NOTE

The Historical Boundaries of Corporate Political Rights

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ABSTRACT

In 2010, the Supreme Court decided Citizens United v. FEC *and in so doing unleashed a flood of corporate dollars into the United States electoral system. This Note argues first that the consequences of* Citizens United *have been disastrous and that the Court should overrule the decision's holding. This Note proposes that the Court do so by utilizing a "history and tradition" test synthesized from the Court's recent applications of history and tradition in constitutional rights analyses. This Note also considers the propriety and need of applying such a test to the context of corporate rights. Finally, this Note applies the history and tradition test to corporate political spending and argues that this right is not deeply rooted in the history and tradition of the United States.*

TABLE OF CONTENTS

* J.D. 2025, The George Washington University Law School. This Note and my wonderful three years at George Washington would not have been possible without the support of my future wife Emily Walling, my father Mark Raineri, and my trusted friends David Wurtele and Will Ginn.

INTRODUCTION

Americans today live in a society dominated politically and economically by corporations.[1] Since 2000, corporate profits in America have swelled by nearly 450%, reaching over $3.5 trillion in 2022.[2] Coinciding with the rapid growth of corporate profits has been a vast expansion of corporations' and other business entities' roles in the United States' electoral system through campaign contributions and political expenditures.[3] Efforts by policymakers to regulate corporate political expenditures have been frustrated,[4] however, in the wake of the Supreme Court's decision in *Citizens United v. FEC*,[5] which held that corporations possessed a First Amendment right to engage in political spending.[6] Beyond

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1 *See* Gerald F. Davis, *Corporate Power in the Twenty First Century*, *in* PERFORMANCE AND PROGRESS: ESSAYS ON CAPITALISM, BUSINESS, AND SOCIETY 395, 395 (Subramanian Rangan ed. 2015); Sheldon Whitehouse, *Cutting Back the Dangerous Levels of Corporate Power*, THE HILL (Apr. 20, 2022, 5:30 PM), https://thehill.com/blogs/congress-blog/3274817-cutting-back-the-dangerous-levels-corporate-power [https://perma.cc/YH32-PQ4X].

2 *Corporate Profits in the United States from 2000 to 2022*, STATISTA (Oct. 15, 2024), https://www.statista.com/statistics/222130/annual-corporate-profits-in-the-us [https://perma.cc/L2NM-EHA4].

3 Political expenditures by business interests in the U.S. rose 481% from the 2000 presidential election to the 2020 presidential election. *See* Taylor Giorno, *Business Interests Spent $3.5 Billion on Federal Political Contributions During the 2022 Cycle*, OPEN SECRETS (Jan. 27, 2023, 12:33 PM), https://www.opensecrets.org/news/2023/01/business-interests-spent-3-5-billion-on-federal-political-contributions-during-the-2022-cycle [https://perma.cc/DR5D-TS6P].

4 *See* Jocelyn Benson, *Saving Democracy: A Blueprint for Reform in the Post*-Citizens United *Era*, 40 FORDHAM URB. L.J. 723, 724 (2012).

5 558 U.S. 310 (2010).

6 *See id.* at 318.

political expenditures, over the last decade the Supreme Court has held that other legislative efforts to regulate corporations at both the state and federal levels have unconstitutionally violated a corporation's rights. For example, in *Americans for Prosperity Foundation v. Bonta*,[7] the Court held that a California statute requiring nonprofit corporations to disclose their donors violated the corporation's First Amendment right to free speech.[8] The creation of individual rights for corporations comes at the expense of robust campaign finance regulation[9] and oversight of anonymous corporate campaign expenditures.[10]

While corporations have had their rights significantly expanded, the Supreme Court has decided several cases in the past three years reevaluating other fundamental rights. In *Dobbs v. Jackson Women's Health Organization*,[11] *New York State Rifle & Pistol Ass'n v. Bruen*,[12] and *Kennedy v. Bremerton School District*,[13] the Court altered the status of individual constitutional rights concerning substantive due process under the Fourteenth Amendment, the Second Amendment, and the First Amendment's Free Exercise clause, respectively.[14] In each of those opinions the Court relied on "the constitutional concepts of history and tradition" to determine the existence and extent of those rights.[15] The emergence of this doctrine and its increasing role in the Court's individual rights analyses have raised questions regarding the potential consequences of applying a history and tradition interpretive method to other individual rights.[16] Without a formal articulation from the Court of where or how a "history and tradition" test should be applied in the context of other constitutional rights, however,

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7 594 U.S. 595 (2021).

8 *See id.* at 607–08.

9 *See* Georgia Lyon, *How Does the* Citizens United *Decision Still Affect Us in 2024?*, CAMPAIGN LEGAL CTR. (Jan. 15, 2024), https://campaignlegal.org/update/how-does-citizens-united-decision-still-affect-us-2022 [https://perma.cc/YBE2-Q5TR].

10 *See* Ian Millhiser, *The Supreme Court Just Made* Citizens United *Even Worse*, VOX (July 1, 2021, 3:15 PM), https://www.vox.com/2021/7/1/22559318/supreme-court-americans-for-prosperity-bonta-citizens-united-john-roberts-donor-disclosure [https://perma.cc/ADG2-XJ3N].

11 Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

12 N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022).

13 Kennedy v. Bremerton Sch. Dist., 597 U.S. 507 (2022).

14 *See* Michael L. Smith, *Abandoning Original Meaning*, 86 ALB. L. REV. 43, 43 (2023).

15 Randy E. Barnett & Lawrence B. Solum, *Originalism After* Dobbs*,* Bruen*, and* Kennedy*: The Role of History and Tradition*, 118 NW. U. L. REV. 433, 435 (2023).

16 Clay Calvert & Mary-Rose Papandrea, *The End of Balancing? Text, History & Tradition in First Amendment Speech Cases After* Bruen, 18 DUKE J. CONST. L. & PUB. POL'Y 59, 60–61 (2023).

the implications of this new constitutional interpretive method remain unclear.[17]

Corporate law is one area in which the application of history and tradition could have significant implications for the recognition of rights.[18] This Note argues that increasing corporate regulation is judicially achievable by challenging recently recognized corporate rights against the history and tradition of corporate rights in the United States.[19] This Note (1) provides a survey of the rise and fall of campaign finance regulation and explores the consequences of the *Citizens United* decision, (2) describes the Court's use of history and tradition and identifies key principles that inform future uses as a novel interpretive method for analyzing constitutional rights, (3) argues that corporate political spending should be analyzed in the context of the history and tradition of those practices, and (4) applies the principles of the Court's history and tradition test to corporate political spending.

I. MONEY IN POLITICS, *CITIZENS UNITED*, AND ITS CONSEQUENCES

A. A Brief History of Campaign Spending, the Successful Legislative Efforts to Regulate Corporate Spending in the Twentieth Century, and the Judicial Unraveling of Effective Campaign Finance Regulation

Money has permeated the American electoral system since the colonial era.[20] Following the ratification of the Constitution, the dollar amounts spent on political campaigns have grown consistently throughout American history.[21] Corporate political spending would enter the crosshairs of regulation after the 1896 presidential election, when William McKinley received $7 million in campaign contributions, "mostly solicited from corporations."[22] Shortly thereafter, some states began to focus legislative efforts toward the growing role of corporations in the political system.[23] In

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17 Barnett & Solum, *supra* note 15, at 435.

18 *See infra* Part IV.

19 *See infra* Part IV.

20 An unsung pioneer of electioneering, during George Washington's run in 1758 to the Virginia House of Burgesses, the then-candidate spent thirty-nine pounds on alcoholic beverages that he distributed to "encourage" voters. *See The 1758 Election of George Washington: A Step Back in Time*, ROYAL EXAM'R (May 22, 2023), https://royalexaminer.com/the-1758-election-of-george-washington-a-step-back-in-time [https://perma.cc/AG6E-HQRV].

21 *See* Bradley A. Smith, *Campaign Finance Reform: The General Landscape: The Sirens' Song: Campaign Finance Regulation and The First Amendment*, 6 J.L. & POL'Y 1, 9 (1997) (describing the steady growth of campaign spending since the Founding era).

22 John Persinger, Note, *Opening the Floodgates: Corporate Governance and Corporate Political Activity after* Citizens United, 26 NOTRE DAME J.L. ETHICS & PUB. POL'Y 327, 330 (2012).

23 *See* Smith, *supra* note 21, at 9.

the 1890s, Nebraska, Missouri, Tennessee, and Florida passed the nation's first laws banning corporate political contributions.[24] By 1907, concerns of corporate political spending led to the passage of the Tillman Act, the first ban on corporate contributions in federal elections.[25] Following its passage, early federal cases affirmed the Tillman Act's constitutionality and held that the ban on corporate political contributions did not violate the First Amendment.[26] These early efforts to limit the political role of corporations lacked sufficiently robust enforcement and oversight mechanisms, however, and were largely ineffective in stopping corporate electioneering.[27]

By the 1970s, "corporate violation[s] of the [political contribution] ban [were] widespread."[28] It took the explosion of the Watergate scandal and newfound popular concerns about the integrity of the political system to renew legislative efforts toward curbing corporate electioneering.[29] The Federal Election Campaign Act of 1971 ("FECA")[30] was passed to close political spending loopholes used by corporations and would later be amended in 1974 to impose a hard cap on corporate political expenditures.[31] Shortly after FECA's enactment, however, the Supreme Court upended the foundation for many restrictions on corporate political spending in *Buckley v. Valeo*[32] and *First National Bank of Boston v. Bellotti*.[33] In *Buckley*, the Court held that political spending by an individual constituted free speech and was protected by the First Amendment,[34] while the *Bellotti* Court held that a corporation was entitled to the same First Amendment protections as individuals.[35] These opinions led to an explosion of corporate spending in elections through political action committees ("PACs")[36]—entities funded

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24 *See id.* at 20.

25 Adam Winkler, *Election Law as Its Own Field of Study: The Corporation in Election Law*, 32 LOY. L.A. L. REV. 1243, 1246 (1999).

26 United States v. U.S. Brewers' Ass'n, 239 F. 163, 169 (W.D. Pa. 1916).

27 *See* Smith, *supra* note 21, at 21 (describing the failures of early corporate campaign contribution restrictions).

28 *See* Winkler, *supra* note 25, at 1252.

29 *See id.*; Colin Cox, Comment, *Protecting Free Speech After* Citizens United*: Why Overruling* Austin v. Michigan Chamber of Commerce *Violates the First Amendment and Encourages Corruption in Campaigns*, 55 S. TEX. L. REV. 339, 344 (2013).

30 Federal Election Campaign Act (FECA) of 1971, Pub. L. No. 92-225, 86 Stat. 3 (codified as amended in scattered sections of Titles 2, 18, 26, and 47).

31 Persinger, Note, *supra* note 22, at 336–37.

32 424 U.S. 1, 48–49 (1976) (per curiam).

33 435 U.S. 765, 784 (1978).

34 *Buckley*, 424 U.S. at 96.

35 *Bellotti*, 435 U.S. at 784.

36 *See* Winkler, *supra* note 25, at 1253 n.61 ("The number of PACs grew from 89 in 1974 to 1,682 in 1984.") (citing THEODORE J. EISMEIER & PHILIP H. POLLOCK III, BUSINESS, MONEY, AND THE RISE OF CORPORATE PACS IN AMERICAN ELECTIONS 101 (1988)).

and operated by corporations for the purpose of political advocacy through spending.[37]

The Supreme Court would provide a temporary lifeline for efforts to limit the influence of corporations in elections in *Austin v. Michigan Chamber of Commerce*.[38] There, the Court held that a compelling government interest exists in preventing corruption in connection with "immense aggregations of wealth that are accumulated by corporations" and that "corporate wealth can unfairly influence elections."[39] In *McConnell v. FEC*,[40] the Court again upheld the government's compelling interest in preventing "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form."[41] Hope for an effective system to limit corporate spending in elections would be short-lived, however, ending with the Court's decision in *Citizens United*.[42]

In a five-to-four opinion, the Supreme Court in *Citizens United* overruled *Austin* and partially *McConnell* and held that corporations possessed the First Amendment right to make unlimited political expenditures.[43] The Court reasoned that "corporations, . . . like individuals, contribute to the discussion, debate, and the dissemination of information and ideas that the First Amendment seeks to foster," and therefore they should be protected by the First Amendment.[44] The Court further reasoned that the government's previously recognized interest in preventing the "distorting effects of immense aggregations of wealth" was unjustified because most corporations in America are small and do not possess large amounts of wealth.[45] Ultimately, the Court concluded that legislative efforts to regulate corporate political expenditures amounted to censorship by the government, preventing corporations "from presenting [their] facts and opinions to the public,"[46] violating the First Amendment's "freedom to think for ourselves."[47] The Court concluded by stating that—despite the Court's assertions to the contrary less than seven years prior—opening the floodgates of unlimited corporate expenditures into elections would not result in the

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37 For a more substantial discussion of PACs, see *id.* at 1269.

38 494 U.S. 652 (1990).

39 *Id.* at 660.

40 540 U.S. 93 (2003).

41 *Id.* at 205.

42 Citizens United v. FEC, 558 U.S. 310, 342 (2010).

43 *Id.* at 365.

44 *Id.* at 343 (quoting Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal., 475 U.S. 1, 8 (1986) (plurality opinion) (internal quotations omitted)).

45 *Id.* at 354 (quoting Austin v. Mich. Chamber of Comm., 494 U.S. 652, 660 (1990)) (internal quotations omitted).

46 *Id.* at 355.

47 *Id.* at 356.

public "los[ing] faith in [American] democracy."[48] To the contrary, the Court declared that its decision would provide greater transparency in American elections and allow the electorate to make better-informed decisions.[49]

B. Citizens United *Caused an Explosion of Unaccountable Corporate Election Spending and Left a Destructive Impact on Transparency and Faith in U.S. Elections*

In the immediate aftermath of *Citizens United*, the 2012 presidential election saw corporate political spending reach over $1 billion for the first time in United States electoral history—a nearly 600% increase from the 2008 levels.[50] After *Citizens United*, outside money began to flood into state and federal legislative elections, state judicial races,[51] and local municipal elections.[52] Beyond the growth of spending, *Citizens United* allowed the very wealthiest entities to have an outsized ability to impact the electoral process and reduced transparency of the sources of election funding.[53] Rather than facilitating greater diversity of opinions in the marketplace of ideas, the Court's decision to allow unlimited corporate spending immediately preceded a decline in small political donations made by individual donors.[54] In fact, "[i]n 2014 the top 100 individual donors spent nearly as much as the estimated 4.75 million small donors in federal elections."[55] Research shows that since *Citizens United*, lower- and "middle-class Americans exercise almost no influence" over federal elections and policymaking, while the wealthiest entities have considerable influence over the policies ultimately enacted.[56]

The concerns that so few can have so large an impact on the political process are compounded by the vastly increased amount of spending in

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48 *Id.* at 360.

49 *Id.* at 371.

50 Wendy L. Hansen, Michael S. Rocca & Brittany Leigh Ortiz, *The Effects of* Citizens United *on Corporate Spending in the 2012 Presidential Election*, 77 J. POL. 535, 535 (2015).

51 CHISUN LEE, BRENT FERGUSON & DAVID EARLEY, AFTER *CITIZENS UNITED*: THE STORY IN THE STATES 5 (2014); *see* Brent D. Boyea, Citizens United *and Independent Expenditures in State Supreme Court Elections*, 41 JUST. SYS. J. 323, 325 (2020).

52 For instance, in 2014 Chevron spent approximately $3 million on local elections in Richmond, California—a city with roughly 100,000 residents. DANIEL I. WEINER, *CITIZENS UNITED* FIVE YEARS LATER 4 (2015).

53 *Id.* at 1, 2.

54 *Id.* at 5.

55 *Id.*

56 Michael J. Klarman, *Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 207 (2020).

elections that cannot be traced to any donors at all.[57] This so-called "dark money" includes 501(c) nonprofits that are not required by law to disclose their sources of funding and, following *Citizens United*, may spend unlimited sums of money.[58] These benefits provided wealthy entities the ability to advance their preferred policy positions without the need to be publicly identified and have led to 501(c)(4) nonprofits contributing forty-seven percent of independent political spending in 2013, up from one percent in 2006.[59] Unfortunately, but perhaps predictably, in the years following *Citizens United* the American people increasingly believed that unlimited corporate political expenditures contributed to corruption in the United States' political system, and a majority of Americans trusted the government less.[60] Regardless of how sincere the Court's goals to promote robust debate and a diversity of ideas were, the ultimate consequence of *Citizens United* has been an erosion of trust in our political system in favor of greater influence for wealthy corporations.[61] Rather than accept this status quo in a future case, the Supreme Court should reevaluate corporate rights utilizing the history and tradition test, overturn the right to unlimited corporate political spending, and restore trust in democracy.

II. HISTORY AND TRADITION AS UTILIZED BY THE SUPREME COURT

One of the earlier uses of history and tradition as an interpretive method by the Supreme Court was determining the existence and extent of unenumerated, individual rights protected by the Fourteenth Amendment's Due Process Clause.[62] In *Washington v. Glucksberg*,[63] the Court recognized that the Constitution protected certain individual rights to make intimate personal decisions, so long as they were "personal activities and

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57 Sheldon Whitehouse, *Dark Money and U.S. Courts: The Problems and Solutions*, 57 HARV. J. LEGIS. 273, 276 (2020).

58 *See* Klarman, *supra* note 56, at 204; James Sample, *The Decade of Democracy's Demise*, 69 AM. U. L. REV. 1559, 1567 (describing the dramatic growth of 501(c) nonprofit election spending in the immediate aftermath of *Citizens United*).

59 William Alan Nelson II, *Buying the Electorate: An Empirical Study of the Current Campaign Finance Landscape and How the Supreme Court Erred in Not Revisiting* Citizens United, 61 CLEV. ST. L. REV. 443, 469 (2013).

60 *See id.* at 464.

61 *Id.*; *see also* Sample, *supra* note 58, at 1568 ("Enhanced corporate spending skews voter impressions, undermines representation values, and yields a significant power asymmetry for rank-and-file voters, who are relatively powerless against wealthy corporations.").

62 Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 11 (2008).

63 521 U.S. 702 (1997).

decisions . . . deeply rooted in our history and traditions."[64] In addition, the right being asserted must be "carefully" described to a satisfactory degree of specificity.[65] A "careful description" of the asserted right, as utilized by the Court in *Glucksberg*, required rejecting broad characterizations of the right to assisted suicide as a "liberty to choose how to die" and "the right to choose a humane, dignified death."[66] Instead, the Court assessed the history of the specific right to "commit suicide" and receive "assistance in doing so."[67] The Court ultimately held that such a right was not deeply rooted in the nation's history and traditions and therefore "not a fundamental liberty interest protected by the Due Process Clause."[68]

The Court's examination of the history and tradition of the right to assisted suicide included a survey of "700 years [of] the Anglo-American common-law tradition," which revealed that suicide and assisted suicide had never been recognized as a right and had been historically proscribed "[i]n almost every State . . . [and] in almost every western democracy."[69] The Court's process of narrowly defining a specific right, assessing the historical recognition of the right, and determining the extent to which the asserted right was regulated or prohibited in the nation's history served as a foundation for the Court's future applications of history and tradition.[70]

In *District of Columbia v. Heller*,[71] the Court again applied history and tradition to determine the existence of a right, this time the Second Amendment right to bear arms.[72] As in *Glucksberg*, the Court utilized a broad survey of historical practices, which included a survey of legislation among the States during the early Republic concerning a right to bear arms.[73] In *Heller*, the Court also relied on historical records.[74] It looked at both American and English sources dating back to, and prior to, the Constitution's ratification as evidence of a national "tradition" of recognizing a right to bear

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64 *Id.* at 727. Some of these individual rights include the right to marry in *Loving v. Virginia*, 388 U.S. 1 (1967), the right to marital privacy in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and the right to abortion in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

65 *Glucksberg*, 521 U.S. at 722.

66 *Id.*

67 *Id.*; *see also* Ronald Turner, *W(h)ither* Glucksberg, 15 DUKE J. CONST. L. & PUB. POL'Y 183, 198 (2020).

68 *Glucksberg*, 521 U.S. at 728.

69 *Id.* at 710–12.

70 *See, e.g.*, McDonald v. City of Chicago, 561 U.S. 742, 769 (2010) (applying *Glucksberg*'s history and tradition test to the right of self-defense).

71 554 U.S. 570 (2008).

72 *Id.* at 598.

73 *Id.* at 601–02.

74 *Id.* at 626–27.

arms.[75] In addition, the Court reviewed early post-ratification-era case law as evidence of a historical practice in the United States recognizing an individual right to bear arms.[76] The Court ultimately held that, in addition to the text of the Second Amendment, this historical record demonstrated the existence of "an individual right to keep and bear arms."[77] Despite the Court analyzing two distinct fundamental rights in *Heller* and *Glucksberg*, each opinion relied on similar historical evidence to confirm or disprove the existence of such a right.[78]

Although these two cases are not an exhaustive representation of the Court's use and development of a history and tradition doctrine,[79] the interpretive principles utilized in *Heller and Glucksberg* greatly shaped the Court's recent application of the doctrine.[80] During the 2022 Term, the Court's decisions in *Dobbs*, *Bruen*, and *Kennedy* all "not merely emphasized, but absolutized, history and tradition" as an interpretive touchstone for constitutional rights analysis.[81] Indeed, the current Justices have begun identifying and referring to the Court's growing usage of history and tradition as interpretive "test[s]" in and of themselves.[82]

Looking first at *Dobbs*, the Court held that the right to an abortion was not "deeply rooted in this Nation's history and tradition" and was therefore not protected by the Constitution, overruling *Roe v. Wade*[83] and *Planned Parenthood v. Casey*.[84] The Court first narrowly defined the scope of the right to be analyzed as the specific right to obtain an abortion and rejected the argument to justify a rights analysis "through appeals to a broader right to autonomy."[85] It then began its analysis of the history and tradition at issue with pre-Founding sixteenth- and seventeenth-century English and

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75 *Id.*

76 *Id.* at 610.

77 *Id.* at 595.

78 *See supra* notes 27–35 and accompanying text.

79 *See, e.g.*, Town of Greece v. Galloway, 572 U.S. 565 (2014) (using a history and tradition test to determine the scope of Constitutional Rights pursuant to the Establishment Clause).

80 *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231, 237–40 (2022); *see also* Smith, *supra* note 14, at 77 (linking the reasoning employed in *Dobbs* to *Glucksberg*).

81 R. George Wright, *On the Logic of History and Tradition in Constitutional Rights Cases*, 32 S. CAL. INTERDISC. L.J. 1, 1 (2022).

82 Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 547 (2022) (Sotomayor, J., dissenting); N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 79 (2022) (Kavanaugh, J., concurring).

83 410 U.S. 113 (1973).

84 505 U.S. 833 (1992); *Dobbs*, 597 U.S. at 231, 250.

85 *Dobbs*, 597 U.S. at 257 (refusing to analyze the right to an abortion in the context of a more generalized right to personal autonomy or agency because analyzing rights at a high level of generality could "license fundamental rights to illicit drug use [or] prostitution").

American common law treatises, each of which described abortion as a crime.[86] The Court used these sources' conclusions as evidence that a "positive right to procure an abortion" did not exist at that time.[87] Next, the Court described early state case law during the colonial and Founding era and highlighted specific instances in which states criminally prosecuted abortion providers.[88] The Court then cited the enactment of statutes among the states in the nineteenth century criminalizing abortion.[89] Finally, the Court cited the lack of historical examples of the right to abortion being asserted as a "fundamental right" as positive evidence that it is not a right.[90]

Likewise, the Court in *Bruen* relied on history and tradition to create a new test to determine the constitutionality of firearm regulations under the Second Amendment.[91] After previously relying on history and tradition to recognize the existence of Second Amendment rights in *Heller*, the Court then relied on the same historical bases to determine "the limits on the exercise of that right."[92] The Court followed a familiar pattern of historical analysis to determine the constitutionality of firearm regulation, beginning with an analysis of Founding-era and pre-Founding sixteenth- and seventeenth-century common law treatises.[93] The Court next considered colonial-era statutes concerning the public carrying of firearms, as well as common law offenses that limited the public carrying of firearms.[94] The Court ultimately concluded from this historical survey that the firearm regulations at issue did not comport with the "historical limitations" on the right to bear arms and therefore violated the Second Amendment.[95]

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86 *Id.* at 243 (analyzing Edward Coke's Institutes of the Laws of England (1644), William Blackstone's Commentaries on the Laws of England (7th ed. 1775), and Matthew Hale's History of the Pleas of the Crown (1736) for historical reference).

87 *Id.* at 245.

88 *Id.* at 246 (reviewing a 1652 criminal prosecution for abortion in Maryland).

89 *Id.* at 248 (providing examples of nineteenth-century statutes criminalizing abortion in Alabama, Maine, New Jersey, and Massachusetts).

90 *Id.* at 251, 253 ("[The proponents of the right to an abortion] have found no support for the existence of an abortion right that predates the latter part of the 20th century—no state constitutional provision, no statute, no judicial decision, no learned treatise.").

91 N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 24–46 (2022).

92 *Id.* at 20–22.

93 *Id.* at 44–48 (opining that Blackstone's Commentaries on the Laws of England (1769) supports the right to possess and use weapons "in common use" and that William Hawkins' Pleas of the Crown (1716) affirms the right to publicly bear arms for the purpose of self-defense).

94 *Id.* at 50–53 (describing early nineteenth-century state supreme court cases from Alabama, Louisiana, Kentucky, Georgia, Tennessee, and North Carolina striking down restrictions on public arms carrying and affirming the legality of publicly bearing arms).

95 *Id.* at 59 (discussing how historical examples of constitutional firearms regulations, such as preventing the public carrying of arms "in a manner likely to terrorize others" or banning the concealed carrying of firearms but allowing for the open carrying of firearms,

Importantly, the Court expressed two considerations when using history and tradition to determine a statute's constitutionality: Older historical traditions are more useful than more contemporary practices to determine historical rights,[96] and a contemporary regulation may pass "constitutional muster" if it is sufficiently analogous to a historical regulation.[97]

Finally, although the Court's use of history and tradition in *Kennedy* is the most "brief" and "unclear" compared to the preceding two cases, key touchstones are present.[98] In *Kennedy*, the Court again relied on history and tradition to determine the scope of constitutional rights, this time under the First Amendment's Establishment Clause.[99] In its opinion, the Court overruled *Lemon v. Kurtzman*[100] and, in its place, instructed that Establishment Clause rights analysis "must be interpreted by 'reference to historical practices and understandings.'"[101] The Court cited *Town of Greece v. Galloway*[102] as an effective use of history and tradition as an interpretive method.[103] *Town of Greece* held that "historical practices" present immediately after ratification are strongly indicative of the present-day constitutionality of similar practices.[104]

These three cases provide the core principles that can inform the scope and limits of a history and tradition test and its future applications. This Note synthesizes a history and tradition test from the Supreme Court's usage of history and tradition to be applied in future cases.

When determining either the existence or extent of a constitutional right or determining the constitutionality of a regulation potentially concerning a constitutional right, courts should apply the following steps: (1) If the matter at issue is determining whether a constitutional right exists, define the right to the narrowest degree of specificity as possible.[105] Then, (2) survey

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were too dissimilar from New York's statute at issue and indicated that New York's statute limiting concealed firearm carrying infringed the Second Amendment).

96 *See id.* at 66 ("[L]ate-19th-century evidence cannot provide much insight into the meaning of the Second Amendment when it contradicts earlier evidence.").

97 *Id.* at 30 ("[E]ven if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster.").

98 Barnett & Solum, *supra* note 15, at 435.

99 *See* Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 535–36, 543–44 (2022).

100 403 U.S. 602 (1971).

101 *Kennedy*, 597 U.S. at 535 (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014)).

102 572 U.S. 565 (2014).

103 *See Kennedy*, 597 U.S. at 535–36.

104 *Town of Greece*, 572 U.S. at 576–77.

105 *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 217–18 (2022) (instructing courts to define potential constitutional rights narrowly and to reject applications of history and tradition to broad, general rights analyses).

historical English and American common law treatises that may apply to the right or regulation at issue.[106] Next, (3) survey historical state and federal legislative action that may be applicable.[107] Following that, (4) survey historical state and federal case law that may be applicable.[108] Finally, (5) assign the greatest analytical value to the oldest historical records, with historical interpretive value declining as records approach the present day.[109] After applying all five steps, should a sufficient historical record exist supporting the existence of a right or regulation, then a future court applying this test may affirm such a right or regulation as being deeply rooted in the history and tradition of the United States.[110]

III. CONSIDERATIONS REGARDING THE MERITS OR VALUE OF A NOVEL HISTORY AND TRADITION TEST

A. The Court's Recent Stare Decisis Jurisprudence Supports the Reevaluation of Corporate Rights Recognized in Citizens United

Stare decisis is the judicial practice of treating "like cases alike" and "treating past judicial decisions as sources of law" and is often perceived as a doctrine that cautions against overruling past precedents.[111] However, the

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106 *See id.* at 241–43 (relying on the pre-Founding and Founding-era common law treatises "Blackstone, Coke, Hale, and the like" to provide the first evidence that the right to abortion does not satisfy a history and tradition test).

107 *See id.* at 246–50 (providing a survey of state statutes criminalizing abortion during the nineteenth century and thereafter to demonstrate that history and tradition does not support the recognition of a right to abortion); N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 44–51 (2022) (reviewing state statutes concerning the regulation of the public carrying of firearms from the colonial period through the Reconstruction era to determine that New York's concealed carry license issuance regime was inconsistent with the history and tradition of firearms regulation); *Town of Greece*, 572 U.S. at 576 (relying on the Founding era practices of Congress and state legislatures engaging in prayer to hold that the contemporary act of city officials engaging in prayer is consistent with the history and tradition of the First Amendment and thereby constitutionally protected).

108 *See Dobbs*, 597 U.S. at 245 (reviewing case law from the pre-Founding era to the early nineteenth century that treat abortion as a crime as a component of its history and tradition test); *Bruen*, 597 U.S. at 50–53 (analyzing nineteenth-century case law concerning the constitutionality of firearms regulation as part of its history and tradition analysis).

109 *See Bruen*, 597 U.S. at 66–67 (reasoning that Founding-era practices of firearm regulation are more informative than nineteenth-century practices for the purpose of determining the constitutionality of contemporary firearms regulations); *Dobbs*, 597 U.S. at 240–41 (opining that the recognition of a right to abortion in American law emerging in "the latter part of the 20th century" is not sufficient evidence to overcome the earlier historical examples of the criminalization of abortion).

110 *See, e.g.*, *Bruen*, 597 U.S. at 50–51 (affirming that the right to bear arms is rooted in the history of the United States but New York's regulation on public carry was not).

111 Nina Varsava, *Precedent, Reliance, and* Dobbs, 136 HARV. L. REV. 1845, 1848 (2023).

Supreme Court's opinion in *Dobbs* not only overruled *Roe* and *Casey*'s substantive protection of the right to an abortion, but also overruled *Casey*'s framework advising how the Court should adhere to stare decisis in future cases.[112] *Dobbs* broke from *Casey* by emphasizing the importance of analyzing the merits of past decisions and advising that future courts are obligated to correct "egregious" and "profound" errors from past cases.[113] Applying the Court's instruction to correct its previous improper rulings provides a justification for *Citizens United* to be reevaluated in a future case.

The Court's use of history and tradition as its central interpretive touchstone represents a departure from the Court's previous methods of constitutional interpretation, and for that reason, previous precedents should be reexamined to accord with this novel interpretive method.[114] Currently, six justices of the Supreme Court have either identified themselves outright as "originalists" or have otherwise endorsed its importance in constitutional interpretation.[115] One prominent form of originalism is "public meaning originalism," generally understood as a method of interpreting the Constitution "based on the original public meaning" at the time of its enactment.[116] Today, public meaning originalism is arguably the "most widely held theory of constitutional interpretation."[117] In *Dobbs*, *Bruen*, and *Kennedy*, however, the Court's reliance on history and tradition did not include an "analysis of how this history and tradition had any bearing on the meaning of the Constitution."[118] Instead, the Court utilized history and tradition as sufficient evidence of the Constitution's original public meaning in and of itself.[119] The Court's departure from the traditional application of

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112 *Id.* at 1847.

113 *Id.*; *id.* at 1847 n.11.

114 *See* Wright, *supra* note 81, at 1 (describing how history and tradition have recently become essential components of constitutional "rights-claims" at the Supreme Court).

115 *See* Smith, *supra* note 14, at 44–45, 50 nn.42–45 and accompanying text.

116 *Id.* at 47–48. Although this description of "public meaning originalism" arguably oversimplifies the doctrine, there are three core principles that inform its application in the context of this Note. *See* Barnett & Solum, *supra* note 15, at 436–37 ("(1) . . . The original meaning of the constitutional text is fixed at the time each provision is framed and ratified; (2) . . . The best understanding of original meaning is the communicative content of the constitutional text that was accessible to the public at the time each provision was framed and ratified (its original public meaning); and (3) . . . Constitutional practice ought to be consistent with, fully expressive of, and fairly traceable to the original public meaning of the constitutional text.").

117 Frederick Mark Gedicks, *The "Fixation Thesis" and Other Falsehoods*, 72 FLA. L. REV. 219, 221 (2020).

118 Smith, *supra* note 14, at 46.

119 *Id.*

public meaning originalism has led some scholars to argue that history and tradition encompass an entirely novel constitutional theory.[120]

Because history and tradition have been used to justify departures from original public meaning and resulted in nonoriginalist analysis,[121] going forward, the Court should recognize its new test as a novel interpretive theory, one in which an analysis of history and tradition is itself sufficiently "constitutive of constitutional meaning."[122] As such, constitutional rights cases in the future should include an analysis of the touchstones of history and tradition as synthesized in this Note. History and tradition will thus become "necessary and indispensable" in the future recognition of rights by the Court.[123] *Citizens United* did not analyze history or tradition to determine the corporate right to political spending.[124] Notwithstanding the opinion's persuasiveness, because it failed to justify the right within the history and tradition of the United States, it does not meet the standards that the Court has applied in its previous history and tradition analyses.[125] Therefore, as instructed by the Court's stare decisis guidance in *Dobbs*, future courts have an obligation to correct the "profound" error of the *Citizens United* majority, revisit the First Amendment rights of corporations, and apply the history and tradition test.[126]

B. The Court Should Apply History and Tradition to Corporate Rights to Undercut Criticisms that It is a "Conservative" and "Selective" Judicial Method

Another major criticism of relying on history and tradition is that its application allegedly provides judges with a pretense to selectively analyze historical sources and reach conclusions that accord with their preferred policy outcomes.[127] Applying a history and tradition test to corporate rights would demonstrate that the doctrine can be used consistently and would undercut the argument that history and tradition is simply a means to reach

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120 *See* Barnett & Solum, *supra* note 15, at 452 (describing "historical traditionalism" as a new, independent constitutional theory centered on history and tradition).

121 *See id.* at 455–56 (arguing that the *Dobbs* opinion utilized history and tradition in part to reach a nonoriginalist conclusion).

122 Marc O. DeGirolami, *The Traditions of American Constitutional Law*, 95 NOTRE DAME L. REV. 1123, 1123 (2020).

123 Wright, *supra* note 81, at 12.

124 *See* Citizens United v. FEC, 558 U.S. 310 (2010).

125 *See supra* Part II.

126 *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 280–82 (2022).

127 *See* Pat Tucker, *The Long History and Tradition of a Right to a Pre-Quickening Abortion in the United States*, 59 IDAHO L. REV. 333, 342–43 (2023) (arguing *Dobbs* inaccurately portrayed the history of abortion in order to justify overturning the right to abortion).

"conservative" outcomes. Opponents of using history and tradition argue that the Court has employed it to maliciously reintroduce undemocratic and unpopular norms into the Constitution.[128] Some critics have even gone as far as to say that history and tradition is a "conservative" method employed by "conservative" judges.[129] To address that criticism, the Court should apply the history and tradition doctrine to new areas of rights analysis to show that it is not a convenient tool used solely to reach "conservative" policy outcomes.

The Court's decision in *Citizens United* to recognize the right of corporations to make unlimited political expenditures has been profoundly unpopular.[130] Although negative public opinion alone does not justify reconsideration of the Court's precedents, it has been argued that the Court's public perceptions *do* play a role in both "maintain[ing] the Court's legitimacy and its ability to make legal policy effectively."[131] Further, some scholars have argued that *Citizens United* was decided not through a faithful application of legal principles, but instead by the conservative majority's "personal views and policy preferences."[132] Notwithstanding this Nation's commitment to the principles of judicial neutrality,[133] should a future Court decide to review the holdings of *Citizens United* and apply some or all of the history and tradition test laid out in this Note, it would likely find that corporate political spending rights decidedly fail the test and would have a duty to overturn that precedent.[134] The Court would then have an example of the "conservative" history and tradition test being applied to overturn a

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128 *See* Joy Milligan & Bertrall L. Ross II, *We (Who Are Not) the People: Interpreting the Undemocratic Constitution*, 102 TEX. L. REV. 305, 339 (2023) (arguing that history and tradition results in undemocratic judicial outcomes).

129 *See* Reva B. Siegel, *How "History and Tradition" Perpetuates Inequality:* Dobbs *on Abortion's Nineteenth-Century Criminalization*, 60 HOUS. L. REV. 901, 910–11 (describing the Justices who apply history and tradition as "conservative").

130 *See* Ashley Balcerzak, *Study: Most Americans Want to Kill 'Citizens United' with Constitutional Amendment*, THE WORLD (May 10, 2018, 11:45 AM), https://theworld.org/stories/2018-05-10/study-most-americans-want-kill-citizens-united-constitutional-amendment [https://perma.cc/R6DG-HBWX].

131 Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515, 1517 (2010).

132 Geoffrey R. Stone, Citizens United *and Conservative Judicial Activism*, 2012 U. ILL. L. REV. 485, 485 (2012).

133 *See* Mark Sherman, *Roberts, Trump Spar in Extraordinary Spat Over Judges*, AP NEWS (Nov. 21, 2018, 6:42 PM), https://apnews.com/article/north-america-donald-trump-us-news-ap-top-news-immigration-c4b34f9639e141069c08cf1e3deb6b84 [https://perma.cc/FH5P-VTWY] (providing the statement of Chief Justice Roberts that "[w]e do not have Obama judges or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated judges doing their best to do equal right to those appearing before them").

134 *See infra* Part IV.

previous "conservative" precedent[135] and instead reach a conclusion supported broadly across American politics.[136] Doing so would demonstrate that history and tradition can be used to reach socially popular outcomes, show that its use does not preordain a "conservative" judicial decision, and directly undermine some of its criticism. Such a decision could rehabilitate not only public and academic perceptions regarding the use of history and tradition, but also the legitimacy of the Court as a whole.[137]

IV. APPLYING THE HISTORY AND TRADITION TEST TO THE RIGHT OF CORPORATE POLITICAL SPENDING

With the history and tradition test in hand, this Part applies the newly synthesized steps to corporate political spending rights and evaluates the constitutionality of related government regulation. This Part argues that applying the history and tradition test shows that a right of a corporation to engage in political spending is not deeply rooted in the United States' history and tradition.

Beginning with Step 1, analyzing the recognition of a right under the history and tradition test requires identifying the right to the narrowest degree of specificity practicable.[138] As such, this test will not be used to analyze whether corporations possess any First Amendment rights[139] or whether political spending by an individual is protected by the First Amendment.[140] When analyzing rights "at a high level of generality,"[141] there is a risk that applying this test would result in the recognition of rights that are not deeply rooted in the "Nation's history and tradition."[142] In *Glucksberg* and *Dobbs*, the Court focused its analysis on the specific acts proscribed by law at issue in each case—the right to die by assisted suicide and the right to an abortion—rather than analyzing broader rights to liberty or autonomy.[143] Because *Citizens United* dealt specifically with the

135 *See supra* note 129 and accompanying text.

136 *See* Balcerzak, *supra* note 130.

137 *See* Gillian E. Metzger, *Considering Legitimacy*, 18 GEO. J.L. & PUB. POL'Y 353, 367 (2020) (describing how ideological perceptions of the Supreme Court's decisions directly impacts public perceptions of the Court's legitimacy).

138 *See supra* Part II.

139 *See* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 784 (1978).

140 *See* Buckley v. Valeo, 424 U.S. 1, 48–49 (1976) (per curiam).

141 *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 257 (2022) (declining to analyze the right to abortion through the general lens of personal autonomy, noting that doing so "could license fundamental rights to illicit drug use [or] prostitution").

142 *See Dobbs*, 597 U.S. at 260 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)) ("[T]he 'established method of substantive-due-process analysis' requires that an unenumerated right be 'deeply rooted in this Nation's history and tradition . . . .'").

143 *Id.* at 257; Washington v. Glucksberg, 521 U.S. 702, 725–26 (1997).

constitutionality of a federal law limiting corporate political spending, this Note focuses on answering the question of whether a corporation possesses an inherent right to engage in unlimited political spending.[144]

Proceeding to Step 2, an analysis of historical legal treatises demonstrates that a corporation did not possess a historical right to engage in political spending. One such source that speaks on the rights of corporations is William Blackstone's *Commentaries on the Laws of England*.[145] Although the treatise discusses English common law, Blackstone's *Commentaries* was in wide circulation in the United States at the time of the Constitution's ratification and played an influential role in shaping early American jurisprudence,[146] as it was utilized by the Supreme Court when analyzing history and tradition.[147] Blackstone devoted an entire section in the *Commentaries* to corporate law and explained how corporations possess a set of limited, discrete rights.[148] Specifically, Blackstone described a corporation's inherent rights as (1) the right to "perpetual succession," (2) the right "to sue and be sued," (3) the right to "purchase lands and hold them," (4) the right to "have a common seal," and (5) the right to "make bylaws" governing the corporation.[149] Additionally, the *Commentaries* makes clear that corporations could only be granted such legal rights by the "King's consent" and through a "charter of incorporation."[150] Notably absent from Blackstone's description of corporations is a mention of the right to engage in political advocacy through financial spending.[151]

Although Blackstone may have been among the earliest to describe the rights of corporations, Steward Kyd's Treatise on the Law of Corporations, published in 1793, is arguably "the first English treatise devoted specifically to corporation law."[152] In the treatise, Kyd identifies similar corporate legal characteristics as Blackstone, including "separate legal personality, . . . perpetual succession, and the ability to aggregate

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144 Citizens United v. FEC, 558 U.S. 310, 319–21 (2010).

145 *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *467–85.

146 *See* Mark L. Jones, *Fundamental Dimensions of Law and Legal Education: An Historical Framework - A History of U.S. Legal Education Phase I: From the Founding of the Republic Until the 1860s*, 39 J. MARSHALL L. REV. 1041, 1055 n.48, 1070 n.103 (2006) (explaining the widespread circulation and influence of Blackstone's *Commentaries* on American law).

147 *See supra* notes 93, 104 and accompanying text.

148 *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *467–85.

149 *Id.* at *475–76.

150 *Id.* at *472–73.

151 *See id.* at *467–85.

152 David B. Guenther, *Of Bodies Politic and Pecuniary: A Brief History of Corporate Purpose*, 9 MICH. BUS. & ENTREPRENEURIAL L. REV. 1, 13 (2019).

property."[153] Additionally, Kyd describes the limits of the corporate form, particularly that a corporation possesses only the legal rights explicitly granted to it.[154] Taken together, the examination of early common law treatises does not provide a clear basis to justify an inherent corporate right to engage in political spending.

Next, the Step 3 analysis of early state actions regarding corporations similarly finds further evidence against recognizing the right to unlimited corporate political spending. From 1781 to 1800, only 335 corporations were chartered across the United States.[155] During that period, the regulatory environment was marked by a predominantly "restrictive attitude of public policy towards corporations."[156] In particular, at the Founding of the United States and into the beginning of the 1800s, "incorporation could only be obtained through special charters granted by the [state] legislatures" which was considered to be "a privilege to be granted by the state in its discretion."[157] One necessary precondition to receive a corporate charter was an obligation for the corporation to pursue a public purpose on behalf of the state, such as serving a quasi- "municipal, religious, charitable, [or] educational" function.[158] Because of this requirement, the vast majority of corporations chartered from 1780 to 1801 were transportation corporations chartered specifically to develop infrastructure.[159]

This pattern of considerable policy restrictions on corporations and corporate activities remained widespread until the United States began to transition away from corporate chartering toward general incorporation statutes.[160] The first state-level general incorporation statute was adopted in New York in 1846 but would not become adopted in most states until 1902.[161] Even after the widespread adoption of general incorporation statutes, thirty-one states enacted laws that "restrict[ed] corporate political

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153 *Id.* at 14.

154 *See* 1 STEWART KYD, A TREATISE ON THE LAW OF CORPORATIONS 13 (London, J. Butterworth 1793) ("[A corporation may exercise] a variety of political rights, more or less extensive, according to the design of its institution, or the powers conferred on it . . . ."); Leo E. Strine, Jr. & Nicholas Walter, *Originalist or Original: The Difficulties of Reconciling* Citizens United *with Corporate Law History*, 91 NOTRE DAME L. REV. 877, 898 (2016).

155 P. M. Vasudev, *Corporate Law and Its Efficiency: A Review of History*, 50 AM. J. LEGAL HIST. 237, 243 tbl.1 (2008).

156 *Id.* at 237.

157 *Id.* at 242.

158 Guenther, *supra* note 152, at 1; *see also* Douglas Arner, *Development of the American Law of Corporations to 1832*, 55 SMU L. REV. 23, 46 (2002) (explaining that during the early Republic, "corporations were conceived as 'an agency of government . . . and *designed to serve a social function for the state*.'") (emphasis added).

159 *See* Guenther, *supra* note 152, at 33.

160 *See* Vasudev, *supra* note 155, at 254.

161 *Id.* at 254 & tbl.3.

activity" in some way.[162] A number of these state regulations included outright bans on corporate political expenditures of any kind.[163] Until the 2010 decision in *Citizens United*, these prohibitions remained in effect for around 100 years without a successful constitutional challenge asserting the rights of a corporation.[164]

The historical evidence concerning the regulatory environment faced by corporations during the early Republic can be defined by the significant restraints from both forming and operating corporations.[165] Even following the expansion of general incorporation statutes, states continued to extensively regulate corporations and corporate political spending.[166] Because early state law limited corporations solely to the rights granted in the articles of incorporation[167] and heavily regulated corporate spending in elections up until the late twentieth century,[168] there is additional evidence against a historical right for corporations to engage in unlimited political spending.

Through surveying previous state and federal laws, Step 4 presents the most evidence against the existence of a historical right for corporations to engage in political spending. From the late eighteenth to the early nineteenth centuries, the predominant legal theory applied by courts to corporate law was the "concessionary theory."[169] This theory reflected an understanding by courts that "corporations are artificial, juridical fictions created by the government . . . [and] are subordinate to the government."[170] One early elucidation of the concessionary theory came in the 1804 Supreme Court

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162 *See* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 803 (1978) (Rehnquist, J., dissenting) (explaining that thirty-one states had enacted legislation aimed at restricting corporate political activity).

163 For example, Wisconsin's 1905 campaign finance law included a complete ban on corporate campaign expenditures and included penalties of "imprisonment in the state prison for a period of not less than one nor more than five years," WIS. ACT 492 (1905), and Montana's 1912 Corrupt Practices Act was passed by voter initiative and "prohibited corporate contributions to and expenditures on candidate elections," MONT. CODE ANN. § 13-35-502 (2023).

164 *See, e.g.*, Paul Abowd, *Wisconsin Recall Breaks Record Thanks to Outside Cash*, CTR. FOR PUB. INTEGRITY (June 3, 2012), https://publicintegrity.org/politics/wisconsin-recall-breaks-record-thanks-to-outside-cash [https://perma.cc/Z9X8-XZCY] (discussing Wisconsin's corporate political contributions ban which remained in place from 1905 until *Citizens United* in 2010).

165 *See supra* note 156 and accompanying text.

166 *See supra* notes 157–158 and accompanying text.

167 *See supra* notes 149–154 and accompanying text.

168 *See supra* Part I.

169 *See* Jonathan A. Marcantel, *The Corporation as a "Real" Constitutional Person*, 11 U.C. DAVIS BUS. L.J. 221, 225 (2011).

170 *Id.* at 224–25.

decision *Head & Amory v. Providence Insurance Co.*,[171] where the Court described a corporation as "the mere creature of the act to which it owes its existence" and stated a corporation may "exert[] its faculties only in the manner which that act authorizes."[172] One consequence of this notion that a corporation can only exist by express statutory authorization is the *ultra vires* doctrine, signifying that a corporation could not officially act in any way that exceeded the scope of its charter as granted by the legislature.[173] Courts in the early nineteenth century routinely struck down or otherwise invalidated the acts of corporations that were held to exceed the scope of their acts of incorporation.[174] Even as the Supreme Court began to recognize novel legal rights for corporations, its opinions still made explicit that corporations did not hold the same rights as natural-born citizens and affirmed that corporations are empowered to act only insofar as a state legislature originally authorized it.[175]

The Supreme Court would not acknowledge that a corporation could be entitled to certain property rights protections, principally Fourteenth Amendment Due Process and Equal Protection rights, until the late nineteenth century.[176] But even as the Supreme Court extended certain property rights to corporations, that development did not translate into a broad expansion of liberty rights to corporations.[177] During this period of expanding judicial recognition of corporate rights, the Supreme Court declined to extend to corporations other protections under the Bill of Rights, including the Fifth Amendment right against self-incrimination, reasserting that a corporation "is presumed to be incorporated for the benefit of the

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171 6 U.S. (2 Cranch) 127 (1804).

172 *Id.* at 167.

173 *See* Morton J. Horwitz, Santa Clara *Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 186–88 (1985).

174 *See* Beaty v. Lessee of Knowler, 29 U.S. (4 Pet.) 152, 168 (1830) ("That a corporation is strictly limited to the exercise of those powers, which are specifically conferred on it, will not be denied."); *see also* Goszler v. Corp. of Georgetown, 19 U.S. (6 Wheat.) 593, 597 (1821) ("A Corporation can make such contracts only as are allowed by the acts of incorporation."). For a detailed discussion of the Supreme Court's early application of the *ultra vires* doctrine, see also Clyde L. Colson, *The Doctrine of* Ultra Vires *in United States Supreme Court Decisions*, 42 W. VA. L.Q. 179 (1936). For an informative survey of the historical development and sequence of corporate rights, see Strine & Walter, *supra* note 154, at 894–910.

175 *See* Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 636, 652–54 (1819) (holding that the legislature of New Hampshire could not unilaterally alter the charter of Dartmouth University, but also affirming that "[a] corporation is an artificial being, invisible, intangible, and existing only in contemplation of law").

176 *See* Horwitz, *supra* note 173, at 223.

177 *See* ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS 400–02 (2018) (arguing that judicial recognition of "liberty rights" for corporations began in the mid twentieth century).

public" and "subject to the laws of the State and the limitations of its charter."[178] The Court continued to frequently distinguish the rights possessed by natural persons and the rights of artificial "persons."[179] In fact, the Supreme Court did not recognize a First Amendment right for corporations to engage in political speech until 1978.[180] Even then, some Justices still utilized the concessionary theory and were skeptical of recognizing new rights for corporations.[181]

The historical record of state and federal case law prior to *Bellotti* demonstrates a strong evidentiary basis against the right for a corporation to engage in political speech.[182] To the contrary, from the Founding until the recognition of limited corporate personhood in the late nineteenth century, corporations arguably possessed *no* rights outside of those granted to them explicitly by their corporate charter.[183] Even then, corporate personhood was largely limited to Fourteenth Amendment protections, and protections for corporations under the Bill of Rights would not be recognized judicially until well into the twentieth century.[184] Taken cumulatively, the historical survey of state and federal case law in Step 4 provides additional evidence against recognizing a historical corporate right to political spending.

Having compiled and analyzed historical legal treatises, state regulations, and case law in Steps 2, 3, and 4, this Note turns to Step 5 to assess the totality of the evidence collected, assigning the greatest evidentiary weight to the oldest sources and the least weight to the most recent sources.[185] To summarize, Step 2 revealed that the earliest sources of

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178 Hale v. Henkel, 201 U.S. 43, 72–77 (1906).

179 *See* W. Turf Ass'n v. Greenberg, 204 U.S. 359, 363 (1907) ("[T]he liberty guaranteed by the Fourteenth Amendment against deprivation without due process of law is the liberty of natural, *not artificial*, persons.") (emphasis added); N. Sec. Co. v. United States, 193 U.S. 197, 362 (1904) (Brewer, J., concurring in judgment) ("A corporation, while by fiction of law recognized for some purposes as a person and for purposes of jurisdiction as a citizen, is not endowed with the inalienable rights of a natural person. It is an artificial person, created and existing only for the convenient transaction of business.").

180 *See* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 777–86 (1978) (holding that corporations possessed the same First Amendment rights as natural persons and that a corporation had a right to make campaign contributions toward Massachusetts state ballot initiatives).

181 *See* Jessica A. Levinson, *We the Corporations?: The Constitutionality of Limitations on Corporate Electoral Speech After* Citizens United, 46 U.S.F. L. REV. 307, 324–25 (2011) (describing Justice Rehnquist's concessionary approach in *Bellotti*).

182 *Bellotti*, 435 U.S. at 776.

183 *See supra* notes 145–150 and accompanying text.

184 *See* Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577, 582, app. at 664–65 (1990) (arguing that most constitutional protections guaranteed by the Bill of Rights were not extended to corporations until the 1960s).

185 *See supra* note 91 and accompanying text.

American common law defined the rights of corporations narrowly and discretely and did not include any recognition of a right to political spending.[186] Step 3 demonstrated that at the Founding, corporations could only be founded at the pleasure of a state legislature and were required to pursue a public purpose.[187] Even after states relaxed the restrictions on founding corporations, states still regularly enacted regulations aimed at limiting corporate involvement in the political process.[188] Step 4 showed that in the early Republic, courts consistently held that corporations possessed only the rights that were granted to it in its founding charter and were otherwise subordinate to the government.[189] Even after the expansion of some constitutional protections to corporations, the rights of natural and artificial persons were still considered to be distinct.[190] Only in the latter half of the twentieth century did the courts begin to recognize a First Amendment right for corporations to engage in political speech through spending.[191] All three bases of historical evidence indicate that any recent recognitions of corporate First Amendment rights are considerably preceded by older evidence to the contrary. As such, applying this history and tradition test to the right for corporations to engage in political spending yields significant evidence that such a right is not deeply rooted in the history and tradition of the United States. For these reasons, the Court should reconsider its opinion in *Citizens United*, apply the history and tradition test to corporate political spending, and hold that corporations do not possess a right to engage in unlimited political spending.

CONCLUSION

The Supreme Court's decision in *Citizens United* granted corporations the right to engage in unlimited political spending in American elections.[192] This decision has enflamed popular concerns about the entrenched power of corporations to influence American society both economically and politically.[193] Current legislative efforts to limit corporate expenditures in elections have focused on amending the Constitution to overturn *Citizens*

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186 *See supra* notes 145–154 and accompanying text.

187 *See supra* notes 155–168 and accompanying text.

188 *See supra* notes 155–168 and accompanying text.

189 *See supra* notes 169–184 and accompanying text.

190 *See supra* notes 169–184 and accompanying text.

191 *See supra* notes 169–184 and accompanying text.

192 Citizens United v. FEC, 558 U.S. 310 (2010).

193 *See* Susanna Kim Ripken, Citizens United, *Corporate Personhood, and Corporate Power: The Tension Between Constitutional Law and Corporate Law*, 6 U. ST. THOMAS J.L. & PUB. POL'Y 285, 315 (2012).

United.[194] Another potentially more practical avenue to limit corporate political advocacy rights, however, could be achieved judicially. Three recent cases in the Supreme Court extensively relied on history and tradition as an interpretive canon for constitutional rights analysis.[195] The principles elucidated in those three opinions provide a basis to synthesize a generally applicable history and tradition "test."[196] That test, if applied to the right for corporations to engage in political spending, shows that such a right is not deeply rooted in the history and tradition of the United States.[197] The Court would therefore have a basis to overturn its decision in *Citizens United*. Doing so would help restore faith and transparency in American democracy and align the rights of corporations with the views of the vast majority of Americans.[198] For those reasons, the Court should revisit *Citizens United* in a future case, apply the history and tradition test to corporate rights, and overturn the right for corporations to engage in unlimited political spending.

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194 *See, e.g.*, *Congressman Schiff Introduces Constitutional Amendment to Overturn* Citizens United, OFF. OF REPRESENTATIVE ADAM SCHIFF (Mar. 24, 2022), https://schiff.house.gov/news/press-releases/congressman-schiff-introduces-constitutional-amendment-to-overturn-citizens-united [https://perma.cc/6Y32-TMHC].

195 *See supra* notes 9–13 and accompanying text.

196 *See supra* Part II.

197 *See supra* Part IV.

198 *See supra* Part III.