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CITIZENS UNITED AND TIERED PERSONHOOD

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I. INTRODUCTION

Citizens United v. FEC[1] is, arguably, the most important campaign finance judicial decision of this century thus far and will likely be remembered as the most significant—and controversial—decision of the Roberts Court. At least one commentator has claimed that *Citizens United* rearranged the political landscape of the United States.[2] The decision has certainly been the subject of much praise and even more criticism. The praise comes from pundits and opinion makers that have claimed that *Citizens United* finally made the law of politics more consistent with core free speech principles.[3] Critics of the opinion have ranged from

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1. Citizens United v. FEC, 130 S. Ct. 876 (2010) [hereinafter *Citizens United*].

2. *See* Robert Barnes, Citizens United *Decision Reverberates in Courts Across Country*, WASH. POST, May 27, 2011, http://www.washingtonpost.com/politics/citizens-united-decision-reverberates-in-courts-across-country/2011/05/20/AFbJEK9G_story.html (stating "[t]he Supreme Court's decision in *Citizens United* . . . rearranged the political landscape. And fallout from the decision continues to reverberate in courts across the nation.").

3. *See* Greg Stohr, *Corporate Campaign Spending Backed by U.S. High Court*, BLOOMBERG (Jan. 21, 2010), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aU.fsorJbt3E (quoting Sen. Mitch McConnell of Kentucky as saying that the Court "struck a blow for the First Amendment"); Stephen Dinan, *Divided Court Strikes Down Campaign Money Restrictions*, WASH. TIMES (Jan. 21, 2010, 11:19 AM), http://www.washingtontimes.com

President Barack Obama;[4] Senator Russ Feingold, with whom Senator John McCain disagreed;[5] media analysts;[6] election activists;[7] and the American public themselves,[8] who have called the opinion inconsistent with American democracy.[9]

/news/2010/jan/21/divided-court-strikes-down-campaign-money-restrict/?page=2 (quoting Hans A. von Spakovsky, a former member of the FEC, as saying, "[t]he Supreme Court has restored a part of the First Amendment that ha[s] been unfortunately stolen by Congress and a previously wrongly-decided ruling of the [C]ourt.").

4. *See Obama Criticizes Campaign Finance Ruling*, CNN (Jan. 21, 2010, 1:52 PM), [hereinafter *Obama Criticizes*], http://politicalticker.blogs.cnn.com/2010/01/21/obama-criticizes-campaign-finance-ruling (quoting President Obama as saying that the *Citizens United* ruling "gives the special interests and their lobbyists even more power in Washington . . . .").

5. *See* Kasie Hunt, *John McCain, Russ Feingold Diverge on Court Ruling*, POLITICO.COM (Jan. 21, 2010, 6:04 PM), http://www.politico.com/news/stories/0110/31810.html (quoting former-Senator Russ Feingold of Wisconsin as saying that when "[p]resented with a relatively narrow legal issue, the Supreme Court chose to roll back laws that have limited the role of corporate money in federal elections since Teddy Roosevelt was president.").

6. *See, e.g.*, David D. Kirkpatrick, *Lobbyists Get Potent Weapon in Campaign Ruling*, N.Y. TIMES, Jan. 22, 2010, http://www.nytimes.com/2010/01/22/us/politics/22donate.html (suggesting "[t]he Supreme Court has handed lobbyists a new weapon. A lobbyist can now tell any elected official: if you vote wrong, my company, labor union or interest group will spend unlimited sums explicitly advertising against your re-election"). Indeed, at least one commentator has suggested that the *Citizens United* decision is the worse judicial decision since *Dred Scott v. Sanford* and would result in corporations effectively owning the entire political system. Keith Obermann, *Keith Obermann on [sic]* "Citizens United v. Federal Election Commission," YOU TUBE (Jan. 21, 2010), http://www.youtube.com/watch?v=PKZKETizybw. *But see* Nick Gillespie, *3 Reasons Not to Sweat the* "Citizens United" *SCOTUS Ruling*, YOU TUBE (Feb. 3, 2010), http://www.youtube.com/watch?v=rUdFaIYzNwU&feature=related (arguing that the liberalization of speech done by *Citizens United* is a benefit).

7. *See, e.g., Democracy 21 President Fred Wertheimer Calls for Prompt Legislative Response to Citizens United Decision in Senate Rules Committee Testimony*, DEMOCRACY 21 (Feb. 2, 2010), http://www.democracy21.org/index.asp?Type=B_PR&SEC=%7B91FCB139-CC82-4DDD-AE4E-3A81E6427C7F%7D&DE=%7B6A1258A6-ABDB-433A-B006-80052A04CD54%7D (advocating for stronger disclosure requirements for corporations and other reforms in light of the Citizens United decisions).

8. A Washington Post-ABC News Poll conducted Feb. 4-8, 2010, revealed the American public's dissatisfaction with the *Citizens United* decision. The poll indicated that at that time, 80% of respondents opposed the ruling, and that 72% of respondents supported Congressional action to reinstate the limits struck down by the Court. *See Washington Post-ABC News Poll*, WASH. POST, http://www.washingtonpost.com/wp-srv/politics/polls/postpoll_021010.html (last visited Sept. 12, 2011) (noting responses to questions 35 and 36 relating to *Citizens United* ruling).

9. *See, e.g., Obama Criticizes*, *supra* note 4 (calling the *Citizens United* ruling "a major victory for big oil, Wall Street banks, health insurance companies and the other powerful interests that marshal their power every day in Washington to drown out the voices of everyday Americans.").

The debate concerning the ramifications of *Citizens United* has been equally robust. Scholars discussing *Citizens United* have focused on its impact within a variety of contexts: how *Citizens United* made First Amendment free speech doctrine more consistent,[10] whether and to what extent the case will impact election spending,[11] whether this case impacts the integrity of the campaign finance system,[12] and the consistency or inconsistency of the idea of corporate personhood[13] underlying the case.[14]

The debate that has occurred since *Citizens United* has failed to pay full attention to the ramifications of the Court's analysis of "personhood." This is not to say that the topic of "corporate

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10. *See* Joel M. Gora, Commentary, N.Y. Times Editors, *How Corporate Money Will Reshape Politics: Restoring Free Speech in Elections* [hereinafter *Corporate Money*], N.Y. TIMES (Jan. 21, 2010, 2:10 PM), http://roomfordebate.blogs.nytimes.com/2010/01/21/how-corporate-money-will-reshape-politics/ (Professor Joel M. Gora, in an opinion piece, wrote that "[t]he First Amendment has always been based on the idea that the more speech we have, the better off we are, as individuals and as a people. The Citizens United [sic] case eloquently reaffirms and reinforces that core constitutional principle."); *cf.* Richard L. Hasen, Citizens United *and the Illusion of Coherence*, 109 MICH. L. REV. 581, 584 (2011) (asserting that *Citizens United* makes the Court's corporate finance doctrine incoherent and inconsistent).

11. *See* Adam Liptak, *O'Connor Mildly Criticizes Court's Campaign Finance Decision*, N.Y. TIMES (Jan. 26, 2010, 2:05 PM), http://thecaucus.blogs.nytimes.com/2010/01/26/oconnor-mildly-criticizes-courts-campaign-finance-decision/?hp (quoting former Supreme Court Justice Sandra Day O'Connor's opinion that "[i]n invalidating some of the existing checks on campaign spending, the majority in Citizens United has signaled that the problem of campaign contributions in judicial elections might get considerably worse and quite soon.").

12. *See* Fred Werthheimer, Commentary, *How Corporate Money Will Reshape Politics: An Electoral Catastrophe*, N.Y. TIMES (Jan. 21, 2010, 12:45 PM), http://roomfordebate.blogs.nytimes.com/2010/01/21/how-corporate-money-will-reshape-politics/ (writing that under the *Citizens United* decision "insurance companies, banks, drug companies, energy companies and the like will be free to each spend $5 million, $10 million or more of corporate funds to elect or defeat a federal candidate – and with that power, influence the candidate on issues of economic important to the companies.").

13. *See generally* DAVID H. GANS & DOUGLAS T. KENDALL, CONSTITUTIONAL ACCOUNTABILITY CENTER (CAC), A CAPITALIST JOKER: THE STRANGE ORIGINS, DISTURBING PAST AND UNCERTAIN FUTURE OF CORPORATE PERSONHOOD IN AMERICAN LAW (2010), *available at* http://www.theusconstitution.org/upload/fck/file/File_storage/A%20Capitalist%20Joker(1).pdf?phpMyAdmin=TzXZ9IzqiNgbGqj5tqLH06F5Bxe (discussing the Supreme Court jurisprudence concerning corporations being extended the same fundamental rights as individuals). Mr. Gans was a contributing panelist during the symposium.

14. *See, e.g.*, Matthew J. Allman, Note, *Swift Boat Captains of Industry for Truth:* Citizens United *and the Illogic of the Natural Person Theory of Corporate Personhood*, 38 FLA. ST. U. L. REV. 387, 388 (2011) (opining that the Court's "reliance on the natural person theory is misplaced for three major reasons: first, the theory is divorced form observable reality; second, the theory is logically incoherent; and third, the theory is inconsistent with the meaning and purpose of the Constitution.").

personhood" has not been given attention in the scholarly literature prior to *Citizens United*,[15] that the way in which *Citizens United* has defined corporate personhood has not been explored,[16] or that there is not a substantial literature concerning personhood as it pertains to natural persons.[17] However, nowhere in this growing literature has anyone called attention to the theoretical intersection between the considerations of the larger literature of personhood, the shift in the idea of personhood created by *Citizens United*, and its ramifications for the jurisprudence on defining who is a person for purposes of distributing constitutional rights. This Article—which the reader should treat as the author's initial thoughts about the theoretical consequences of this landmark case, thoughts to be explored in greater depth in subsequent articles—claims to present an initial effort to articulate this view.

Within the *Citizens United* context, the conventional starting point is to discuss the issue of corporate personhood. Indeed, the personhood issue seems to be a problem particular to the corporate form of artificial persons, and this Article will limit its discussion to corporations as artificial persons.[18] As will be discussed below,

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15. The debate concerning corporate personhood was a mainstay of the academic literature prior to *Citizens United*. *See generally* Carl J. Mayer, *Personalzing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L. J. 577 (1990) (discussing various Supreme Court Cases that, over the past few decades, have increased corporations' personal liberties); Susanna Kim Ripken, *Corporations are People Too: A Multi-dimensional Approach to the Corporate Personhood Puzzle*, 15 FORDHAM J. CORP. & FIN. L. 97 (2009) (discussing several different theoretical schools of thought in considering the question of a corporations' personhood).

16. *See generally* Alex Osterlind, Note, *Giving a Voice to the Inanimate: The Right of a Corporation to Political Free Speech*, 76 MO. L. REV. 259 (2011) (discussing corporate personhood in the manner it was considered by the Supreme Court in *Citizens United*); Dale Rubin, *Corporate Personhood: How the Courts Have Employed Bogus Jurisprudence to Grant Corporations Constitutional Rights Intended for Individuals*, 28 QUINNIPIAC L. REV. 523 (2010); Jan Baran, Citizens United v. FEC*: Independent Advertising by Corporations*, 2010 EMERGING ISSUES 4875 (2010), *available at* http://www.wileyrein.com/resources/documents/Baran%20Lexis%20Nexis%20Article.pdf; Allman, *supra* note 14, at 387-410.

17. For purposes of this Article, I will be distinguishing "natural persons," which are defined as "human beings" (i.e., animals of the species *Homo sapiens*) from "artificial persons," which are defined as "an entity (such as a corporation) that is recognized at law as having most of the rights and duties of a human being. *See* BLACK'S LAW DICTIONARY 1257 (9th ed. 2009) (defining "person").

18. Unions and other non-corporation "associations of persons" are not relevant here. This is for several reasons. First, to the author's knowledge, none of the prior debates concerning artificial personhood have included unions. Second, as my colleague, Dr. Anne Marie Lofaso, pointed out to me, unions are distinguishable from corporations within this context because unions are organized by their members for the purpose of benefiting their membership. *See* 29 U.S.C. § 152(9) (2006) (defining "labor organization" as

the corporate person is traditionally conceived of as an artificial entity that exists by sufferance of the state and thus may be limited by the state.[19] However, the *Citizens United* decision relied not merely on the conventional view of corporate personhood; it sought justification for its decision with the idea that a corporation is an "association of persons."[20] At least part of the core justification for the decision is the view that an association of persons, whether a corporation or labor union or some other "association," ought to be imbued with the same rights as the rights the persons themselves possess. In other words, these "associations" should be wholly equated to natural persons in regards to constitutional rights.

This plausible reading[21] of *Citizens United* continues to blur

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"any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."); *see also* Matthew T. Bodie, *Information and the Market for Union Representation*, 94 VA. L. REV. 1, 40 (2008) (defining "labor organization" as is defined by the statute). In contrast, the predominant view of the purpose of corporations is to generate profit for their shareholders. *See, e.g.*, Jena Martin Amerson, *What's in a Name: Transnational Corporations as Bystanders Under International Law*, 85 ST. JOHN'S L. REV. 1 (2011) (finding that a transnational corporations' actions are often fueled by self-interest). *But see* Ian B. Lee, *Corporate Law, Profit Maximization, and the "Responsible" Shareholder*, 10 STAN J. L. BUS. & FIN. 31, 33 (2005) (noting this view but arguing that the legal requirement for corporate directors maximize profits is ambiguous). Thus, the political interests of individual union members may directly affect the interests of the union, and the union may be held accountable to such interests by its members, whereas a corporation's directors or employees may undertake action that is disinterested in the political interests of its shareholders, or even in opposition to the political interests of its shareholders so long as it can be justified on the grounds of maximizing profit. In such a scenario, accountability is virtually impossible to achieve. Osterlind, *supra* note 16, at 281 (discussing the use of corporate funds to advance political speech, the author finds that "[u]nauthorized corporate political speech impinges upon the First Amendment liberty of such unrepresented shareholders . . . . [B]y the time a shareholder first learns his political views conflict with those disseminated by the corporation, the initial harm has already been inflicted."). Third, non-corporate organizations whose main function is to advocate for parties, candidates, or political positions simply do not fit within this discussion as they have benefitted from this core First Amendment protection, where the First Amendment rights of corporations have been the subject of intense scrutiny by the courts for a number of years. *See infra* Part III (discussing corporations in the context of political personhood).

19. *See* discussion *infra* Part III.

20. *Citizens United*, 130 S. Ct. at 906-08.

21. *See, e.g.*, Rubin, *supra* note 16, at 584 ("Cases such as Buckley, Bellotti, and Citizens United, all of which unquestionably accept the 'corporations as natural persons' mantra, have created a political atmosphere in which corporations can wield their financial power while the interests of the people has been relegated to the sidelines."); Kathleen M. Sullivan, *Two Concepts of*

the distinction between artificial persons and natural persons. This blurring suggests that we ought not only look at *Citizens United* as merely a case that resolves a conflict about the First Amendment, or that pushes the boundaries of corporate personhood; we should recognize that *Citizens United* forces us to look at our assumptions about how legal personhood—for both natural and artificial persons—is constructed in the law. This shift raises the question of what the ramifications of our legal norms are if we accept this assumption. This Article will consider this question by viewing *Citizens United* through the lens of natural personhood cases[22] and through the application of a critical jurisprudential perspective.[23]

Freedom of Speech, 124 HARV. L. REV. 143, 154 (2010) ("But Justice Stevens clarifies that his focus on corporate personhood is ultimately relevant less to a theory of self-expression than to whether an entity possesses the preconditions for raising an equality claim."); Toni M. Massaro, *Foreign Nationals, Electoral Spending, and the First Amendment*, 34 HARV. J.L. & PUB. POL'Y. 663, 673-74 (2011) ("[I]n *Citizens United* in particular, the Court has embraced the real entity theory, which more strongly supports treating corporations as rights holders equivalent to individuals."). For a discussion of the historical evolution of the corporate form, see generally Reuven S. Avi-Yonah, *To Be or Not to Be?* Citizens United *and the Corporate Form* (Mich. Law Sch. Pub. Law & Legal Theory Working Paper Series, Paper No. 10-005), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1546087.

22. This approach, examining a landmark case through the lens of other landmark cases with an eye on a particular descriptive or normative question, is nothing new. *See, e.g.*, Michael J. Klarman, Bush v. Gore *Through the Lens of Constitutional History*, 89 CAL. L. REV. 1721, 1722 (2001) (considering the *Bush* case through the lens of other landmark Supreme Court decisions, including *Dred Scott v. Sandford*, *Brown v. Board of Education*, *Furman v. Georgia*, *Roe v. Wade*).

23. Specifically, this Article suggests that the jurisprudential ramifications of *Citizens United* should be viewed through the lenses of Critical Legal Studies (CLS) and, more specifically, Critical Race Theory (CRT) and Feminist Legal Theory. "[CLS] is a theory that challenges and overturns accepted norms and standards in legal theory and practice. Proponents of this theory believe that logic and structure attributed to the law grow out of the power relationships of the society. The law exists to support the interests of the party or class that forms it and is merely a collection of beliefs and prejudices that legitimize the injustices of society. The wealthy and the powerful use the law as an instrument for oppression in order to maintain their place in hierarchy. The basic idea of CLS is that the law is politics and it is not neutral or value free." See *Critical Legal Studies: An Overview*, LII/LEGAL INFORMATION INSTITUTE, http://topics.law.cornell.edu/wex/Critical_legal_theory (last visited Sept. 12, 2011). CRT is a specific offshoot of CLS which sought to develop methodologies to examine and confront entrenched racism in American society. *See* andre douglas pond cummings, *A Furious Kinship: Critical Race Theory and the Hip-Hop Nation*, 48 U. LOUISVILLE L. REV. 499, 501-03 (2010) (discussing the emergence of CRT). Feminist Legal Theory is a jurisprudential school designed to look at the role of gender and the law. It takes as its guiding assumption the idea that society is patriarchal and that the law has been used to re-enforce such patriarchy. LII/LEGAL INFORMATION INSTITUTE, *supra* at ¶4. Indeed, feminist legal theory examines explicitly how women

The question of who was—and who was not—a legal person framed American society from its founding to today.[24] Although the three-fifths compromise of the 1787 Constitution,[25] and the Founders' and states' legal treatment of race shaped the fact that African Americans were treated as chattel or as noncitizens,[26] the

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have been excluded from "the public sphere of marketplace and government" and relegated to the private sphere of home. Nadine Taub and Elizabeth M. Schneider, *Women's Subordination and the Role of Law, reprinted in* FEMINIST LEGAL THEORY: FOUNDATIONS 9-10 (D. Kelly Weisberg ed., 1993), *available at* http://books.google.com/books?id=55TYVDVVBiIC&q=the+public+sphere+of+the+marketplace#v=snippet&q=%22the%20public%20sphere%20of%22&f=false. This Article does not purport to articulate an overarching theory that looks at the intersections of these issues; it does, however, seek to enlighten the reader about the larger theoretical ramifications of the Citizens United decision through voicing an analysis informed by a narrative critical view of American society based in the legal history—and modern experience—of women and people of color. For assistance in realizing these connections and for larger insights into the larger normative enterprise of law, I must credit my colleague, Will Rhee, and his forthcoming article *Law and Practice: Balanced Realism and the Epistemology of Legal Doctrine*, 9 J. LEGAL COMM. & RHETORIC (forthcoming 2012) (manuscript on file with the author).

24. As noted earlier, this debate takes place most often within the realm of questions of citizenship. For an overview of the long history of the granting subordinate status, i.e., status of less than full citizenship to women, minorities, indigenous peoples, and immigrants, see generally EDIBERTO ROMÀN, CITIZENSHIP AND ITS EXLCUSIONS: A CLASSICAL, CONSTITUTIONAL, AND CRITICAL RACE CRITIQUE 83-118 (2010). Professor Romàn correctly includes indigenous peoples and immigrants within the scope of his discussion of citizenship; for want of space do I not include them in this Article. For an overview of citizenship policy pertaining to non-United States citizens who seek to enter into the United States, see T. Alexander Aleinikoff, *Between Principles and Politics: U.S. Citizenship Policy, in* FROM MIGRANTS TO CITIZENS: MEMBERSHIP IN A CHANGING WORLD (Aleinikoff and Douglas Klusmeyer, eds. 2000).

25. The "three-fifths compromise" was the political and economic agreement reached by the founders during the Constitutional Convention, which allowed representation within the House of Representatives to be based upon the whole number of free persons and three-fifths of the number of persons held in servitude, i.e., slaves. This was an attempt to reach a compromise between the northern and southern states to agree to adequate representation in the government. However, this was also part of a larger scheme "to sublimate the rights of blacks to the interests of whites." DEREK BELL, RACE, RACISM, AND AMERICAN LAW 28 (6th ed. 2008). More to the point, it is a rhetorical illustration of one of the premises of this Article—that enslaved African Americans were less than full persons in the eyes of the white establishment. For further discussion of slavery and the founding fathers, see *id.* at 25-28. For a narrative of the politics that led to the compromise, and specifically the politics of slavery, see LAWRENCE GOLDSTONE, DARK BARGAIN: SLAVERY, PROFITS, AND THE STRUGGLE FOR THE CONSTITUTION 123-29 (2005).

26. Though articulated in terms of citizenship, or political personhood, as I suggest in this Article in light of the Citizens United transformation, the underlying framework for these debates is the question of race and racism. The deliberate formation, creation, and perpetuation of a racial hierarchy has been the ongoing theme of American history, from the first settlement of

Court's jurisprudence had a direct hand in shaping this notion of personhood. The Court, in cases like *Dred Scott v. Sanford*[27] and *Plessy v. Ferguson*,[28] drew—and then redrew—the boundaries of political personhood in relation to race in our society. Similarly, in *Minor v. Happersett*[29] the Court confirmed the boundaries of political personhood in regards to gender. These cases served to grant rights as well as legal and social privilege to certain persons in our society, usually at the expense of others. Similarly, during the early nineteenth century, the law and society maintained the notion that women had no social standing and thus were less than citizens. This also framed societal conceptions of personhood.

As will be explained in this Article, this way of thinking about legal personhood created what Professor Henry Chambers called (in the context of *Dred Scott*) "tiered personhood."[30] The legal history discussed below illustrates the point that this process of granting personhood categorizes and makes separate levels of legal personhood by excluding some, giving others some rights, and giving the most privileged full rights—or full political personhood. Additionally, the forms of wealth and power that those privileged persons received through their status and which they used to re-enforce their status were also given prominence.[31]

The question of personhood was (and is) imbedded in a related question, "who is a citizen?" As the post-Civil War amendments and their application sought to delete the distinction between legal persons and nonpersons—and as this shift towards equality was resisted at every turn—the citizenship question took prominence.

Though conceptually distinct, the citizenship question revolves around the same issue as the question of personhood:

Europeans in America to modern-day concerns about criminal justice, the rights of aliens, social and economic disparities. Discrimination on the basis of race has been an organizing tool of American society, and in the United States, discrimination on the basis of race has been expressed state policy. JUAN F. PEREA ET AL, RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 6 (2d ed. 2007).

27. Dred Scott v. Sanford, 60 U.S. 393 (1857).

28. Plessy v. Ferguison, 163 U.S. 537 (1896).

29. Minor v. Happersett, 88 U.S. 162 (1875).

30. Henry L. Chambers, Jr., *Dred Scott: Tiered Citizenship and Tiered Personhood*, 82 CHI.-KENT L. REV. 209, 210 (2007) (arguing that tiers of personhood and of citizenship are created when certain citizenship rights are stripped from a person or a group of people without proper justification).

31. In other words, I argue in this Article that a choice about personhood forms a hierarchy not only of status within society, but it also provides a means to accumulate capital and re-enforce one's status through the capital one accumulates. I argue below that this mechanism—fundamental to a capitalist structure—and the personhood issues I raise are intertwined. In relation to corporations and the political process, *Citizens United* puts this issue in clear relief, as will be explained below.

What entities are entitled to the range of constitutional rights as distinct from other entities? Cases like *Brown v. Board of Education*[32] and *Roe v. Wade*,[33] as well as passage of the Nineteenth Amendment,[34] the Civil Rights Act of 1964,[35] and the Voting Rights Act of 1965[36] ultimately expanded the boundaries of personhood to include people formerly excluded or subordinated by American society. Put another way, these cases were efforts to erase the tiers of personhood. As a whole, these personhood decisions confirmed or removed privilege and reset the political boundaries that restricted access to American democracy for their era.[37]

This Article argues that *Citizens United* is the latest in this line of cases because it set wide open the category of personhood from simply natural persons—that is, human beings—to corporations, unions, and other legal entities. Put another way, *Citizens United* forces us to once again ask, "what is a person?"

The Court has expanded the boundaries of what I am calling "political personhood." I define political personhood as both a status and a framework. As a status, political personhood allows a natural person to exercise the range of constitutional rights and entitles a person to receive constitutional protections. The political personhood process is where the Court—as well as lawmakers, enforcers, and society generally—establishes a norm of who is recognized as a person for purposes of the legal privilege. In addition to being a grant of rights, political personhood provides privilege and status, allowing it to amass and affect capital in a manner that best enables and enforces the privilege of those who possess political personhood. In this way, granting political personhood reinforces status and separates some with greater

32. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

33. Roe v. Wade, 410 U.S. 113 (1973).

34. U.S. CONST. amend. XIX.

35. Civil Rights Act of 1964, Pub L. No. 88-352, 78 Stat. 241 (1964), *amended by* 42 U.S.C. § 2000e. The Civil Rights Act provided statutory protections to prevent discrimination against minorities and women in public accommodations, employment, governmental services, or employment.

36. Voting Rights Act of 1965, Pub L. No. 89-110, 79 Stat. 437 (1965) *amended by* 42 U.S.C. § 1973. The Voting Rights Act prohibits discriminatory practices in voting, elections, and other relevant mechanisms of the democratic process.

37. Yet we are still trying to answer the citizenship question. As I contend in this Article, the modern citizenship question includes the issues raised by *Citizens United* of the role of corporations in our modern democratic process, and the role of people—acting as individuals—in that process. I will suggest the possibility of what I discuss in the last part of this Article. It is worth noting, however, that the battles over citizenship are ongoing. For example, Professor Romàn describes how structures of de facto subordination have evolved into modern-day de facto subordination for African Americans, Mexican Americans, and other non-whites. Romàn, *supra* note 24, at 119-46.

status and power from others. The process creates tiers of personhood.[38]

Now, after *Citizens United*, political personhood includes not only natural persons but also artificial persons—whose sole purpose is to amass capital and generate profit—to participate in political discourse. And arguably, the artificial person of the corporation may become more significant, and may have the power to exercise rights to a greater extent and on a greater tier, than the natural person.

This Article makes an initial effort to support the argument that the Court is engaged in an ongoing process of defining political personhood and *Citizens United* is the latest opinion to this end. Towards this goal, this Article will proceed in four parts. First, it will define political personhood as a process of shaping the boundaries of democratic discourse and then briefly sketch its operation through an exploration of the personhood cases described above. Second, this Article will briefly sketch out what scholars have said about corporate personhood and corporate constitutional rights with the goal of showing how these rights were thought of as limited and distinct from the rights granted natural persons.

Third, this Article will illustrate how the breadth and scope of the reasoning of *Citizens United* suggest that it more appropriately fits within the political personhood line of cases. This Article will argue that this expansion of the idea of personhood represents a fundamental shift in the idea of political personhood, yet at the same time represents the underlying operation of the political personhood idea as expressed during the nineteenth and twentieth centuries. Finally, this Article will conclude by offering thoughts on the effects of *Citizen United* if it is interpreted from this perspective. As I discuss below, the main effect of the new conception of personhood in *Citizens United* will be twofold: First, it will allow for corporate interests to obtain an unprecedented level of dominance over the American political discourse. Second, this corporate dominance will reaffirm an old form of supremacy: the power of the mostly white and mostly male class that controls corporations. This new era of corporate rights dominating the rights of natural persons may lead to a new period of tiered legal personhood in our democracy, an outcome that is inconsistent with the vision of rights under our modern Constitution.

38. Rubin, *supra* note 16, at 584; Chambers, Jr., *supra* note 30, at 231-32.

II. POLITICAL PERSONHOOD

A. Personhood and the Allocation of Rights

As defined earlier, political personhood is a status that allows a person to exercise the range of constitutional rights connected to persons, and it entitles a person to receive the constitutional protections that accompany those rights. A grant of this status is not inherent or automatic; it is socially contingent and a process of choice that is inherent in the law. This subsection will discuss why this is the case and then elaborate more fully on the nature of political personhood as related to natural persons.

This discussion starts with a basic proposition: that law works by creating categories and then allocating authorization to act or penalties for acts based on whether the entity in question, and its actions, fit the constructed category.[39] This methodology of categorization is intrinsic in legal reasoning in a western common law system. It is axiomatic that law creates categories and allocates privilege or sanction through approving categories and disapproving others, and then locating entities either within or outside of those categories.[40]

When it comes to applying the law, a court, lawmaker or decision maker—either explicitly or implicitly—must answer several questions regarding categorization: Is the category itself consistent with the intent determined by the politically responsible body or by social convention? Is the entity capable of being categorized appropriately? Even if the category is sound and the entity is susceptible to categorization, the decision maker must face the question of whether the entity in question fits within the legal category presented. This dynamic seems basic to the process of adjudication even if the answers to these foundational questions are taken for granted in the vast majority of cases.

From this basic premise we can recognize that the law must categorize entities to allocate rights. This process is often taken for granted when it comes to natural persons. We can ascertain what a natural person is; there is an easily applied scientific definition for what a person is, and it is easier still to distinguish persons from artificial entities and natural nonpersons. As a result, the question of what is a person is often taken for granted. Similarly, when it comes to legally created entities like corporations and labor unions, entities that we treat like persons for discrete purposes, e.g., contract formation, litigation, and other ends of

39. *See* Pierre Schlag, *The Aesthetics of American Law*, 115 HARVARD L. REV. 1047, 1058-60 (describing the aesthetic of law as one of classification of categories and policing those categories).

40. *Id.*

business,[41] it is easy to identify them as artificial persons since they must act through their legal authorization and construction.[42] The question of what is a corporation, thus, is similarly taken for granted in most cases.

It follows that as between persons, rights must be allocated based upon the politically sanctioned categories put in place within the law.[43] This is true for entities subject to the law, whether they are natural persons or artificial persons. For example, persons who are citizens are allocated the maximum amount of rights allowed under American law. Persons who are not citizens cannot receive rights reserved for citizens. This is often premised in the American context on a theory of a social contract.[44] This methodology of categorization of persons is essential to both an understanding of relating rights to persons and to comparing valid and invalid exercises of those rights as part of ordering the constitutional scheme.

This methodology of categorization also reveals something else intrinsic to the process of allocating rights: there may be rights intrinsically associated to the nature of the person. Pointedly, there are rights that only have meaning in relation to the person exercising those rights because the right was created

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41. Ripken, *supra* note 15, at 106.

42. *See id.* (acknowledging the argument that "[t]he corporation is simply a creature of statute and is dependent on the law to give it form and function").

43. Mayer, *supra* note 15, at 623 (discussing the Court's decision in Hale v. Henkel, 201 U.S. 43 (1906) and noting that "[t]he individual exists antecedent to the state and therefore owes no duty to the state and cannot be deprived of any constitutional rights. The corporation, however, is a mere 'creature of the State.' Its powers are limited by law. . . .").

44. *See, e.g.*, Anita L. Allen, Social Contract Theory in American Case Law, 51 FLA. L. REV. 3 (1999) ("According to some historians, the American colonists relied upon liberal, Lockean notions of a social contract to spirit rebellion against unwanted British rule. Historians have maintained that social contractarian theories of political order significantly influenced the people who wrote and defended the Declaration of Independence, the original Constitution, and the Bill of Rights."); JOHN WITHERSPOON, Lectures on Moral Philosophy, *in* AN ANNOTATED EDITION OF LECTURES ON MORAL PHILOSOPHY BY JOHN WITHERSPOON 45 (Jack Scott ed., 1982) ("The central tenet of Witherspoon's political philosophy in common with those of other American revolutionists was the theory of the social contract."); Christine N. Cimini, The New Contract: Welfare Reform, Devolution, and Due Process, 61 MD. L. REV. 246, 275 (2002) ("[T]he Declaration of Independence, original state constitutions, the Articles of Confederation, and the federal Constitution with its accompanying Bill of Rights all based their notions of the structure of democratic government on ideas of social contract. These documents amount to a formalization of the social contract between the government and its people."); *see also* Janice Aitken, *The Trust Doctrine in Federal Indian Law: A Look at its Development and at How Its Analysis Under Social Contract Theory Might Expand Its Scope*, 18 N. ILL. U. L. REV. 115, 147 (1997) ("Social contracts may be formalized, as in a constitution, or they may be the 'legal fictions' that legitimize governmental authority.").

for the person—whether natural or artificial—for a purpose related to that person's status.[45] Conversely, it may be argued that entities of a particular sort, i.e., natural persons, by their status as natural persons have certain inherent rights.[46] For example, in the context of the earlier consideration of citizenship, it is clear that the idea of citizenship is premised on the notion that citizens are persons, and that it is the "person" who is entitled rights within our society. One might argue that citizenship belongs to persons and not to nonpersons;[47] however, without regard to whether a person is a citizen or not, that person may nonetheless have certain rights guaranteed to her by simple virtue of being a *person.* Thus, there are, arguably, some rights to be exercised by persons—or, at least, rights conceived of and intended to protect natural persons, and other rights that are not so conceived. Put another way, there are rights that are intrinsic aspects of legal personhood.

Thus, at the heart of the categorization question is the question of how to define a person in order to allocate rights to those persons for whom there is an intrinsic fit with the rights. And, therefore, for the purposes of the allocation of constitutional rights, the notion of personhood plays a fundamental role. For the purpose of allocating legal rights, and for being an object of legal responsibilities, the idea of personhood must be defined. The next subsection of this Article will discuss natural persons; a brief view of the forest of paper expended on corporate personhood will follow in Part III.

B. What Is A Person, Anyway?

This is a deceptively simple question. A brief look at Black's Law Dictionary reveals this deceptively simply conclusion: a person is "a human being."[48] Beneath this simple answer is a far

45. *See, e.g.*, Jean Bethke Elshtain, *The Dignity of the Human Person and the Idea of Human Rights: Four Inquiries*, 14 J. L. & RELIGION 53, 60-61 (noting that in the American context, the idea of rights became to be known as the possession of free standing individuals); *see generally* MARY ANN GLENDON, RIGHTS TALK (1991) (discussing the nature of rights discourse in American society).

46. *See generally* Phillip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L. J. 907 (1993) (summarizing the role of natural rights in the constitution and arguing that such rights were in fact limited).

47. *See generally* Linda Bosniak *Persons and Citizens in Constitutional Thought*, 8 INT'L J. CONST. L. 9 (2010) (discussing the alignment—or non-alignment with the concept of person and the concept of citizen in constitutional law).

48. BLACK'S LAW DICTIONARY 1257 (Bryan Gardner ed., 9th ed. 2009). Blacks also notes in definition (3) that a person is also "[a]n entity (such as a corporation) that is recognized by law as having most of the rights and duties of a human being." *Id.* This will be discussed more thoroughly in Part III.

more complex history relating to how political personhood—in the sense of having the full range of rights and privileges—in the United States was only bestowed upon white men who owned property—until societal, judicial, and statutory change modified this definition of personhood.

Within American constitutional history, personhood has been equated, in the natural person context at least, being a full human being with the ability to exercise rights. Not all human beings met this definition during the entirety of our constitutional history. Until the Thirteenth Amendment, slaves were not considered persons; they were considered property. Married women were considered the property of their husbands,[49] and prior to marriage, the property of their families.[50] Though chattel slavery and the supremacy of husbands over wives reflected different lived social and societal realities, they both shared the fact that neither a slave nor a married woman in the nineteenth century could exercise the basic rights that white men could: to vote, to own property, to travel freely, to enter into and terminate contracts, and to completely own their bodies.

It follows that the role of personhood is to grant rights reserved ordinarily for, and specifically to, *Homo sapiens* citizens. The delineation of those rights and the allocation of those rights to those humans the Republic deemed worthy of holding such rights defines legal personhood. It determines who composes our Republic and what democratic assumptions control within our republic. The Court, through some of the most infamous and celebrated cases in American history, executed precisely this analysis.[51] It determined what persons ought to be entitled rights or excluded persons from the status of having rights. Put another way, the Court determined who would and would not hold political personhood. Then the Court, through its judgment, sought to include or exclude the subject person (or class of persons) in question by analogizing that person to the norm of entities who held political personhood.

This definition of personhood is best explored through an investigation of the history of adjudicating personhood. The next section will argue that there is a specific process of categorization

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49. *See* TIFFANY K. WAYNE, WOMEN'S ROLES IN NINETEENTH CENTURY AMERICA 17 (2007) (stating "[t]he American colonies had followed British common law of *feme-covert*, or coverture, which determined that women were legally 'covered' by their husbands through marriage. . . . Upon marriage all property, land, even personal possessions and wages earned, became the property of her husband, as did her children.").

50. NO SMALL COURAGE: A HISTORY OF WOMEN IN THE UNITED STATES 261 (Nancy F. Cott ed. 2000) ("In practice, coming of legal age mainly freed young women from parental authority . . . .").

51. *Dred Scott*, 60 U.S. at 393, *Plessy*, 163 U.S. at 537, *Minor*, 88 U.S. at 162.

that the Court undertakes to reach the conclusion that a person exists for the purpose of legal rights. This Article will then turn in the next part to comparing briefly this process with the theories of corporate personhood.

C. The Process of Political Personhood

Natural personhood constitutional cases all share the following aspects. First, the Court makes a specific choice to analyze the issue as one of political personhood; this inquiry is essential to the legal decision. Second, after the choice is made to make a political personhood determination, the Court has to reason as to whether the purported person fits the definition of "person" and thus falls within the category of citizen. This requires a definition—either implicit or explicit—of what a person is. Once this decision is made, the Court can then declare whether their person—or nonperson—fits the category in question.

1. Framing

The issue of how to frame the question is as important as the ultimate result itself. Framing considers the decision that the Court faced in defining what the precise legal question is. In particular, in many of the constitutional personhood cases, the Court faced a decision about whether or not to treat the case as a constitutional rights case of some sort or to frame the issue as one of statutory or common law. For example, *Dred Scott* could have been decided on standing grounds[52] rather than reaching the broad constitutional issue it decided—that slaveholders had a Fifth Amendment property right to their slaves (as property), which is protected against government regulation[53] and taking, and that people of African descent had no citizenship rights that the United States was obligated to recognize. Similarly, *Brown*, which outlawed discrimination, could have been decided on narrower grounds—not the least of which would be stare decisis—in deference to *Plessy v. Ferguson*, which itself regulated the personhood of African Americans by giving them so-called "separate but equal" rights to participate in the Republic.[54]

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52. *See* MARK A. GRABER, DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL 19 (2006) (noting comments from both the other Justices and political leaders that the decision could have been simply dismissed on standing grounds).

53. For a thoughtful discussion of *Dred Scott*'s holding and its impact on constitutional theory generally, *see* Jack M. Balkin and Sanford Levinson, *13 Ways of Looking at Dred Scott*, 82 CHI.-KENT L. REV. 49 (2007).

54. *Plessy*, 163 U.S. at 550-51 ("[W]e cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored

Though not determinative, the framing question illustrates the proposition that the judges often choose specific issues—and questions personhood in particular—even though the constitutional personhood question may not be presented directly. By defining a question to be an absolute issue about rights, as opposed to a question that is about the issue presented, the Court has often overreached to create doctrine that may or may not have been necessary at the time. This process seems to demonstrate the importance of framing a constitutional issue—and therefore raises the constitutional personhood question—rather than resolving the legal issue through a rule with lesser impact. It suggests that the Court in these "personhood" cases chose to draw the line where it is, and draw conclusions of law that it was not necessarily obligated to decide.

2. Categorization

Once a constitutional question has been discovered, the core determination that the Court made in this history of personhood cases is whether the entity seeking rights is a person for purposes of the Constitution. It is this determining of personhood, or categorization, related to who is and who is not a person that is at the heart of the personhood analysis. And this analysis of "what is a person" revolves around the status of the "entity" at question in relation to the acceptable norm or idea of what a "person" is. Put another way, to answer a constitutional personhood question, the Court must engage in a process of determining the form of the entity seeking rights, and then decide whether that entity fits within or outside of the accepted or privileged norm for "persons." It is not a question of biology—it is a question of on whom (or what) the Court wishes to confer status and why.

The story of African American personhood cases illustrates this. In *Dred Scott*, *Plessy*, and *Brown* specifically, what is clear is that each one of those opinions operated on the basis of a norm of personhood. More specifically, each of those opinions contemplated a hierarchy of persons within society. *Dred Scott* excluded slaves altogether from the definition of persons who were entitled rights with its language that no slave had rights which a white man was obligated to recognize.[55] Thus, as property, slaves had no status whatsoever. Slaves were not persons. African Americans were chattel, and the *Dred Scott* Court even went so far as to say that persons of African descent could *never* be citizens.[56] The *Plessy*

children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures.").

55. Chambers, Jr., *supra* note 30, at 211.

56. *Id.* at 213 ("Basing his analysis of black citizenship at the Founding on race and ancestry rather than status, Taney merged race and slavery,

Court was confronted with the constitutional norm of equality imbedded in the Fourteenth Amendment.[57] However, the *Plessy* Court determined to treat African Americans as equal on a "separate but equal" basis.[58] The *Plessy* majority recognized that African Americans were citizens,[59] but did not recognize that citizenship rights had to be distributed to persons on a fully equal basis.[60] In its place, *Plessy* created another tiered scheme of citizens and not–quite–citizens: "Separate but Equal."[61] *Brown* rejected this hierarchy in its rhetoric and its holding.[62]

These cases illustrate the categorization of political personhood. In other words, as scholars in this field have often pointed out, each opinion worked from the assumption of privilege of white persons and then accorded African Americans those privileges relative to that norm of whiteness. This illustrates the operation of the process of defining personhood, in how African Americans were excluded entirely from personhood in *Dred Scott*, granted limited personhood through partial recognition of citizenship rights in *Plessy*, and then ultimately granted full personhood by the Court in *Brown*. In each instance, the Court: (1) found a constitutional question related to the extent of rights due under the Constitution to African Americans; and then (2) allocated rights in proportion to the acceptable norm of personhood.

This status as personhood question is similarly illustrated by the plight of non-slave women in American society during the seventeenth and eighteenth centuries. The question of full political personhood for women did not even exist until a movement to mobilize for women's rights began in the mid-1800s.[63] Prior to that

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asserting that all black persons had come to America as slaves. Consequently, all black people, whether free or slave, were descendants of slaves and were in the same class of people, for citizenship purposes, as slaves, and thus were unable to be or become citizens of the United States.").

57. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

58. *Plessy*, 163 U.S. at 548-49 ("While we think the enforced separation of the races, as applied to the internal commerce of the State, neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws, within the meaning of the Fourteenth Amendment . . .").

59. *Id.* at 550-51.

60. *Id.* at 543.

61. *Id.* at 552 (Harlan, J., dissenting) (noting that the law in question in Plessy purported to create a "separate but equal" status between African Americans and whites).

62. *See Brown*, 347 U.S. at 493 (holding that segregation in schools is unconstitutional under the Fourteenth Amendment).

63. *See* COTT, *supra* note 50, at 242-51 (describing the historical evolution of the women's rights movement).

point, the law considered a woman as a form of property.[64] For example, a married woman was effectively the property of her husband. This meant that a married woman could not own property in her own name, enter into contracts, or otherwise exercise the basic private law rights that a man had.[65] A married woman had little to no recourse for exiting abusive relationships.[66] Women did not have the right to engage in professions (except for homemaker and perhaps teacher).[67] If personhood is seen as possessing full status and complete privilege within society, women lacked personhood during the pre-Civil War period of American history.

This is most clearly illustrated by the fact that women lacked core political rights: they could not vote, engage in discourse about civil society, or otherwise participate in political decisions. Indeed, the Court reinforced this vision of women as non-persons within the sphere of politics through its decision in *Minor v. Happersett*. Although the Court recognized that women were citizens[68] and persons[69] for purposes of the Constitution, it nonetheless declared that the Constitution did not add the right to vote to the privileges

64. WAYNE, *supra* note 49, at 17.

65. "[A] married woman could not engage in or bring forth lawsuits; she could not enter into business contracts, nor could she buy or sell or otherwise have control over any property, even that which she may have brought to the marriage." *Id.* at 17. For an explanation of property rights as they applied, or more appropriately did not apply to women, see LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW 147-48 (3d ed. 2005).

66. "As late as 1850 wife beating with a 'reasonable instrument' was legal in nearly every state . . . ." KENNETH D. ROSE, AMERICAN WOMEN AND THE REPEAL OF PROHIBITION 12 (1996). For a discussion of women's marital rights, see FRIEDMAN, *supra* note 65, at 140-45. In many cases, divorces would only be granted for "good cause" or because adultery had been committed. *Id.* at 142-44. As Friedman explains, "[i]n general, the law never recognized full, free consensual divorce." *Id.* at 145.

67. In 1860, the most popular women's magazine of the era, *Godey's Lady's Book*, proclaimed: "The perfection of womanhood . . . is the wife and mother, the center of the family . . . . The wife is truly the light of the home." WAYNE, *supra* note 49, at 1. As Tamara K. Hareven explains, "[o]ne of [the] consequences [of the 'cult of domesticity' that emerged in the nineteenth century] was the insistence that confinement of women's main activities to the domestic sphere and the misguided assumption that mothers' work in the labor market would be harmful to the family and to society." Tamara K. Hareven, *Continuity and Change in American Family Life*, *in* MAKING AMERICA: THE SOCIETY AND CULTURE OF THE UNITED STATES 308, 316 (Luther S. Luedke, ed., 1992). In fact, Edward H. Clarke of the Harvard Medical School Faculty believed that "too much education" would be so strenuous to a woman's physical strength, that it would actually endanger her childbearing ability. DOROTHY M. STETSON & DOROTHY E. MCBRIDE, WOMEN'S RIGHTS IN THE USA: POLICY DEBATES AND GENDER ROLES 150 (3d ed. 2004).

68. Minor v. Happersett, 88 U.S. 162, 165 (1874).

69. *Id.*

and immunities of citizens.[70] Thus, the Court reasoned that the right to vote was not guaranteed by the Fourteenth Amendment, and therefore, the Missouri law that reserved the franchise to men was upheld.[71] Thus, in a different personhood context, the Court made a similar decision to limit the scope of privileges and immunities so that women were excluded from the political sphere.

The political personhood of women certainly was recognized, slowly, over the course of the nineteenth and twentieth centuries. Interestingly, this movement began through the efforts of liberal white women to recognize the civil and human rights of enslaved Africans in America.[72] This work of organization and resistance led to mobilization towards the recognition of women's rights. This led to the movement to pass the Married Women's Property Acts[73] and the Nineteenth Amendment.[74] This empowerment led to further reforms, including the ultimate recognition that the right to privacy included the ability for women to exercise complete control over their bodies without state interference.[75] This recognition is the core intellectual contribution of *Roe v. Wade*.[76]

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70. *Id.* at 171.

71. *Id.* at 173-78.

72. *See* WAYNE, *supra* note 49, at 106 (remarking, "[w]hether white or black, women's involvement in the antislavery movement transformed women's own sense of themselves and of their public roles. Through their work in the antislavery movement, women learned how to be political activists, how to organize, and how to pursue new strategies beyond just 'moral suasion,' such as gathering petitions, lobbying legislatures, writing for and editing newspapers, organizing conventions, and delivering public speeches."). As Bob Ostertag explains, "[t]he roots of the women's rights movement in the United States [were] deeply intertwined with abolitionism." BOB OSTERTAG, PEOPLE'S MOVEMENTS, PEOPLE'S PRESS: THE JOURNALISM OF SOCIAL JUSTICE MOVEMENTS 52 (2006).

73. WAYNE, *supra* note 49, at 18 ("When an organized women's rights movement emerged in the late 1840s, the issue of married women's property rights was one of the main ones targeted for reform. In 1848 New York State passed the landmark Married Women's Property Act, which became the model for other states throughout the remainder of the century.").

74. ELIZABETH FROST-KNAPPMAN & KATHRYN CULLEN-DUPONT, WOMEN'S SUFFRAGE IN AMERICA 21 (2005) ("The women's rights movement had its roots in the campaign to end slavery . . . . '[I]n the age which is approaching she should be something more—she should be a citizen.'").

75. *See generally* DEBRAN ROWLAND, THE BOUNDARIES OF HER BODY: THE TROUBLING HISTORY OF WOMEN'S RIGHTS IN AMERICA (2004) (discussing the effects of legislation on women's rights to control their bodies).

76. *Roe*, 410 U.S. 113. In holding that the right of privacy extended to the ability of women to choose medical procedures in regards to their unborn, nonviable fetus, the Court ultimately vindicated the ability of women to own their own bodies which, in light of the discussion above concerning personhood and the sanction by the state of control of bodies, is the ultimate overthrow of the intellectual roots of nineteenth century tiered personhood as to natural persons. This concept merits far more discussion, but such discussion must be

What was true of these personhood cases concerning African Americans is that the Court privileged the dominant form of social construction during American history: white male supremacy.[77] Moreover, the system of wealth that existed as a consequence of (and served to re-enforce) white male supremacy, i.e., the financial benefits that accrued from having a mater and subservient class, was "dismantled," at least in the eyes of the Court, in *Brown*.[78] Similarly, the economic status and societal benefits that came from excluding women from the political sphere and relegating them to the domestic sphere demonstrated how political personhood was not given to women. It too created a master class (men) and a subservient class (women).[79]

These allocations of privilege based on race and gender illustrate the truth of those periods and the truth of our capitalist society even now—that the definitions of personhood and property not only define privilege but they also grant access to the most effective means of influence and power. It creates a tiered society where those who possess political personhood in full are allowed to dominate contests between those who have full personhood and those who do not; it also allows those who possess political personhood to amass capital and wealth to re-enforce and replicate their own status.

III. CORPORATIONS: THE SPECIAL CASE OF POLITICAL PERSONHOOD

The process of determining political personhood relates to the rights to be granted to natural persons as part of the polity of the United States. With the rise of the corporate form in the nineteenth and twentieth centuries, the Court had to confront the question of what rights corporations should be granted within the constitutional scheme. This issue of corporate personhood became a vexing intellectual and legal dilemma. *Citizens United* puts it

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reserved for another day.

77. *See* Chambers, *supra* note 30, at 214 (stating that "Taney noted that Southern states never would have ratified the Constitution had they believed that black persons could be citizens whose rights of citizenship would have to be protected as they travelled from state to state.").

78. Dismantling took a decade of effort, however, due to the mass resistance of the South to the *Brown* decision. The Court had to revisit the issue in *Brown v. Board of Education II*, 349 U.S. 294 (1955), where the court ordered transformation of the segregated schools of the South with "all deliberate speed." *Id.* at 301. This set forth a long period of resistance to the order by the white Southern society. This was only resolved by legislative change through the Civil Rights Act of 1964, the Voting Rights Act of 1965, and (sometimes) vigilant federal enforcement.

79. Chambers, *supra* note 30, at 215 ("the [*Dred Scott*] Court noted that women are citizens, but defined citizenship rights and responsibilities in ways that allowed the possibility of second-tier citizenship for women.").

squarely in relief once again.

The theoretical approach of this Article does not start with the ongoing debate about corporate personhood.[80] It focuses instead on the transformation in the idea of political personhood that the Court has adopted in the past and is now revising via *Citizens United*.[81] However, to effectively complete this commentary about *Citizens United*, it is necessary to make some observations about the corporate personhood dilemma. The Court's own decisions prior to *Citizens United* and the literature concerning corporate personhood suggest that though corporations have been granted certain legal rights depending on how the nature of the corporation was viewed, corporate artificial personhood nonetheless is wholly different than the personhood conceived of for natural persons.

Demonstrating this difference requires a brief discussion of the predominant models of corporate personhood. Thereafter, this next section observes how, pre-*Citizens United*, an artificial person model of corporate personhood was applied to the question of whether corporations were entitled First Amendment speech rights, and how this set up the problem in *Citizens United*. Additionally, the section will discuss the problematic compromise created by *Austin v. Michigan Chamber of Commerce*.[82] Then, Part IV will address how *Citizens United* shifted the paradigm of personhood to place corporations within the realm of objects of political personhood.

A. Political Personhood and the Theory of the Corporation

The personhood of corporations has been a longstanding topic of debate in both judicial and academic circles. Arguments about corporate personhood have generally revolved around three different theories of corporate personhood.

The earliest theory of the corporation is that it is merely a creation of the state.[83] This "artificial person" or "concession" theory rested on the view that a corporation effectively exists at the sufferance of the state and, therefore, is not entitled to any rights or protections not granted to it by statute.[84] Importantly,

80. I will not take an extended period of time to discuss the problem of corporations and personhood as this topic will be treated in depth both in the other volumes in the symposium and in the substantial scholarly literature on this point.

81. *See infra* discussion Part III, IV.

82. Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990).

83. Mayer, *supra* note 15, at 580 (discussing the Court's notions of corporate personhood, the author explains that "[t]he first and most traditional notion was the 'artificial entity' theory viewing the corporation as nothing more than an artificial creature of the state . . . .").

84. Trustees of Dartmouth Coll. v. Woodward, 17 U.S. 518, 636 (1819) (finding that "[a] corporation is an artificial being" created by the law and, as

the corporation, as a creation of the state, could not assert rights against its benefactor, the state itself.[85]

During the early part of the nineteenth century, political leaders and the courts took this view of the corporation. Corporations depended on legislative approval for their creation—i.e., corporations were a concession provided by the government—and were thus dependent on the legislature for their existence, regulation, and the scope of their powers.[86] Underlying this theory is the idea that corporations were publically oriented.[87] The corporation was created for a public purpose and thus the state could regulate its operations for the good of the public.[88]

However, this view shifted with *County of Santa Clara v. Southern Pacific Rail Co.*[89] from one of mere artificial personhood to a view that corporations held the status of personhood for purposes of the Fourteenth Amendment.[90] In *Santa Clara*, the Court held that a corporation is a person for purposes of the Fourteenth Amendment, and accordingly, it cannot be taxed differently than natural persons.[91] Within this model, it was argued that a corporation is an amalgamation of the people who stood behind the corporation.[92] Thus, according to the amalgamation model, it was appropriate to grant the corporation rights in order to protect the rights of the people behind it.[93]

This model was in ascendancy during the *Lochner* era of Supreme Court jurisprudence.[94] *Lochner* jurisprudence allowed corporations to receive the benefits of the deregulation that took place during that period of the Court's jurisprudence.[95] Indeed, this view is premised on the view that the corporation is not a creation of the state but the product of the free market and of economic forces, and exists for the benefit of the persons who constitute it. [96] Accordingly, the state should support the rights of the persons who constitute corporations and not interfere with their consensual actions.[97]

Indeed, at the turn of the twentieth century, a third model

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such, "it possesses only those properties which the charter of its creation confers upon it . . . .").

85. Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577, 580 (1990).

86. Ripken, *supra* note 15, at 109.

87. *Id.*

88. *Id.*

89. Cnty. of Santa Clara v. S. Pac. R.R. Co., 118 U.S. 394 (1886).

90. Rubin, *supra* note 16, at 554.

91. Ripken, *supra* note 15, at 110.

92. *Id.*

93. *Id.* at 111.

94. *Id.* at 579-80.

95. *Id.* at 580.

96. Ripken, *supra* note 15, at 111.

97. *Id.*

emerged among scholars and the Court for how to conceptualize the corporation: the "natural person" or "real entity" model.[98] This model rests on the premise that the corporation is an entity that emerged separate and apart from the sanction or authorization of the state.[99] Also, it exists separate and apart from the natural persons who might at any particular time control it.[100] In this sense, a corporation *is* a person—an entity with status and rights that should be recognized under the constitution and laws.

The important implication of this real entity theory is that the corporation has a life completely separate and apart from the state; the state merely records the combination of the private parties and plays only observer of the corporation's formation.[101] Accordingly, the corporation has a "collective consciousness" or a "collective will" that is separate and apart from those who may run the corporation at any given time.[102] Thus, under this view, a corporation may be considered to be fully a "person" under the law and entitled to the legal rights and responsibilities that would attend to any natural person.[103] A slightly different understanding of the natural person view of corporations is the view that there should be a public law of corporations, which seeks to regulate corporations to ensure that they use their powers not merely to generate profit for their shareholders, but that they benefit those affected by the corporation and advance the public good.[104]

What this theoretical debate about how to conceptualize the corporation indicates is that there is a range of positions about whether corporations should or should not be granted political personhood. The concession model would suggest that there is no such thing as political personhood for corporations. As entities regulated and controlled by the state, statute defines the corporation's legal boundaries. Thus, a corporation would not be entitled any constitutional rights that would trump statutory control.

The aggregation or amalgamation model suggests that the corporation would be entitled a type of political personhood to the extent that its incorporators would be entitled political personhood status. Political personhood status for the corporation would derive from the personhood of the people who compose it, which would leave room to distinguish between the persons who organize the corporation and the corporation itself. Similarly, the real entity model suggests that the corporation is a political person

98. Mayer, *supra* note 94, at 580-81.
99. Ripken, *supra* note 15, at 112-13.
100. *Id.* at 112.
101. *Id.* at 113.
102. *Id.* at 114.
103. *Id.* at 116.
104. *Id.* at 117.

entitled all of the protections within the Constitution. The distinction between it and the aggregation model is that the corporation is entitled political personhood as a right intrinsic to the corporation itself.

This brief discussion also suggests that it is plausible to read the conception of personhood in *Citizens United* as adopting a position relating to political personhood—the kind of personhood this article previously suggested was ordinarily applicable to human beings solely. This represents a substantial shift from the jurisprudence of the Court concerning the ability of corporations to spend in elections, where the Court upheld limits consistent with placing the interests of citizens ahead of those of corporations. To this prior jurisprudence this Article will now turn.

B. Political Speech and Corporations: The Bellotti *and* Austin *Thicket*

The jurisprudence of the Court within the realm of corporate political speech prior to *Citizens United* struck an uneasy balance between what appears to be an aggregation approach to the corporation and the desire to prevent the appearance of corruption within the political process. The Court recognized that corporations may have had First Amendment free speech rights when it came to ballot initiatives about which a corporation might wish to speak, but until *Citizens United*, a corporation's speech rights—i.e., its own direct spending on elections—were curtailed as to campaigns to elect political officials. These regulations had been upheld[105]—until *Citizens United.* This suggests that the Court thought of corporations as political persons of a sort as they pertained to the First Amendment, but only to the extent that their interests did not interfere with the interests of citizens in their democracy. To explain this proposition, this part will briefly discuss the Court's campaign finance corporate spending jurisprudence.

The seminal case which defines modern campaign finance law is the 1976 case of *Buckley v. Valeo.*[106] There, the Court struck down a number of spending limits under the Federal Election Campaign Act Amendments of 1974. *Buckley*, however, did not address legislatively-imposed spending limits imposed on corporations and labor unions. In the period between *Buckley* and *Citizens United*, the Court at times possessed skepticism about such limits and at times deferred to legislative judgments that

105. Richard L. Hasen, Citizens United *and the Illusion of Coherence*, 109 MICH. L. REV. 581, 585-86 (2011) (noting that this has been the case since Buckley v. Valeo, 424 U.S. 1, 28-29 (1976), wherein the Court held that "campaign contributions could be limited to prevent corruption or the appearance of corruption . . . .").

106. *Buckley*, 424 U.S. at 28-29.

such limits were necessary.[107] Under this jurisprudence, the political personhood of the corporation was limited at best. The Court recognized that a corporation could exercise free speech rights, but the Court limited this right in recognition of the fact that the corporation's ability to amass wealth made it fundamentally different than the natural (political) person. Its influence could corrupt the political process.

The first case to effectively recognize the political personhood of corporations—at least as it relates to First Amendment free speech—was the 1978 case of *First National Bank of Boston v. Bellotti*.[108] There, the Court ruled that corporations had a First Amendment right to make contributions in order to attempt to influence political processes.[109] The corporation in question sought to spend money to influence a ballot initiative; however, the Massachusetts law prohibited corporations from making expenditures that would affect elections.[110]

The *Bellotti* court reasoned that a speaker could not be prohibited from political speech simply because the speaker was a corporation.[111] In particular, the Court rejected as an impermissible constraint on First Amendment rights the notion that its speech interests were restricted to topics that "materially impact[ed]" the corporation's business interests.[112] This reasoning suggests the Court had in mind the notion that a corporation possessed political personhood—that it represented an entity entitled to absolute protection due to its status as an entity entitled to rights of speech.

Yet, this recognition was tempered by the Court in 1982 when it recognized, in *FEC v. National Right to Work Committee*,[113] that the government had a compelling interest in limiting corporate spending to prevent corruption. *National Right to Work Committee* raised the constitutionality of section 441(b) of the Federal Election Campaign Act[114] which limited corporate direct spending in campaigns. The Court upheld Section 441(b) as narrowly tailored to meet the government's interests in insuring that "substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political 'war chests' which could be used to incur political debts from legislators who were aided by the

107. DANIEL LOWENSTEIN, RICHARD HASEN, AND DANIEL TOKAJI, ELECTION LAW: CASES AND MATERIALS 807 (4th ed 2008).
108. First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765 (1977).
109. *Id.* at 784-86.
110. *Id.* at 769.
111. *Id.* at 777.
112. *Id.* at 740.
113. FEC v. Nat'l Right to Work Comm., 459 U.S. 197 (1982).
114. Federal Election Campaign Act (FECA) of 1971, 2 U.S.C. § 441(b), *invalidated by Citizens United*, 130 S. Ct. at 876.

contributions."[115] The Court also reasoned that Congress had incentive "to protect the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to who they may be opposed."[116]

Subsequently, in 1990, the Court heard *Austin v. Michigan Chamber of Commerce*,[117] where it reaffirmed this limitation on corporate rights of political speech. The Court ruled that a state statute that prohibited corporations from spending money to support or oppose candidates in elections was constitutional.[118] There, the corporation in question litigated against the constitutionality of the Michigan statute that prohibited corporations from spending on behalf of candidates in elections.

The *Austin* court continued to afford corporations First Amendment protection as to speech, but it found that this particular campaign spending restriction passed constitutional muster. The *Austin* court again recognized that the state had an interest in preventing the corrosive influences that the massive wealth which could be infused into an election by corporate spending would have to distort an election.[119] This view, often called the "antidistortion rationale" of *Austin*, swayed the Court to uphold the limits on campaign spending by corporations.[120] The *Austin* majority worried that direct corporate spending in elections would have the effect of distorting the messages in the elections due to the impact that massive amounts of spending by corporations could have.[121]

The Court also noted that the restriction was narrowly tailored to the state's interest in preventing corruption because "the Act does not impose an *absolute* ban on all forms of corporate political spending but permits corporations to make independent political expenditures through separate segregated funds."[122] The Court noted that contributors who know the funds will be used for political speech can pay into the segregated fund so that the

115. *Nat'l Right to Work Comm.*, 459 U.S. at 207.
116. *Id.* at 208.
117. *Austin*, 494 U.S. 652.
118. *Id.* at 668-69.
119. *Id.* at 669.
120. The *Austin* court defined the anti-distortion rationale as the government's interest stopping the "corrosive and distorting effects of immense aggregations of wealth that are 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." *Austin*, 459 U.S. at 659-60. For an exploration of the treatment of the anti-distortion rationale in *Citizens United*, see Richard Hasen, *Citizens United and the Orphaned Antidistortion Rationale*, 27 GA. ST. L. REV 989 (2011).
121. *Austin*, 494 U.S. at 659.
122. *Id.* at 665.

speech would accurately "reflect[] contributors' support for the corporation's political views."[123] In other words, the *Austin* Court suggested that the interests in political speech—and the spending therefrom—were the province of natural persons—actual citizens who had the greatest stake in the electoral process. Speech via the corporate form (through, e.g., political action committee funds) that accommodated their views and still allowed their contributions to enable the corporate person to speak was acceptable.

Arguably, then, *Austin* balanced the risks of absolute corporate political free speech created by *Bellotti* if *Bellotti* were taken to its extreme: the balance sought to enable actual persons acting through the corporate form to have political free speech through that form. Though *Austin* was roundly criticized for creating this carve out in the ideal of the First Amendment, it did distinguish between the interest of natural persons and the interest of corporate persons. That uneasy balance continued until the Court handed down *Citizens United.*

IV. THE CATEGORICAL CHANGE WROUGHT BY *CITIZENS UNITED*

Seen from the lens of political personhood, *Citizens United* can be reasoned in this way: the *Citizens United* majority made a judgment as to what rights corporations are entitled to and then granted those rights. Arguably, the *Citizens United* Court could have shown judicial restraint by just invalidating the portions of the Bipartisan Campaign Reform Act that were directly at issue.[124] However, the Court pushed forward to find a broad constitutional right of corporate political freedom of speech.

In its analysis, the *Citizens United* majority recognized that for purposes of the First Amendment, corporations were persons entitled to unlimited speech rights.[125] The Court, through Chief Justice Roberts, arrived there by determining that corporations were merely associations of persons, citizens who then take the corporate form in order to act.[126] As an "association of persons" the Court argued that a corporation—like any organization of people—should be entitled to rights of speech.

In this we see the political personhood process at work. The majority decided to first find a constitutional issue relating to free speech (when it had the option to decide the case on far narrower grounds). Second, the Court categorized corporations as persons by making a decision as to whether corporations fit into the notion of a political person, and then once a corporation was deemed to be

123. *Id.* at 660-61.
124. Hasen, *supra* note 106, at 593.
125. *Citizens United*, 130 S. Ct. at 914.
126. *Id.* at 906-07.

sufficiently like a political person, the Court decided to imbue it with rights. Thus, both of the "process" criteria of political personhood have been met.

Indeed, it is clear from this that the Court adopted the amalgamation model of the corporation as its way of categorizing the corporation. The judgment of the majority was that the corporation merely was a proxy for the persons behind it and thus held political personhood to function for them. Accordingly, it was entitled the full panoply of First Amendment rights in relation to spending in elections. This sweeping theoretical choice locates the Court as viewing the corporation as possessing political personhood *without* limits.

As such an entity, the substantive concerns raised by the idea of political personhood come into play. Granting this privilege of absolute First Amendment freedom of speech creates a right that the holders of the right—the corporations themselves—may use to inculcate and replicate their privilege. As we saw with the slaveholders in *Dred Scott*, the white male political establishment in *Minor*, and the apartheid white society in *Plessy*, the Court's ruling has the effect of providing a means for corporations—who are organized by, controlled by, and provide profits to a privileged group of mostly straight, white men—to ensure their dominance over society through insuring their privilege through the political process. Just like *Dred Scott* made slavery constitutional and *Plessy* made segregation legally acceptable, the potential now exists for corporations to distort the political process for their own ends and dominate politics through unlimited spending. By allowing corporations an unfettered voice in the political marketplace, they have the potential through their amassed capital to dominate ordinary citizens. By their sheer power, and their ability to replicate and enforce that power, corporations can, arguably, operate on a different tier of political personhood than ordinary citizens and political parties.

This engagement of the political process to an end separate and apart from natural persons drove the concerns of the *Citizens United* dissent. Where the majority thought of the corporation as an association of persons—qualifying as close to being a political person—Justice Stevens in dissent saw corporations as state-created entities that "differ from natural persons in fundamental ways"[127]; "have no consciences, no beliefs, no feelings, no thoughts, no desires"[128]; and "must engage the political process in instrumental terms if they are to maximize shareholder value."[129] Of particular note, the dissent asserted, "corporations have been

127. *Id.* at 971 n.72.
128. *Id.* at 972.
129. *Id.* at 965.

'effectively delegated responsibility for ensuring society's economic welfare.'"[130] This differs markedly from the idea of political personhood espoused by the majority. Indeed, the majority clearly relies on shoehorning corporations into traditional bounds of personhood, an association of persons entitled to rights based on their natural status. However, the Stevens dissent points out the conflicting view, that corporations are better thought of as lacking the attributes of persons and thus may be limited as legal—but not real-person-like—entities.

As Justice Stevens observed, "corporations," those state sanctioned entities now granted political personhood, "have been 'effectively delegated responsibility for ensuring society's economic welfare.'"[131] This observation that the corporation is the dominant form of capital in our modern society points us back to our recognition of the effects of political personhood, that these choices made by the Court are instrumental in the sense that they privilege some class, group, or new entity (a group that, as I will discuss shortly, is almost entirely white, straight, and male). Now, for First Amendment purposes, political persons—whether real persons or state-created entities—may participate in the political process. A class of entities is now privileged, so the question becomes: "At whose expense does this privilege come?"

V. *CITIZENS UNITED*, PERSONHOOD, AND THE POLITICAL PERSON OF THE FUTURE

Citizens United has expanded the category of persons for purposes of the First Amendment. By implication, this case has now included within the realm of political personhood the "person" of the corporation. What are the ramifications of this choice for the law of politics and for the philosophy of American law? This is a broad question that will be dealt with for years to come.[132]

First, *Citizens United* at its most basic level seems to confirm the ascendancy of corporate interests as the dominant form of capital within our society. This will have a number of substantive ramifications for our Republic. The first of those is that corporate spending now has the great potential to dominate the elective

130. *Id.* at 971.

131. *Id.*

132. This Article is meant to be an effort to articulate a progressive, post-modern jurisprudential view of the theoretical possibilities stemming from the *Citizens United* case. I think there are ideas here that deserve further exposition, including the interrelationship between the mobilization of capital and the protection of status within tiered personhood, the justifications and problems of limits on First Amendment speech on artificial persons and their interrelationship with this theory, and how the notion of tiered personhood as process may be descriptive of the processes of the Court generally. I intend to discuss these and related points in future articles.

process. Professor Dale Rubin explicitly argued that corporations can now "buy and sell" candidates.[133] Professor andre cummings has pointed out that given the track record of corporate leaders prior to the financial crisis of 2008, there is no reason to believe that in a post-*Citizens United* world that they would not spend recklessly to the end of effectively hijacking the political process.[134] There are others, like Professor Bradley Smith, who have observed that *Citizens United* was really an anti-incumbency decision. Smith argued that *Citizens United* provides an opportunity for either political party to receive support, and thus would frustrate only the interests of incumbents.[135]

As a possible progressive reply to Professor Smith, Professor Stefan Padfield commented that corporate interests have already purchased candidates through the 2010 election and that the candidates elected by these corporate interests are supporting their backers. Professor Padfield commented:

> Against this backdrop, what have the newly-elected set out to do? They have set their sights on abolishing Dodd-Frank for the recently bailed-out Wall Street bankers who have recovered very nicely indeed to rake in record profits this year while Main Street continues to deal with unemployment and foreclosures. They have set their sights on repealing universal health care, a result much appreciated by the free-spending health-care industry. They plan on cutting much of the social safety net so they can continue to give tax breaks to the wealthy. (Moody's recently estimated that the House Republicans' proposed cuts would cost 700,000 jobs by 2012.) And they have set their sights on busting the unions that serve so much of Main Street.[136]

It is an open question as to whether the ascendancy of corporate interests will be confirmed by future elections, but it would seem that this question, which raises serious issues about the integrity of our democratic process, will need to be addressed for years to come.

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133. *See, e.g.*, Rubin, *supra* note 16, at 550 (noting that the *Citizen's United* holding allows corporations to "expend unlimited sums" to support or defeat a political candidate).

134. *See* andre douglas pond cummings, *Procuring "Justice?":* Citizens United, Caperton, *and Partisan Judicial Elections*, 95 IOWA L. REV. BULL. 89, 108 (2010) (stating "[i]t is to this group of leaders, with proven reckless and negligent leadership records, that the Supreme Court through Citizens United confers unfettered ability to spend shareholder funds in campaigning for preferred politicians and judges.").

135. Bradley Smith, *The Incumbent's Bane: Citizens United and the 2010 Election*, WALL. ST. J., Jan. 25, 2011, http://online.wsj.com/article /SB10001 424052748703 555804576101622398145818.html.

136. Stefan Padfield, *The Impact of Citizens United: Anti-Incumbent or Pro-Business*, BUS. LAW PROF BLOG, (Mar. 5, 2011), http://lawprofessors.type pad.com/business_law/2011/03/the-impact-of-citizens-united-anti-incumbent-or-pro-business.html.

A second ramification that should be seriously considered and which was abandoned in *Citizens United* is the anti-distortion rationale of *Austin*.[137] It follows from this rationale that direct corporate spending in elections *at all*, and especially at a level above and beyond what an individual could spend would, arguably, create a perception that the electoral system and ultimately the government itself are corrupt because they are beholden to corporate interests. It has been argued that the abandonment of the anti-distortion rational should be reconsidered.[138]

To add to this concern, there exists the fear that corporate political personhood, which is now protected within terms of the speech rights of the First Amendment, can grow into an unpredictable trump on the political process. To be clear, this process was designed by citizens to be run for citizens. But now it may end up being dominated by artificial persons, corporations whose only interest in political outcomes stems from how those outcomes may maximize profit, a desire unrelated to that which Americans actually want. The anti-distortion rationale protects individuals from distorted communications during elections; it also creates a semblance of independence for political candidates. If both of these are lost, the voters may lose the faith in the political system, what of it there is that remains. Elections may become, in the words of Alexander Keyssar, "a pro forma ritual designed to ratify the selection of candidates who have already won the fund-raising contests."[139] In a post-*Citizens United* world, these contests—and perhaps the candidates themselves—will be brought to the people by corporations.

Third, the ramifications of the process of political personhood ought to raise concern for us about who the privileged classes are in our society and how that privilege currently manifests. It can be argued that the potential exists to shift control of the American democratic process absolutely from individuals to corporations. The political, economic, and social concerns of individuals may then be ignored because corporate concerns will rate as more important. The more important political person after *Citizens United*—indeed, the now-privileged class—is apparently the corporation and the people who control it.

As *Dred Scott* empowered slaveholders, and *Plessy* privileged the separate white society over African American society, perhaps the ramification of the Court's latest personhood analysis is the privileging of corporate power over the traditional political power

137. *See supra* note 121 and accompanying text (defining anti-distortion rationale).

138. Hasen, *supra* note 121, at 990.

139. ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 322 (2000).

curried by parties and individuals. As evident in those periods, a stratification of political personhood existed between landed white men on the one hand, and women and people of color on the other; perhaps *Citizens United* now confirms that the corporate person possesses a greater political personhood status than the individual person.

Perhaps a third era of tiered personhood has manifested where corporate interests are superior to individual interests, which is ironic given that the Constitution and its amendments were designed to protect the natural person. The Founders undoubtedly believed in this protection, and perhaps this explains the outcry from the general public regarding *Citizens United.* Intuitively, this tiered personhood does not fit the reality of what people think of when they think of a "right." The ramifications of this turn—if it holds out to be true—will irrevocably change society in the twenty-first century.

Finally, and beyond mere analytical analogy to the personhood cases, maybe this story is, once again, explicitly about race, gender and class stratification. In the immediate aftermath of *Citizens United*, Steven Ramirez on the Corporate Justice Blog noted the following:

> [T]here has been one female of color who has ever served as the CEO of a Fortune 500 company—and that happened only last summer [2009]. That appears to bring the total number of African American CEOs to five. As of November, 2007, there were four Latino CEOs and fourteen women.
>
> With respect to board seats, men hold 83% of all Fortune 100 directorships. Latinos and African Americans hold 14% of such positions and Asian Americans hold 1%. For Fortune 500 companies the reality is bleaker—there are even fewer African American directors and the number is declining. Only 3% of all Fortune 500 board positions are held by Hispanics.
>
> To the extent that *Citizens United* shifts political power to corporations, fundamentally, it shifts power away from communities of color (and women) notwithstanding their increased voting power.[140]

This shift in power to the corporate form appears to raise the question of legitimizing not only corporate form as the dominant form of capital but also affirming a new form of political power that will control the traditional political hierarchies. The blunt

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140. Steven Ramirez, *The Corporatocaracy and Race and Gender: Inverse Convergence Theory*, CORPORATE JUSTICE BLOG, (Jan. 31, 2010), http://corporatejusticeblog.blogspot.com/2010/01/corporatocracy-and-race-and-gender.html; *see also* cummings, *supra* note 137, at 109 (citing Ramirez to demonstrate that although women and communities of color have experienced increased voting power, white males dominate the voting power in corporations).

fact is that those who control these hierarchies are mostly white and mostly male. Further, this group is a substantial minority in American society, given that those who run corporations and own corporations are small in number in relation to the rest of diverse America. What we face is the possibility of a few who could represent a stratified, homogeneous class in America that holds the power to dominate elections and to tilt the democratic process in its favor. Put another way, the question to be asked is whether *Citizens United* marks the beginning of an era where this country makes plain the existence of tiered political personhood, where the individual citizens' interests are sublimated to the interests of corporate artificial persons (and the minority of upper-class, mostly white male persons who own the corporations).

This appears to be a consequence of the Court's granting political personhood to corporations. This choice—like that in *Dred Scott* and *Plessy*—may alter our society for years to come, especially given that by 2050 ethnic minorities may become the majority in this country. By 2050, political, economic, and social power may be concentrated in the hands of a minority of mostly white, mostly male powerbrokers who may effectively be an oligarchy in relation to the majority-minority population of the United States. Such a scenario certainly warrants concern.

VI. CONCLUSION

Corporate speech is only one piece of a larger puzzle that has to do with race, class, the distribution of wealth, and the manifestations of privilege in American society. But in this era of unfettered political speech by corporations, if we are not critical of the policies of democracy going forward, and if we do not look at the possibility of corporate dominance of the electoral system with a cynical and proactive eye, the generations that follow us may count *Citizens United*—along with *Dred Scott*, *Minor*, and *Plessy*—as one of the most infamous decisions, adverse to individual rights, ever rendered by the Supreme Court.