3. TIMELINE ON CORPORATE PERSONHOOD

1791: The First Amendment is ratified, providing for freedom of speech, freedom of the press, and peoples' rights to assemble and petition the government.[1] The Framers also are clear, in various writings, of their mistrust of self-interested corporate power.[2]

1819: In ***Dartmouth College v. Woodward***, the Supreme Court determines that corporations are protected by the Contracts Clause of the Constitution.[3] In his opinion, Chief Justice John Marshall is adamant that a corporation is merely a state-created, artificial "creature of law" that does not possess inalienable human rights under the Constitution, but rather "only those properties which the charter of creation confers upon it."[4]

Pre-Civil War: Court decisions confirm that while corporations have limited constitutional protection related to their rights conferred by the state in their charters, individual citizens' substantive rights do not extend to corporations.[5] Corporations are subject to stringent regulations.[6]

1870s: Advocates begin disseminating the novel theories that corporations have inherent constitutional rights, and business activities should be shielded against state regulation.[7]

1880s and 1890s: The Pendleton Act of 1883 enacts the modern civil-service system and marks the end of the "spoils system," under which government jobs were a source of partisan political patronage and campaign funding.[8] In its aftermath, corporate leaders and corporations' own coffers become a major source of political contributions and expenditures. Mark Hanna – the millionaire businessman, Republican Party boss, and Ohio Senator who ran President William McKinley's 1896 and 1900 campaigns – emphasizes fundraising from bankers and other large corporate interests.[9]

1886: The doctrine of corporate personhood is first suggested in ***Santa Clara v. Southern Pacific Railroad Co.*** A California railroad tax is challenged based on an assertion of Fourteenth Amendment Equal Protection rights.[10] The Supreme Court rules in favor of the railroad based on narrow state-law grounds.[11] However, the court reporter adds a footnote to the opinion noting that, during oral arguments, the Chief Justice said the justices did not wish to hear argument about whether the Equal Protection Clause applied to corporations because "[w]e are all of the opinion that it does."[12]

1897: Citing *Santa Clara*, the Court expressly recognizes that "corporations are persons within the provisions of the fourteenth amendment," declaring it "well settled" law and striking down, on equal protection grounds, a state statute requiring railroad defendants to pay attorneys' fees for certain winning plaintiffs.[13] Other decisions this year hold unconstitutional a state statute permitting the condemnation of private railroad property as violating the Fifth Amendment's Takings Clause via the Fourteenth Amendment's Due Process Clause,[14] and a regulation that violated a corporation's "liberty to contract," protected by substantive due process.[15]

1905: ***Lochner v. New York*** strikes down a state law setting the maximum number of hours that bakers may work, as violating the substantive due process rights of employers and employees to freely engage in contracts.[16] For the next three decades, the Court holds unconstitutional state and federal laws based *Lochner*'s *lassiez-faire* theory of economic liberty.

1906: In ***Hale v. Henkel***, the Supreme Court finds that corporations are protected by the Fourth Amendment right against "unreasonable searches and seizures," but *not* the Fifth Amendment protection against self-incrimination – which is only meant for natural persons.[17]

1907: In the aftermath of controversy over corporate contributions to campaigns, including his own, President Theodore Roosevelt signs the Tillman Act, which bans direct corporate contributions to federal political campaigns.[18] Some states follow suit with similar regulations – others with even more restrictive limits. The federal ban is extended to contributions from labor unions in 1947.[19]

1937: The Supreme Court abandons *Lochner*[20] and begins upholding progressive regulations and New Deal programs. Over the next several decades, many key decisions based on corporate constitutional rights are overturned.[21]

1971: Congress passes campaign finance regulations with the Federal Election Campaign Act (FECA). In a memorandum to the U.S. Chamber of Commerce, tobacco company lawyer and future Supreme Court Justice Lewis Powell argues that in response to the mainstreaming of consumer rights and environmental advocacy, corporate America needs to take legal action and build an infrastructure to prevent regulation.[22] He writes that "Under our constitutional system, especially with an activist-minded Supreme Court, the judiciary may be the most important instrument for social, economic and political change."[23]

1974: In wake of the Watergate scandal, Congress amends FECA to implement comprehensive campaign finance reforms, including limits on campaign contributions and expenditures, matching funds for presidential campaigns, and a new enforcement body, the Federal Election Commission. This law is almost immediately challenged on First Amendment grounds.

1976: In a long, unsigned opinion with multiple partial dissents, the Supreme Court finds in ***Buckley v. Valeo*** that personal expenditures on advertisements advocating the election or defeat of candidates is protected political speech under the First Amendment.[24] The Court upholds limits on contributions to candidates in order to protect against corruption or the appearance thereof, but finds insufficient evidence that the limits on expenditures are justified by the same concern.[25]

1976: The Supreme Court strikes down a state restriction on price advertising by pharmacies. ***Virginia Board of Pharmacy v. Virginia Citizens Consumer Council*** is brought, not on behalf of corporations, but by Public Citizen asserting the right of the public to receive information.[26] The Court finds that the First Amendment can sometimes be applied to "commercial speech," and that this total ban on information in which the public is interested is not justified.

1978: In ***Bellotti v. First National Bank of Boston***, a 5-4 majority led by Justice Powell strikes down a Massachusetts ban on for-profit corporate spending to influence referenda, finding that the corporate "identity" of the speaker did not deprive it of First Amendment protection.[27] Powell does, however, note that this ruling does not necessarily apply to limits on corporate expenditures to influence candidates' elections, as the danger of real or apparent corruption may be more pronounced.[28] Justice Byron White – joined by Justices William Brennan and Thurgood Marshall – and Justice William Rehnquist author strong dissents, arguing that corporations should not have the same constitutional rights as individuals, and that they should not be able to overwhelm elections with massive spending.[29]

1978: The Supreme Court rules that a plumbing company's Fourth Amendment expectation of privacy is violated by the unannounced workplace inspection provisions of the Occupational Safety and Health Act.[30]

1980: In ***Central Hudson Gas & Electric Corp. v. Public Service Commission***, the Supreme Court invalidates a New York regulation that banned promotional advertising by an electric utility company.[31] The ruling lays out a four-part balancing test for determining if a restriction on commercial speech – either by individuals or corporations – violates the First Amendment.[32] Justice Rehnquist dissents, arguing that "a state-created monopoly . . . is [not] entitled to protection under the First Amendment."[33]

1980s: The Court defers to Congress's judgment that corporations' unique privileges and structure require regulation to uphold corporate political action committee fundraising regulations.[34] The Court strikes down FECA's restrictions on corporate independent expenditures as applied to non-profit organizations that take no for-profit corporation or union money.[35]

1986: In ***Pacific Gas & Electric Co v. Public Utility Commission of California***, the Court strikes down a state regulation of utility monopolies on First Amendment grounds.[36] The state utility commission had ruled that when the monopolies sent out newsletters in customers' monthly bills that contained political statements, they had to give consumer advocacy groups the right to respond with mailing inserts of their own (at no cost to the utility). The court holds that the state rule violated corporations' "negative speech rights" since it might compel them to explain that they disagreed with the content of the consumer group insert.

1990: In ***Austin v. Michigan Chamber of Commerce***, the Court acknowledges that the "corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form" justify government bans on non-media corporations' independent spending on behalf of candidates.[37] New Justices Antonin Scalia and Anthony Kennedy, joined by Justice Sandra Day O'Connor, author vigorous dissents accusing the majority of censorship and of being inconsistent with *Buckley* and *Bellotti*.[38]

2002: To address the proliferation of corporate and special-interest influence through unregulated "issue advocacy" expenditures and "soft money" contributions, and other loopholes that emerged after *Buckley*, President George W. Bush signs the Bipartisan Campaign Finance Reform Act (BCRA), also known as the McCain-Feingold Act.

2003: In ***McConnell v. Federal Election Commission***, the Supreme Court rejects constitutional challenges to BCRA and reaffirms *Austin*'s anti-distortion interest.[39]

2007: In ***Federal Election Commission v. Wisconsin Right to Life***, the first campaign finance case since Chief Justice John Roberts and Justice Samuel Alito joined, the Court strikes down BCRA's ban on sham issue ads, which mention – but do not expressly advocate for the victory or defeat of – candidates, during the lead-up to primary and general elections.[40] The Court declines to completely overrule *McConnell*,[41] though Justice Scalia – joined by Kennedy and Clarence Thomas – writes separately to make the case for doing so.[42]

2008: In ***Davis v. Federal Election Commission***, the Roberts Court strikes down another part of BCRA, the so-called "Millionaires Amendment." This provision created higher contribution limits for candidates whose opponents spent over $350,000 of personal funds. The Court held that "the advantage that wealthy candidates now enjoy . . . is an advantage that flows directly from Buckley[.]"[43] The higher fundraising limits, the court reasoned, would unconstitutionally chill the potentially self-financing candidates from spending personal funds on the campaign.

2008: Citizens United, a conservative, corporate-funded non-profit corporation, seeks to air a 90-minute documentary criticizing Hillary Clinton through on-demand cable services in the run-up to the Democratic presidential primary in Wisconsin.[44] Seeking declaratory and injunctive relief to avoid potential civil and criminal penalties under BCRA, Citizens United sues the FEC.[45]

2009: The Supreme Court hears oral arguments in ***Citizens United v. Federal Election Commission***, for the first time, with the plaintiff focusing on a narrow argument.[46] The Court responded by ordering an additional round of briefing and arguments on the questions of whether limits on corporate and union "independent" expenditures on electioneering communications are unconstitutional, and whether findings to the contrary in *McConnell* and *Austin* should be overruled.[47]

2010: In a bitterly divided 5-4 ruling, the Court rules in ***Citizens United*** that limits on any corporate independent expenditures are unconstitutional, ruling as a matter of law, and with no factual record, that independent spending does not lead to political corruption or the appearance thereof. The Court overturns part of *McConnell* and all of *Austin*.[48] Mere months later, in ***SpeechNow.org v. Federal Election Commission***, the DC Circuit Court of Appeals applies *Citizens United* to strike down limits on contributions to political groups making only independent expenditures.[49] In compliance, the FEC creates a new form of "independent expenditure only PACs," commonly known as Super PACs, which may accept unlimited contributions from individuals, corporations, unions, and political groups – including 501(c)(4) non-profits, which are not legally required to disclose their donors.

2011: In ***Sorrell v. IMS Health, Inc.***, the Court strikes down Vermont's Prescription Confidentiality Law – which restricted the sale and disclosure of doctors' prescribing practices to drug companies for marketing purposes – on First Amendment grounds.[50] Justice Stephen Breyer's vigorous dissent argues that the Court has moved away from the Central Hudson balancing approach and toward granting strict scrutiny to an expansive category of corporate activities defined as commercial speech.[51]

2011: A 5-4 Supreme Court invalidates Arizona's optional "Clean Elections" public financing system for state-level elections, in ***Arizona Free Enterprise Club v. Bennett***.[52] Chief Justice John Roberts writes that by triggering additional public funds for a "Clean Elections" candidate if an opponent opts out of the system and spends over a certain high threshold, the law has a chilling effect on non-"Clean Elections" candidates' speech and impermissibly seeks to "level[] the playing field."[53] Dissenting, Justice Elena Kagan dismisses the notion that Arizona impeded wealthy candidates; the petitioners, in fact, "refused" public assistance.[54]

SOURCES

1 *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").
2 David H. Gans & Douglas T. Kendall. A CAPITALIST JOKER 8 (Constitutional Accountability Center 2010).
3 *Dartmouth College v. Woodward*, 17 U.S. 518, 654 (1819).
4 *Id.* at 636.
5 *See* Generally Howard J. Graham, *The "Conspiracy Theory" of the Fourteenth Amendment*: 2, 48 YALE L.J. 171 (1938).
6 *Id.*
7 Gans, *supra* note 2, at 3, 22-23.
8 Melvin I. Urofsky, *Campaign Finance Reform Before 1971*, 1 ALB. GOV'T L. REV. 1, 8-9 (2008).
9 *See id*. at 10-12.
10 *Santa Clara v. Southern Pac.* R.R. Co., 117 U.S. 394, 409 (1886).
11*See id*. at 411-18.
12 *Id*. at 394.
13 *Gulf, Colo. & Santa Fe Ry. Co. v. Ellis* 165 U.S. 150, 154-55, 159, 166-67 (1897).
14 *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 234, 241 (1897).
15 *E. Allgeyer & Co. v. Louisiana*, 165 U.S. 578, 589, 591 (1897).
16 *Lochner v. New York*, 198 U.S. 45 (1905).
17 *Hale v. Henkel*, 201 U.S. 43, 69-70, 75-76 (1906).
18 *Federal Election Commission v. Beaumont*, 539 U.S. 146, 152-53 (2003) (citing Tillman Act, ch. 420, 34 Stat. 864-65 (1907)).
19 Taft-Hartley Act of 1947, Pub. L. No. 80-101, 61 Stat. 137 (1947).
20 *See West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).
21 Gans, *supra* note 2, at 4.
22 Robert E. Mutch, *Before and After Bellotti: The Corporate Political Contribution Cases*, 5 ELECTION L.J. 293, 315 (2006).
23 *Id*.
24 *Buckley v. Valeo*, 424 U.S. 1, 23, 58 (1976).
25 *Id*. at 23, 27-28, 58.
26 425 U.S. 748, 771.
27 *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 767, 768 n. 2, 776-77 (1978).
28 *Id*. at 788 n. 26.
29 *Id*. at 825-26, 828 (Rehnquist, J., dissenting); id. at 804-06, 812 (White, J., dissenting).
30 Marshall v. Barlow's, Inc., 436 U.S. 307 (1978).
31 Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 558, 571-2 (1980).
32 Id. at 566.
33 Id. at 584 (Rehnquist, J., dissenting).
34 Fed. Elec. Comm'n v. Nat'l Right to Work Comm., 459 U.S. 197 (1982).
35 *Fed. Elec. Comm'n v. Mass. Citizens for Life*, Inc., 479 U.S. 238 (1986).
36 475 U.S. 1 (1986).
37 *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 655, 666, 684 (1990).
38 *Id*. at 695 (Kennedy, J., dissenting); id. at 684-86 (Scalia, J., dissenting).
39 *McConnell v. Fed. Elec. Comm'n*, 540 U.S. 93, 223-24 (2003).
40 *Fed. Elec. Comm'n v. Wis. Right to Life*, 551 U.S. 449, 455-57 (2007).
41 *Id*. at 482.
42 *Id.* at 483-84, 504 (Scalia, J., dissenting).
43 128 S.Ct. 2759, 2776.
44 *Citizens United v. Federal Election Commission*, 130 S. Ct. 876, 886-88 (2010).
45 *Id*.
46 *Brief for Appellant at 2, Citizens United*, 130 S. Ct. (No. 08-205), available at http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_07_08_08_205_Appellant.authcheckdam.pdf.
47 *Id*.
48 *Citizens United*, 130 S. Ct. at 909, 913.
49 *SpeechNow.org v. Fed. Elec. Comm'n*, 599 F.3d 686, 695 (DC Cir. 2010).
50 *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2659, 2672 (2011).
51 *Id*. at 2675-76 (Breyer, J., dissenting).
52 *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2813-14 (2011).
53 *Id*. at 2823-24, 2826.
54 *Id*. at 2835 (Kagan, J., dissenting).