See generally* Kirsty L. Spalding, et al., *Dynamics of Fat Cell Turnover in Humans*, 453 NATURE 783 (2008); Olaf Bergmann, et al., *Evidence for Cardiomyocyte Renewal in Humans* 324 SCL 98 (2009).

<sup>309</sup> EDWIN H. SUTHERLAND & DONALD R. CRESSEY, CRIMINOLOGY 44-47 (1978). In law, the exemplary case is that of the Ford Pinto, which had a design defect that led the fuel tank to explode on rear end collisions. Aware of the defect, Ford decided not to recall the cars based on a cost-benefit analysis that showed an \$11 per vehicle repair necessary to correct the defect exceeded an estimated cost of \$49.5 million to reimburse for death and injury; in 2014, General Motors was accused of similar reasoning concerning an ignition defect. *See* Mark Dowie, *Pinto Madness*, MOTHER JONES (1977), available at <http://www.motherjones.com/politics/1977/09/pinto-madness>; RICHARD A. POSNER, TORT LAW: CASES & ECONOMIC ANALYSIS 225-26 (1982).

<sup>310</sup> Otto Neurath, *Protocol Sentences*, in LOGICAL POSITIVISM 199-208 (A. J. Ayer ed., 1959).

<sup>311</sup> CHARLES A. REICH, THE GREENING OF AMERICA 13-14 (Bantam 1971).

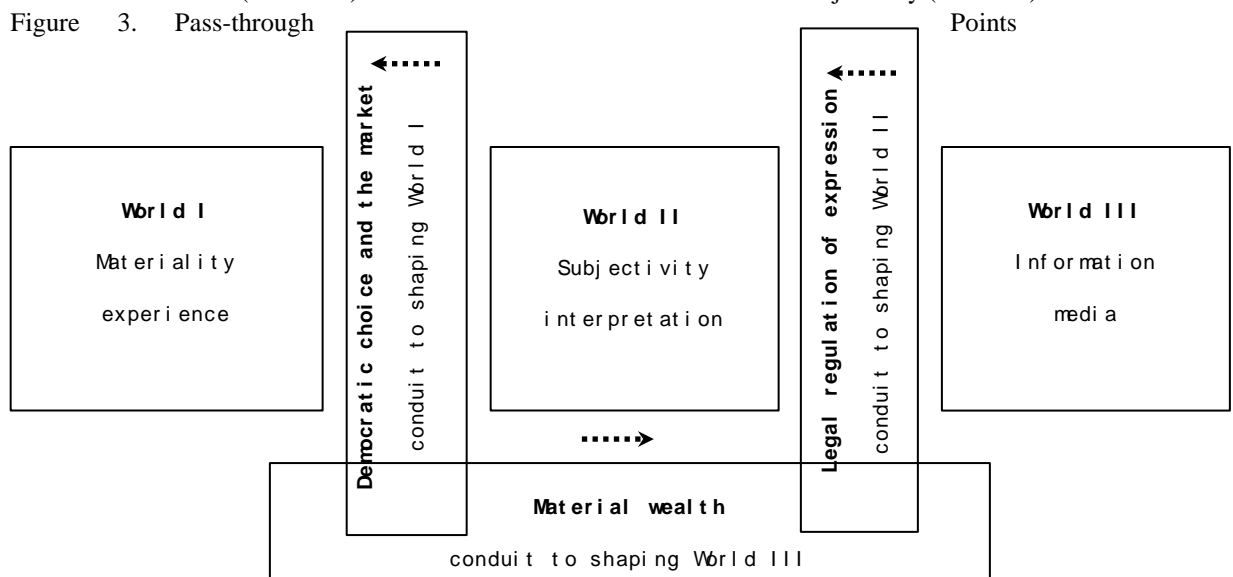
<sup>312</sup> Sociologist Gershon Shafir defines citizenship as “the transcendence of the instrumental sphere of

material ends in the definition of selfhood given by contemporary philosopher Michael J. Sandel:

[The self] means there is always a distinction between the values I *have* and the person I *am* . . . [T]he shape of this “me” must be given prior to any of the aims or attributes I bear. One consequence of this distance is to put the self *itself* beyond the reach of its experience, to secure its identity once and for all. Or to put the point another way, it rules out the possibility of what we might call *constitutive ends*.<sup>313</sup>

Organizations, by contrast, are explicitly constituted for ends without which they would not exist at all. Even an organization whose purpose is to serve human beings’ moral goals cannot “itself” possess the metaphysical attributes that would lead it to pursue the good for its own sake. It stands in instrumental relation to its ends, even if they are moral. This is the case with nonprofit organizations like Citizens United; and was precisely the point the Supreme Court made about corporate personhood in the nineteenth century.<sup>314</sup>

Now that we have understood this key difference, we can return to McCain-Feingold. That law was an attempt to regulate the relationship between some of the most powerful organizations in our society and the mass broadcast and persuasive “electioneering communication” that their treasuries could purchase to influence the electorate. We can describe this as a regulation of the pass-through point between material wealth (World I) and persuasive forms of mass media (World III) as a means to influence individual voter subjectivity (World II):



necessity, in which we toil to satisfy our material wants, into the sphere of freedom where the practice of freedom, in a collective rational and moral deliberation over a common destiny, is its own reward.” Gershon Shafir, *Introduction: The Evolving Tradition of Citizenship*, in *THE CITIZENSHIP DEBATES: A READER* 1, 3 (Gershon Shafir ed., 1998).

<sup>313</sup> SANDEL, *supra* note 131, at 162.

<sup>314</sup> See *Dartmouth College*, 17 U.S. at 553, 637-38; see also KANT, *supra* note 62 and associated text.

Much critical thought was devoted during the twentieth century to the impact of mass media on individual consciousness. Observing social changes wrought by the rise of television, journalist George Trow described a “grid of two hundred million” and a “grid of intimacy” as the two poles of American experience in a televised culture in which the “middle distance had fallen away.”<sup>315</sup> Political scientist Robert Putnam empirically and precisely identified the depopulated space where local civic activity had starkly declined since the emergence of television.<sup>316</sup> Sociologist David Riesman theorized a shift in individuals from “inner-directed” to “other-directed” personality coinciding with the rise of mass media,<sup>317</sup> and psychologist Sherry Turkle found that while communications technologies lent unprecedented control and convenience in interpersonal relationships, they generated a feeling of being “alone together.”<sup>318</sup> These effects have been detected even at the geopolitical level, where economist Jeffrey D. Sachs identified as a significant threat to growth and social order a “distracted society” in places of affluence and high-tech communication like the United States.<sup>319</sup>

Well before television, Antonio Gramsci noted that World I’s distinct ontological status meant that it could be captured or coopted by nonhuman actors, such as the state or other organizations, introducing the term “hegemony” to describe the power of cultural institutions like the media for purposes of social control.<sup>320</sup> Walter Lippmann studied public opinion and famously coined the term “stereotype” to explain how people form opinions about what they do not know.<sup>321</sup> What we “believe to be a true picture,” Lippmann said, “we treat as if it were the environment itself.”<sup>322</sup> In an ever-more complex world, we rely heavily on what others say to craft our understandings of it. We become more susceptible to persuasive new forms of “iconography.”<sup>323</sup> As Vaclav Havel noted when taking the helm of the world’s newest democracy

<sup>315</sup> TROW, *supra* note 167, at 47.

<sup>316</sup> See PUTNAM, *supra* note 45, at 61-63.

<sup>317</sup> DAVID RIESMAN, *THE LONELY CROWD: A STUDY OF THE CHANGING AMERICAN CHARACTER* 13-21 (1961); *but see* Talcott Parsons & Winston White, *The Link Between Character and Society*, in *CULTURE AND SOCIAL CHARACTER: THE WORK OF DAVID RIESMAN REVIEWED* 89-135 (Seymour Martin Lipset & Leo Lowenthal eds., 1961) (refuting Riesman and presenting an alternative explanation).

<sup>318</sup> See generally SHERRY TURKLE, *ALONE TOGETHER: WHY WE EXPECT MORE FROM TECHNOLOGY & LESS FROM EACH OTHER* (2011).

<sup>319</sup> JEFFREY D. SACHS, *THE PRICE OF CIVILIZATION: REAWAKENING AMERICAN VIRTUE & PROSPERITY* 133-58 (2011). A half-century earlier, historian David M. Potter made a similar assertion that television aimed to “fix the attention but not the mind.” DAVID M. POTTER, *PEOPLE OF PLENTY: ECONOMIC ABUNDANCE AND THE AMERICAN CHARACTER* (1954).

<sup>320</sup> SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI 245 (Quintin Hoare & Geoffrey Nowell Smith eds. and trans., 1971); see generally JACQUES ELLUL, *PROPAGANDA: THE FORMATION OF MEN’S ATTITUDES* (Konrad Kellen and Jean Lerner trans., 1965).

<sup>321</sup> WALTER LIPPMANN, *PUBLIC OPINION* 18-19 (First Free Press 1997).

<sup>322</sup> *Id.* at 4; see also IAN HACKING, *REPRESENTING AND INTERVENING: INTRODUCTORY TOPICS IN THE PHILOSOPHY OF NATURAL SCIENCE* 134 (1997).

<sup>323</sup> See, e.g., M.I.A.— *Bad Girls (Official Behind the Scenes): Noisy Specials #08*, <https://www.youtube.com/watch?v=m6-sNTOhYnU&feature=youtu.be> (last visited Jun. 13, 2015) (the creative directors of a pop music video use terms like “iconography” to explain how they convey specific ideas about gender roles, class,

in 1995: “how easily my television image can be made to seem different from the real me.”<sup>324</sup>

These precise kinds of concerns generated public pressure on Congress to regulate the “ad wars” in American politics at the turn of the century by addressing its latest campaign finance reform expressly to mass broadcast forms of “electioneering communication.” To neutralize the concern, the Supreme Court articulated an optimistic view of an idea-marketplace made plentiful by new kinds of technology (and those organizations that could afford to use the marketplace to speak). Yet empirical work casts doubt on the validity of that portrayal. In a recent paper tracking the flow of information into American households, W. Russell Neuman, Yong Jin Park, and Elliot Panek described the increase in the ratio of supply to demand for media minutes of information, from 82 in 1960 to 884:1 in 2005, as creating a greater than human-scale cognitive challenge.<sup>325</sup> Two generations earlier, philosopher and law professor Jacques Ellul mused that so much “excessive data do not enlighten the reader or the listener; they drown him . . . . [I]f he does not want to risk losing his mind, he will merely draw a general picture.”<sup>326</sup> Supporting that assertion, one recent study found broadband access to be negatively correlated to national exam scores in middle schools.<sup>327</sup>

The “antidistortion” interest that captured some of these concerns reappeared in 2011 in the case of *W. Tradition P’ship v. Attorney Gen. of Mont.*<sup>328</sup> A Montana law prohibited corporations from making contributions or expenditures “in connection with a candidate or a political committee” unless from a separate, segregated fund solicited from shareholders, employees, or members of the corporation.<sup>329</sup> Montana’s supreme court, however, focused not on capital but on technology, emphasizing that contemporary mass messaging had outstripped voters’ ability to parse it: “[f]or one thing, voters generally do not have the desire, much less the time, sophistication, or ability to sift through hours upon hours of attack ads . . . in order to winnow truth . . . from fiction and half-truths . . . .”<sup>330</sup> This situation, the court found, marginalizes individual citizens’ impact on the political process because “it defies reality to suggest that millions of dollars in slick television and Internet ads—put out by entities whose purpose and expertise, in the first place, is to persuade people to buy what’s being sold—carry the same weight as the flyers of citizen candidates and the letters to the editor of John and Mary Public.”<sup>331</sup>

and social meaning).

<sup>324</sup> HAVEL, *supra* note 290. (“[t]elevision forces me to express my thoughts as sparely [sic] as possible, in witticisms, slogans, or sound bites . . . . [H]ow easily my television image can be made to seem different from the real me.”).

<sup>325</sup> W. Russell Neuman, Yong Jin Park & Elliot Panek, *Tracking the Flow of Information into the Home: An Empirical Assessment of the Digital Revolution in the United States, 1960-2005*, 6 INT’L J. COMM. 1022, 1034 (2012).

<sup>326</sup> ELLUL, *supra* note 321, at 87.

<sup>327</sup> See, e.g., Rodrigo Belo, Pedro Ferreira, & Rahul Telang, *Broadband in School: Impact on Student Performance*, 60:2 MANAGEMENT SCIENCE 265 (2014) (finding high levels of broadband access in Portuguese middle schools had a negative impact on national exam scores regardless of gender, subject, or school quality).

<sup>328</sup> *W. Tradition P’ship v. Attorney Gen. of Mont.*, 271 P.3d 22-23 (Mont. 2011), *overruled by* *Am. Tradition P’ship v. Bullock*, 132 S. Ct. 2490 (2012).

<sup>329</sup> *W. Tradition P’ship*, 271 P.3d at 3.

<sup>330</sup> *Id.* at 34.

<sup>331</sup> *Id.* at 34-35.

Montana's supreme court upheld the law.

The Supreme Court overruled the decision based on *Citizens United*.<sup>332</sup> Yet the variation in judges' reasoning within these cases about technologies of mass media suggests that the Constitution preordains no specific theory of technology in relation to the exercise of expressive rights, and therefore judges must develop those theories alongside their jurisprudence in cases that require it.<sup>333</sup> These theories are not constitutional theories, however; they are theories about the media and about communication. The "marketplace of ideas," for example, reflects what media theorists call a "transmission view" of communication, which conceives of communication as a process whereby information is transmitted and distributed.<sup>334</sup> This justifies *Buckley*'s focus on the quantity of ideas, irrespective of the money that is spent to produce them, by what kind of entity. The marketplace of ideas is simply the transmission of information; it matters little by whom or what means it is carried out. *Citizens United* relied heavily on the transmission view, quoting from *Buckley*: "A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached"<sup>335</sup> harming "society as a whole, which is deprived of an uninhibited marketplace of ideas."<sup>336</sup>

A "ritual view" of communication looks at it as more than simply a way of getting ideas from one place to another. Rather, communication is a form of drama.<sup>337</sup> "What is arrayed before the reader" of a newspaper, media theorist James Carey wrote in *Communication as Culture*, "is not pure information but a portrayal of the contending forces in the world."<sup>338</sup> This view explains Congress' focus in McCain-Feingold on *who* and *what* is transmitting political communication before elections, and whether their relative power in society bears a risk of "distorting" electoral politics. This view is also at the heart of the Montana Supreme Court's comment that "it defies reality to suggest that millions of dollars in slick television and Internet ads—put out by entities whose purpose and expertise, in the first place, is to persuade people to buy what's being sold—carry the same weight as the flyers of citizen candidates and the letters to the editor of John and Mary Public."<sup>339</sup>

The reason that the Supreme Court's theory about mass media in relation to freedom of expression prevails over Congress' (or, in this case, Montana's supreme court) is because of its authoritative position as constitutional interpreter in a government of divided powers.

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<sup>332</sup> *American Tradition P'ship v. Bullock*, 132 S. Ct. 2490 (2012).

<sup>333</sup> See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (Harvard Univ. Press 1980) [introduction].

<sup>334</sup> JAMES W. CAREY, *COMMUNICATION AS CULTURE: Essays on Media and Society* 15 (Rev. ed. 1992).

<sup>335</sup> *Citizens United*, 558 U.S. at 339 (quoting *Buckley*, 424 U.S. at 19).

<sup>336</sup> *Id.* at 335 (quoting *Hicks*, 539 U.S. at 119).

<sup>337</sup> CAREY, *supra* note 334 at 15.

<sup>338</sup> *Id.* at 20.

<sup>339</sup> *W. Tradition P'ship*, 271 P.3d at 34-35.

## IV. CONCLUSION

You are my creator, but I am your master; - obey!<sup>340</sup>

This Article finds its place among studies of law and modernization, and has specifically sought to understand the relationship between law and technology in the transformation of the United States into an “organizational society” during the late nineteenth and twentieth centuries. Working from the premise that law is an institution that reflects culture, it hypothesized that judicial opinions can serve as artifacts of particular moments in the history of modernization and social change.<sup>341</sup> Noting that the United States became both highly technological and highly “organizational” during the industrial and postindustrial periods, this article located cases concerning the legal rights of corporations within the history of technology in order to identify what law and society scholars Susan Silbey and Carol Seron describe as “the relationship of these legal practices to the macro transformations of modern society.”<sup>342</sup> This interest is not unique, however, to sociologists who study law. Within the profession, one of the most cited legal scholars of the last century, Roscoe Pound, urged us to not only follow the law in the books, but also the “law in action.”<sup>343</sup>

The Article therefore methodologically rejected the formalist claim that legal scholarship should confine itself to a “close reading” of the law’s own printed materials.<sup>344</sup> That idea is useful because it allows the elaboration of systems of logically ordered and conceptually coherent doctrines on which lawyers can make predictions about the outcomes of legal arguments, yet it does little to associate legal change with what happens outside of legal institutions, making decisions like *Citizens United*—which involve a complex mix of reasoning about the law, technology, and society—extremely hard to explain. When a two hundred year-old legal concept like “corporate personhood” suddenly becomes controversial with no change in the underlying law, we should approach the jurisprudence that created the controversy as a “system of meaning,” not as a “machine.”<sup>345</sup> To do that, this Article liberally crossed doctrinal categories and time periods and devoted very little space, for example, to mechanics of judicial review such as the intricacies of strict scrutiny.

The Article began with a broad question: it asked how and why the United States Supreme Court’s view of corporations’ constitutional rights could diverge so widely from popularly held views and common sense notions of the same (roughly eighty percent of Americans opposed the ruling in *Citizens United* with relatively little difference of opinion among

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<sup>340</sup> MARY WOLLSTONECRAFT SHELLEY, *FRANKENSTEIN; OR, THE MODERN PROMETHEUS* 235 (1891).

<sup>341</sup> The Article approached judges’ writing from an “anthropological mode,” described by historian Robert Darnton as built upon the premise “that individual expression takes place within a general idiom, that we learn to classify sensations and make sense of things by thinking within a framework provided by our culture.” ROBERT DARNTON, *THE GREAT CAT MASSACRE AND OTHER EPISODES IN FRENCH CULTURAL HISTORY* 6 (1985). Within this frame, judicial opinions can be viewed as artifacts “marked by the circumstances of their production.” SERGIO SISMONDO, *AN INTRODUCTION TO SCIENCE AND TECHNOLOGY STUDIES* 11 (2010).

<sup>342</sup> Seron & Silbey, *supra* note 29, at 33.

<sup>343</sup> See generally Roscoe Pound, *The Need of a Sociological Jurisprudence*, 19 GREEN BAG 607 (1907).

<sup>344</sup> SERON & SIBLEY, *supra* note 29 at 33.

<sup>345</sup> *Id.*



Democrats (85%), Republicans (76%), and independents (81%)).<sup>346</sup> It found that the answer cannot be told separately from a story about specific technologies that expanded organizations' ability to do things in the later nineteenth and twentieth centuries, and the Court's opinion of those technologies. Reading these strains of legal and technological history together, the Article revealed the provenance of *Citizens United* to be a line of cases that adapted legal paradigms to the rise of technologically-enabled organizations, first in jurisdiction, and then in speech. In these cases, the Supreme Court developed a particularly technologically-optimistic and -deterministic kind of constitutionalism as it reasoned about the role that corporations should play in our society as it continues to modernize.

The Court maintained a kind of nineteenth-century affinity for individualism—but of a “shifted” kind. It construed corporations as political minorities that must be protected against majority tyranny, such as popularly enacted laws like McCain-Feingold and the Affordable Care Act, which regulate organizations specifically *as* organizations. Thus in *Citizens United* the Court said, referring to corporations and unions, “We find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers.”<sup>347</sup> And in *Hobby Lobby* it said, “When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people” who own and control the corporation.<sup>348</sup>

This Article has shown, however, that before the rise of an “organizational society” in the United States, a corporation was not seen as providing general protection for human beings in the sense of a complete set of rights that could be “shifted” from them. Well past the middle of the nineteenth century, the Supreme Court described corporate rights as limited other than “where contracts or rights of property are to be enforced.”<sup>349</sup> As a means of deepening the antidistortion interest, this Article strongly critiqued the recent assertion that there is a straight and uncomplicated line from the full set of people's rights to those of the organizations they create, because organizations fundamentally lack the kind of subjective consciousness that is possessed by the human members of the political community that brings them into existence.

“Shifted personhood” is not the kind of methodological individualism that Professor Horwitz pointed out sustained the artificial entity theory of the corporation in which organizations are simply artificial aggregations of individuals: “artificial. . . invisible, intangible, and existing only in contemplation of law,” in John Marshall's formulation.<sup>350</sup> It combines from

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<sup>346</sup> Dan Eggen, *Poll: Large Majority Opposes Supreme Court's Decision on Campaign Financing*, WASH. POST, (Feb. 17, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/17/AR2010021701151.html>; *c.f.*, *Supreme Court Favorability Reaches New Low*, PEW RESEARCH CTR. (May 1, 2012), <http://www.people-press.org/2012/05/01/supreme-court-favorability-reaches-new-low> (poll conducted Apr. 4-15, 2012).

<sup>347</sup> *Citizens United*, 558 U.S. at 333.

<sup>348</sup> *Hobby Lobby*, 134 S. Ct. at 2769 (“the purpose of this fiction is to provide protection for human beings. . . protecting the free-exercise rights of corporations like Hobby Lobby, Conestoga, and Mardel protects the religious liberty of the humans who own and control those companies.”).

<sup>349</sup> *Paul v. Virginia*, 75 U.S. (1 Wall.) 168, 177 (Sup. Ct. 1868), *overruled by* *United States v. Se. Underwriters Assn.*, 322 U.S. 533 (1944).

<sup>350</sup> See Horwitz, *supra* note 9, at 72 (“The artificial entity theory of the corporation . . . sought to retain the premises of what has been called “methodological individualism,” that is the view that the only real starting point for political or legal theory is the individual. Groups, in this view, were simply artificial aggregations of individuals. On the other hand, it was the goal of the Realists to show that groups, in fact, had an organic unity, that the group was greater than

methodological individualism the idea that the individual is the only real starting point for political or legal theory, and from the entity theory the idea that corporations have a kind of organic unity; they can participate in political discourse *qua* individuals, and even have “nerve centers” like living beings do.<sup>351</sup> The result is a kind of Frankenstein creation that is made up of individuals but distinct and autonomous from them. This new “group theory” appears to have easily slid organizations and individuals into constitutional parity with each other during the twenty-first century.

While people seem to widely oppose this idea of parity, we have struggled with how to debate about it. *Citizens United* came on the heels of the financial crisis of 2008, and the outcry over “corporate personhood” it provoked was focused on the interests of those who have capital versus those who do not.<sup>352</sup> This directed analytic resources towards questions of class and away from questions of technology that were deeply central to the legislation the case overturned. This deeply obscured proper analysis of the case. There is little room to consider the *particular* role of technology within an argument that contends that *Citizens United* is part of a “campaign to increase corporations’ legal rights”<sup>353</sup> or, conversely, that it articulates a reality so obvious and vital to American ways of being and doing as to be innocuous: “Corporations are people, my friend.”<sup>354</sup>

While acknowledging that the association between legal order and class oppression has a legitimate history,<sup>355</sup> this article went mostly around the conventional outlines of the corporate personhood debate in an attempt to illuminate what is less well understood than class and power differentials between individuals and corporations: the relationship between technology and the law. It argued that McCain-Feingold was an active attempt to regulate technology, rather than to simply allow it to “scale up” the electoral process to a series of “slickly produced television clashes” funded by corporations and unions.<sup>356</sup> *Citizens United* and *Buckley v. Valeo*, in contrast, combined optimism about technologies of mass media as maximixing factors in the “marketplace of ideas” with deterministic reasoning about their effect on the constitutional protection of freedom of expression. These cases articulate that the law should *lag* behind technological change,<sup>357</sup> allowing, in the formulation of STS scholars Leo Marx and Roe Smith, “technology to drive history.”<sup>358</sup>

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the mere sum of its parts.”); *Dartmouth College*, 17 U.S. at 543.

<sup>351</sup> See *Hertz*, *supra* note 118, and associated text.

<sup>352</sup> The “Occupy Wall Street” movement viewed *Citizens United* as proof that the Supreme Court was willing to use its power to shore up the position of elite class allies. See, e.g., M.J. Lee, “Occupy Courts” to Hit *Citizens United*, POLITICO (Jan. 20, 2012), <http://www.politico.com/news/stories/0112/71711.html>.

<sup>353</sup> Editorial, *The Rights of Corporations*, N.Y. TIMES, Sept. 22, 2009, at A30.

<sup>354</sup> Mitt Romney, U.S. presidential candidate, Speech at the Iowa State Fair (Aug. 11, 2011) (responding to hecklers).

<sup>355</sup> See, e.g., William J. Chambliss, *A Sociological Analysis of the Law of Vagrancy*, 12 SOCIAL PROBLEMS 67-77 (1964).

<sup>356</sup> See Zeleney, *supra* note 168.

<sup>357</sup> See generally Richard L. Abel, *Law as Lag: Inertia as a Social Theory of Law*, 80 MICH. L. REV. 785-809 (1982).

<sup>358</sup> Marx & Smith, *supra* note 19.

We have perhaps failed to recognize judges' reasoning about technology in these decisions because it becomes "blackboxed" within them and simply *not seen* as instrumental to the holdings.<sup>359</sup> The Article argued that this phenomenon resulted in an analytic failure to distinguish *Austin* and *McConnell* as presenting two different kinds of antidistortion interests: the first concerning a regulation of capital (of contributions and expenditures) and the latter a regulation of technology (of "electioneering communication"). "Blackboxing" occurs because judges hew to traditional "rights talk" when they encounter technology management questions within the bounds of constitutional cases. This is understandable because judges, like scientists, are professionally constrained by rules of logical inquiry that do not allow them to transparently do normative work, such as concerning the management of technology in society.<sup>360</sup> Yet "rights talk" places judges' reasoning about the complex relationship between technology, organizations, and society within the bounds of a traditionally understood justification for the existence of counter-majoritarian institutions like the federal courts.

This has an implication in these types of technology cases. Justice Kennedy's musings about television in *Citizens United* become part of "the law," which is both a structure and a mechanism of social order. His optimism about a technologically-mediated "marketplace of ideas" prevails over Congress' vision of a society in which the "ad wars" are tamped down by regulations, like McCain-Feingold. This does what Professor Cover described as "violence" towards the vision of society chosen against, and to those who hold that vision.<sup>361</sup> When we fail to see judges' reasoning about technology as part of their legal reasoning, we fail to hold them accountable for the harm done by their mandated technological orders—mandated because carried forth as a matter of constitutional interpretation whose effects cannot be reversed through ordinary legislation. Thus, this article sought to do two things: (1) raise questions of political theory concerning how judicial review fits into the fabric of majoritarian democracy in a technological age, and (2) sensitize judges to the hubris that allows them to let their norms supercede the legislature's when they reason about the technologies that enable the exercise of particular freedoms.

Pointing, in particular, to the Internet, the majority in *Citizens United* suggested that the antidote to mass media in politics was not more and better legislation, but more and better technology.<sup>362</sup> However, there are reasons to doubt that the Internet can serve as a more democratic alternative to television. For instance, hundreds of thousands of Americans blog about politics, yet search engines concentrate online news audiences on the top corporate media outlets.<sup>363</sup> Google is widely perceived as a tool for finding what simply "exists" online, but Google views its search results as a form of corporate speech protected under the First

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<sup>359</sup> This is another contribution from STS, which has described the "blackboxing" of normative choices within scores of technical objects. See, e.g., Trevor Pinch & Wiebe Bijker, *The Social Construction of Facts and Artefacts: Or How the Sociology of Science and the Sociology of Technology Might Benefit Each Other*, 14:3 SOCIAL STUDIES OF SCIENCE (1984).

<sup>360</sup> Michel Foucault, who studied the history of systems of thought, showed how historical anachronism functions similarly in the production of scientific knowledge despite its logical-rational frame. MICHEL FOUCAULT, *THE ARCHAEOLOGY OF KNOWLEDGE* 135-95 (A.M. Sheridan Smith trans., Pantheon 1972).

<sup>361</sup> See Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

<sup>362</sup> *Citizens United*, 558 U.S. at 364 ("Soon, however, it may be that Internet sources, such as blogs and social networking Web sites, will provide citizens with significant information about political candidates and issues.").

<sup>363</sup> See MATTHEW HINDMAN, *THE MYTH OF DIGITAL DEMOCRACY* 135 (2009).

Amendment,<sup>364</sup> and modifies those results as it sees fit in a way computer scientist and professor of information Christian Sandvig describes as an “algorithmic allocation of attention.”<sup>365</sup> Under a recent federal court ruling, the physical deliverers of online content—internet service providers, or “ISPs”—have no obligation to provide equal access or to deliver content at equal speeds.<sup>366</sup> ISPs already are substantially aligned with the corporate interests of cable television.<sup>367</sup> Thus, twenty-first century communication technologies and the nodal, decentralized and flexible networks they make possible<sup>368</sup> do not necessarily portend a shift of power outside of capital-rich organizations in our era. Technologies cost money to produce. Even if they are freely given to us, they continue to be expressions of the interests of capital.<sup>369</sup>

However, nor do we here need to rely on a polarizing class critique, which views the mass media as part of an ideological superstructure driving a wedge of false consciousness into individuals.<sup>370</sup> For at least two generations, sociologists have urged us to recognize that modern power lies not only with the “exploitative capitalist or an imperialist general or a narrow-minded bureaucrat,” but also in “the efficient structure of modern organizations.”<sup>371</sup> We can therefore express concern about the Supreme Court ceding the First Amendment to the momentum of large-scale sociotechnical systems of mass communication by underwriting its legal reasoning with “Pollyanna-ish” reasoning about technology and organizations, while avoiding becoming mired in

<sup>364</sup> See Eugene Volokh & Donald M. Falk, *First Amendment Protection for Search Engine Search Results* (Apr. 20, 2012), <http://volokh.com/wp-content/uploads/2012/05/SearchEngineFirstAmendment.pdf> (paper commissioned by Google).

<sup>365</sup> Christian Sandvig, *Corrupt Personalization*, SOCIAL MEDIA COLLECTIVE: RESEARCH BLOG (June 26, 2014), available at <http://socialmediacollective.org/2014/-6/26/corrupt-personalization/>; See, e.g., Leslie Kaufman, *Google Punishes Site in Ranking Scheme*, N.Y. TIMES, Dec. 27, 2013, at C2 (suppressing search results in retaliation against RapGenius); Claire Cain Miller & Mark Scott, *Google Settles Its European Antitrust Case; Critics Remain*, N.Y. TIMES, Feb. 5, 2014, available at [http://www.nytimes.com/2014/02/06/technology/google-reaches-tentative-antitrust-settlement-with-european-union.html?\\_r=0](http://www.nytimes.com/2014/02/06/technology/google-reaches-tentative-antitrust-settlement-with-european-union.html?_r=0) (alleging alteration of search results to promote business interests).

<sup>366</sup> See *Verizon v. FCC*, 740 F.3d 623, 658-59 (D.C. Cir. 2014). In the recent “net neutrality” decision, the D.C. Circuit found that the FCC had relinquished its right to regulate Internet service providers (ISPs) as common carriers. *Id.*

<sup>367</sup> See Saul Hansell, *Media Megadeal: The Overview; America Online Agrees to Buy Time Warner for \$165 Million; Media Deal is Richest Merger*, N.Y. TIMES, Jan. 11, 2000, at A1. In 2000, internet company America Online and cable television company Time Warner merged to form the largest media company in the world, and in 2014 cable and internet company Comcast moved to acquire the merged Time Warner Cable. *Id.*; David Gelles, *Comcast Deal Seeks to Unite 2 Cable Giants*, N.Y. TIMES (Feb. 12, 2014) <http://dealbook.nytimes.com/2014/02/12/comcast-set-to-acquire-time-warner-cable/>.

<sup>368</sup> See generally ALEA M. FAIRCHILD, *TECHNOLOGICAL ASPECTS OF VIRTUAL ORGANIZATIONS* (2003); Michael E. Porter, *Clusters and the New Economics of Competition*, HARV. BUS. REV. 77 (reprinted in 1998).

<sup>369</sup> Illustrating how technical things are inscribed with socio-economic relations is another central contribution of STS. See, e.g., Langdon Winner, *Do Artifacts Have Politics?* 109 DAEDALUS 121, 122, 126-27 (1980); Jim Johnson, *Mixing Humans and Nonhumans: The Sociology of a Door-Closer*, 35 SOCIAL PROBLEMS 298, 308-10 (1988).

<sup>370</sup> GRAMSCI, *supra* note 321, at 12.

<sup>371</sup> PETER M. BLAU & RICHARD A. SCHOENHERR, *THE STRUCTURE OF ORGANIZATIONS* 357 (1971). See also REICH, *supra* note 296, at 13 (observing corporate polluters during the early environmental rights movement that their combination of “vital factors of bureaucracy, organization, and technology” produced “a powerful momentum of their own that may not be inconsistent with class interests, but may well be indifferent to them.”).

the gridlock of “class warfare” by accusing the Court of intentionally engaging in it.

We must continue to unpack the debate over “corporate personhood” because technological orders established by constitutional decision-making will be significantly harder to alter than those by legislation, no matter how dystopian the results. Dystopian is how some describe deliberative democracy in its present form in the United States. Relying on *Citizens United*, the D.C. Circuit in *Speechnow.org* inaugurated the era of the “Super PAC” by holding unanimously that organizations making independent expenditures that support or oppose candidates, cannot be restricted in receiving contributions of any size from any source.<sup>372</sup> Super PACs qualify for tax-exempt status as social welfare groups under § 501(c)(4) of the Internal Revenue Code as long as they spend no more than fifty percent of their resources on explicitly political activities; they also need not disclose their donors.<sup>373</sup> The fifty-percent rule has proven difficult to enforce, and money from obscure sources has flowed massively into political contests large and small across the country.<sup>374</sup>

The use of Super PACs, like the use of television, has swept across party lines and ideological differences. After becoming the first presidential candidate to abandon public financing in 2008,<sup>375</sup> Barack Obama became the first sitting president to utilize a Super PAC; his former campaign manager David Axelrod described the creation of these organizations as an “arms race” in which the Democratic Party could not afford to step down.<sup>376</sup> In 2011, the FCC formally abandoned the Fairness Doctrine on grounds that new expansive media sources like cable television and the Internet had eliminated the broadcast scarcity on which the justification for “equal time” rested.<sup>377</sup> In the last presidential election, some candidates simply used their campaigns “as promotional tours for books, movies, and their own personal brands.”<sup>378</sup>

At the first stirrings of the Industrial Age, Mary Shelley told a tale about an inventor losing control of his creation. Often lost in the retelling is the fact that Dr. Frankenstein’s aim was not to create a monster, but a creature to do good. So too the growth of organizations in our

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<sup>372</sup> *Speechnow.org v. FEC*, 599 F.3d 686, 696, 698 (D.C. Cir. 2010).

<sup>373</sup> See Chick & Henchey, *supra* note 4, at 6, 11.

<sup>374</sup> See, e.g., Jeremy Singer-Vine, *How Much are Super PAC’s Spending?* (2012), <http://www.caorchicago.org/2012/08/06/super-pacs-changing-the-nature-of-the-game/>; Matea Gold, *Koch-Backed Political Network, Built to Shield Donors, Raised \$400 Million in 2012 Elections*, WASH. POST, Jan. 5, 2014, available at [http://www.washingtonpost.com/politics/koch-backed-political-network-built-to-shield-donors-raised-400-million-in-2012-elections/2014/01/05/9e7cfd9a-719b-11e3-9389-09ef9944065e\\_story.html](http://www.washingtonpost.com/politics/koch-backed-political-network-built-to-shield-donors-raised-400-million-in-2012-elections/2014/01/05/9e7cfd9a-719b-11e3-9389-09ef9944065e_story.html).

<sup>375</sup> See, e.g., *2008 Presidential Campaign Financial Activity Summarized: Receipts Nearly Double 2004 Total*, FED. ELECTION COMM’N, June 8, 2009, <http://www.fec.gov/press/press2009/20090608PresStat.shtml>. No presidential candidate since the initiation of public funding in 1971 had declined to use public funding. *Id.* After a high point of \$240 million, the fund decreased to \$139 million in 2008. *Id.* Barack Obama became the first ever major party nominee to refuse it, allowing him to raise a total of \$745 million. *Id.* John McCain accepted \$84.1 million in public funds after raising \$46.4 million in private funds, and he was defeated. *Id.*

<sup>376</sup> Zeleney & Rutenberg, *supra* note 4.

<sup>377</sup> Press Release, FCC, *FCC Chairman Genachowski Continues Regulator Reform to Ease Burden on Businesses; Announces Elimination of 83 Outdated Rules* (Aug. 22, 2011), available at [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-309224A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-309224A1.pdf). Fairness Doctrine equivalents are still widely in effect as a form of electoral regulation throughout Europe.

<sup>378</sup> Zeleney, *supra* note 160.

society has been driven by our desire to find ways to live better and accomplish things in modern times. Their suitability in this regard is why Max Weber linked corporations' emergence to the need for large-scale organization in modern industrial societies, and why he found them present irrespective of substantial differences in the surrounding form of political economy, such as whether it was democratic capitalism or socialism.<sup>379</sup>

Oliver Wendell Holmes once described the theory of our Constitution as “an experiment, as all life is an experiment,” in which “we have to wager our salvation upon some prophecy based upon imperfect knowledge.”<sup>380</sup> If our organizations become our monsters, it is because we have allowed it. Long before *Citizens United* and *Hobby Lobby*, Professor Tushnet put us on notice of a “well-worn path” by which corporations had “moved from the legislative arena, in which they had lost, to the judicial arena, where they succeeded in persuading the judges to rule that constitutional interests were at stake.”<sup>381</sup> This is precisely what early corporate entity theory dissenter Justice Daniel predicted as the result of the Supreme Court's decision in *Letson*. He described it as rendering a corporation “equal to a release from the thralldom of constitutional restriction, and made competent at any rate to the power of commanding the action of the federal courts.”<sup>382</sup> Similarly, Dr. Frankenstein's creature eventually said: “You are my creator, but I am your master; - obey! . . . Beware for I am fearless, and therefore powerful.”<sup>383</sup>

Finally, this Article offers a brief word on further research. We have long had a deep-seated cultural optimism about technology in the United States. A fruitful direction for further analysis will be to compare the evolution of the legal status of organizations in places with different perspectives on technological innovation, such as in Europe, where regulation of political communication is an area of significant regulatory contrast to the United States.<sup>384</sup> My colleague Emanuel Bertrand, who is a member of the Science and Democracy Network, has noted a discursive trend of inclusion of organizations in political discourse as a proxy for individual civil society participation in the European Union.<sup>385</sup> This is comparable to the rise of organizations in political discourse in the United States, and it would be interesting to see if there is a joint evolution in their constitutional status as speakers.<sup>386</sup> Further, while this article has dealt

<sup>379</sup> WEBER, *supra* note 28, at 337-38.

<sup>380</sup> *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

<sup>381</sup> Tushnet, *supra* note 281, at 254.

<sup>382</sup> *Marshall*, 57 U.S. at 344 (1853) (Daniel, J., dissenting) (using the French word *deterré*, meaning literally “to unearth” to describe the corporation's use of the judicial system).

<sup>383</sup> SHELLEY, *supra* note 341, at 235-36.

<sup>384</sup> Regarding technology, Europe as an example, experienced authoritarian uprisings during the twentieth century that harnessed technological innovation to negative effect, resulting in an overall more “precautionary” approach than in the United States. See, e.g., ROBERT PAARLBERG, *THE POLITICS OF PRECAUTION: GENETICALLY MODIFIED CROPS IN DEVELOPING COUNTRIES* (2001); SHEILA JASANOFF, *DESIGNS ON NATURE: SCIENCE AND DEMOCRACY IN EUROPE AND THE UNITED STATES* 280-87 (2005) (arguing that democratic decisionmaking has an important role to play in technology management and illustrating how that has been the case more in Europe than in the United States for, example, genetically modified food).

<sup>385</sup> See generally Emanuel Bertrand, *The Participation of Organized Civil Society as Seen by the European Commission: The Discursive Regime of Participative Governance*, Science and Democracy Network Tenth Annual Meeting (Paris, June 25-27, 2012) (on file with the author).

<sup>386</sup> See generally Vienna Convention on the Law of Treaties between States and International Organizations

with organizational freedom of action under Article III and the First Amendment, its conclusions should be tested against analysis of disputes over organizational rights under the Fourth and Fifth Amendments, and disputes over assigning to them higher-order responsibilities, such as humanitarian ones under the law of nations.<sup>387</sup> An interesting other line of historical analysis would consider why radio, which was primarily regional, did not draw the same legislative or judicial attention concerning the political speech of organizations as did television.

In 2010, the Wall Street Journal commended the Supreme Court for its decision in *Citizens United*, calling it the “branch of government that seems to understand technology best.”<sup>388</sup> The simplicity of that conclusion—that the Supreme Court even has a point of view about technology—is reinforced by the fact that it has imposed an absolute, half-century ban on televising its own courtroom activities.<sup>389</sup> This article has substantially fleshed out what the Court really thinks about technology, and how that point of view has underwritten its jurisprudence concerning certain kinds of corporate rights over two centuries. When he mused about the Internet in *Citizens United*, Justice Kennedy seemed to be looking for a new technology that could return the political conversation to individual citizens by restoring to them the power of speech, even as *Citizens United* opened it evermore to organizations. The “new” technology needed is precisely the “old” one whose results the Court overturned: that, simply, of the democratic process.

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or Between International Organizations, Mar. 21, 1986, available at [http://legal.un.org/ilc/texts/instruments/english/conventions/1\\_2\\_1986.pdf](http://legal.un.org/ilc/texts/instruments/english/conventions/1_2_1986.pdf) (expanding treaty-making to include organizations as parties).

<sup>387</sup> See, e.g., *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1663-64 (2013) (concerning whether corporations can be held accountable for human rights violations).

<sup>388</sup> L. Gordon Crovitz, *Tech-Savvy Justices Protect Free Speech*, WALL ST. J., May 10, 2010, <http://online.wsj.com/articles/SB10001424052748704858104575232340596598422> (“The branch of government that seems to understand technology best is the one whose members take notes on legal pads, not iPads.”).

<sup>389</sup> See, e.g., WASH. POST, *Souter Won’t Allow Cameras in High Court*, L.A. TIMES, Apr. 9, 1996, available at [http://articles.latimes.com/1996-04-09/news/mn-56470\\_1\\_supreme-court](http://articles.latimes.com/1996-04-09/news/mn-56470_1_supreme-court) (“The day you see a camera come into our courtroom it’s going to roll over my dead body”); Cheryl Hanna, *Court Appearance*, SEVEN DAYS, Nov. 29, 2006, available at <http://www.sevendaysvt.com/vermont/court-appearance/Content?oid=2128871> (arguing that Supreme Court arguments should be televised. Ms. Hanna was well regarded and will be deeply missed at Vermont Law School).