COMMENTS

In the Wake of *Citizens United*, Do Foreign Politics Still Stop at the Water's Edge?

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I. INTRODUCTION

In our American Republic, the longstanding custom is for the Justices of the United States Supreme Court to stay above the political

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fray.[1] Their role in the constitutional system is often compared with an umpire's role in a baseball game—to just call balls and strikes.[2] Likewise, the relationship between the executive and judicial branch is often marked by respect and decorum.[3]

As if kicking up dust to protest a bad call made at the plate, President Obama, in his 2010 State of the Union Address, delivered a sharp rebuke to the Court, declaring: "Last week, the Supreme Court reversed a century of law to open the floodgates for special interests, including foreign corporations, to spend without limit in our elections. . . . I don't think American elections should be bankrolled by America's most powerful interests, or worse, by foreign entities."[4]

While six Justices sitting directly in front of President Obama remained expressionless, one lost his cool.[5] Furrowing his brow in disapproval, Justice Alito mouthed the words "[n]ot true, not true."[6] His reaction was captured by national television cameras and caused a stir in the news.[7]

Critics complained that the President's direct reproach of the Court constituted a grave breach of decorum.[8] Supporters applauded the President for standing up against conservative judicial activism.[9] By upbraiding the Court, President Obama was channeling popular outrage directed at the recent Supreme Court ruling, *Citizens United v. FEC*.[10]

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1. For example, a host of justiciability doctrines serve to limit the federal judicial power—including the political question doctrine, which holds that some subject matters are inappropriate for judicial review, despite allegations that specific government conduct is unconstitutional. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 49-50, 129 (3d ed. 2006).

2. In Chief Justice Roberts' confirmation hearing before the Senate, he declared that "'Judges are like umpires . . . . Umpires don't make the rules; they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role.'" Bruce Webber, *Umpires v. Judges*, N.Y. TIMES, July 12, 2009, at WK1 (quoting Confirmation Hearing on the Nomination of John G. Roberts, Jr., To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 56 (2005) (statement of Judge John G. Roberts, Jr.)).

3. Robert Barnes, *Alito Dissents on Obama Critique of Court Decision*, WASH. POST, Jan. 28, 2010, at A6.

4. Dan Eggen, *Democrats Try To Counter Ruling on Election Spending*, WASH. POST, Jan. 29, 2010, at A7 (quoting President Barack Obama, State of the Union Address (Jan. 27, 2010)).

5. Barnes, *supra* note 3.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. Dan Eggen, *Corporate Sponsorship Is Campaign Issue on Which Both Parties Can Agree*, WASH. POST, Feb. 18, 2010, at A15 ("Eight in 10 respondents said they opposed a Supreme Court ruling last month that allows unfettered political spending by corporations.").

The polarized reaction to President Obama's public rebuke of the Court mirrored the stirring debate that arose in the wake of *Citizens United* among scholars, journalists, and the general public. Supporters jubilantly praised the decision as a vindication of the First Amendment and a rollback of invidious government censorship. Critics claimed that the decision threatened to usher in an era of corporate domination, where the voices of the people are drowned out by powerful special interests, thus undermining representative democracy. The decision generated considerable confusion concerning the ability of Congress to steer the American political process by limiting the influence of foreign citizens and entities.[11] This uncertainty was grounded in the sweeping language of the decision.

This Comment will attempt to clarify the *Citizens United* decision and explore its implications for laws restricting foreign influences in domestic elections. To understand why many prominent politicians and scholars have rebuked *Citizens United* as a dangerous break with the nation's traditions, it is necessary to examine its holding and reasoning. Part II of this Comment will do just that, scrutinizing the ruling's main holding that "the Government may not suppress political speech on the basis of the speaker's corporate identity."[12] In the process, I hope to clarify some of the uncertain aspects of the decision.

Part III will explore the ability of Congress, in the wake of *Citizens United*, to restrict foreign influences in electoral politics. To begin, it is helpful to review the theoretical basis for restricting foreign influences in domestic campaigns. Then, Part III will survey the pertinent American laws on the books that place restrictions on foreign influences in domestic politics. After that, Part III will assess whether current laws will likely survive scrutiny under the logic and reasoning of *Citizens United*. Part IV concludes by arguing that foreign-related corporations should be excluded from participating in domestic elections.

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11. *See, e.g.*, Kenneth A. Gross, *Alito Was Right*, FOREIGN POL'Y, Feb. 2, 2010, http://www.foreignpolicy.com/articles/2010/02/02/alito_was_right ("[T]he opinion does not upset the longstanding prohibition on foreign money in U.S. elections."). *But see* Josh Gerstein, *Decision May Mean More Foreign Cash*, POLITICO, Jan. 21, 2010, http://www.politico.com/news/stories/0110/31845.html#ixzz0e2lAUZ1j ("'It is a plausible inference from the court's opinion that [foreign] money can't be restricted.'" (quoting Michael Dorf, a Cornell law professor)).

12. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 913 (2010).

II. *CITIZENS UNITED* DECISION

A. Overview

Citizens United concerned a documentary called *Hillary: The Movie* (*Hillary*), which portrayed then-Senator Hillary Clinton as a lying, power-crazed gorgon.[13] Citizens United (Citizens), the conservative nonprofit organization that produced this film, wanted to release their work on cable television during the Democratic Primaries in January 2008.[14]

To promote *Hillary*, Citizens produced three advertisements to run on cable television.[15] Because Citizens had accepted contributions from for-profit corporations, it feared that running its television advertisements would violate § 441b's restriction on corporate-funded independent expenditures, thus exposing the organization to possible civil and criminal penalties.[16]

In December 2007, Citizens brought suit arguing for declaratory and injunctive relief against the Federal Election Commission (FEC), alleging, among other things, that § 441b is unconstitutional as applied to *Hillary*.[17] The district court denied Citizens' request for a preliminary injunction and granted summary judgment to the FEC.[18] Citizens appealed, and the Supreme Court granted certiorari.[19] The Supreme Court of the United States held that the government may not suppress political speech based on the speaker's corporate identity.[20]

B. Background

The First Amendment provides in part that "Congress shall make no law . . . abridging the freedom of speech."[21] It should be readily apparent that the text of the First Amendment is vague and open-ended;[22]

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13. *See id.* at 887, 890.
14. *Id.* at 888.
15. *Id.* at 887-88.
16. *Id.* at 888.
17. *Id.*
18. *Id.*
19. *Id.* The procedural history of this case was quite unusual. In the district court, Citizens expressly abandoned a facial challenge to the statute. The question presented to the Supreme Court was narrow. However, during oral argument, the majority evidently grew unhappy with the limited nature of the case, so they ordered re-argument to afford an opportunity to strike down the law. *Id.* at 931-32 (Stevens, J., dissenting).
20. *Id.* at 913 (majority opinion).
21. U.S. CONST. amend. 1.
22. The weight of authority indicates that the text of the Constitution is purposefully vague. In the immortal words of Justice Marshall, the nature of the Constitution requires that "only its great outlines should be marked, its important objects designated, and the minor

nevertheless, near universal agreement exists among scholars that political speech—that is, speech connected with the political process—is the very core of the First Amendment.[23] A major purpose of the First Amendment is to ensure the free discussion of political affairs, including "discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to [the] political process[]."[24]

Although the First Amendment appears to contain absolute language, the Supreme Court has never interpreted it to prohibit all government regulation of speech.[25] But neither does the government have license to censor speech indiscriminately; restrictions on political speech are subject to strict scrutiny.[26] To satisfy this standard, the government must meet two requirements. First, it must demonstrate a compelling state interest. Second, the restriction must be narrowly tailored to meet such a compelling interest.[27]

Because some provisions of the Constitution expressly apply to "persons" and others apply to "citizens," a question arises concerning the extent to which corporations are entitled to constitutional protections.[28] A full exploration of this matter is beyond the scope of this Comment. It suffices to say that the Supreme Court has long deemed corporations to be "persons" under the Constitution.[29] Accordingly, corporations enjoy

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ingredients which compose those objects be deduced from the nature of the objects themselves. . . . [W]e must never forget, that it is a *constitution* we are expounding." M'Culloch v. Maryland, 17 U.S. 316, 407 (1819). As for the First Amendment, beyond prohibiting licensing of publication and punishment for seditious libel, "there is little indication of what the framers intended." CHEMERINSKY, *supra* note 1, at 923-24 ("'[N]o clear, consistent vision of what the framers meant by freedom of speech will ever emerge.'" (quoting Professor Smolla)).

23. *See* CHEMERINSKY, *supra* note 1, at 1070.

24. Mills v. Alabama, 384 U.S. 214, 218-19 (1966).

25. CHEMERINSKY, *supra* note 1, at 924.

26. *See id.* at 1071.

27. *Id.* at 1070-71 (noting that restrictions on speech must "burden no more speech than [is] necessary" to accomplish the government's objective (quoting Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 765 (1994))).

28. *See* CHEMERINSKY, *supra* note 1, at 1082. It bears mention that the role of corporations in society has dramatically changed since the country's founding. Justice Stevens illustrates this point in his dissent, pointing out that in the late eighteenth century, corporations were few in number; their actions were sharply limited by the ultra vires principle; and they were generally maligned as an evil and corrupting influence. *See* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 948-49 (2010) (Stevens, J., dissenting).

29. *See* Jess M. Krannich, *The Corporate "Person": A New Analytical Approach to a Flawed Method of Constitutional Interpretation*, 37 LOY. UNIV. CHI. L.J. 61 (2005). For a discussion of the constitutional rights of corporations, see Stephen G. Wood & Brett G. Scharffs, *Applicability of Human Rights Standards to Private Corporations: An American Perspective*, 50 AM. J. COMP. L. 531 (2002).

rights protected by the First Amendment and are entitled to some measure of free speech protection.[30]

However, Congress long ago established a body of laws restricting corporate spending on political campaigns. Since the 1890s, laws governing the ability of corporations to influence elections have incrementally tightened.[31] The purpose of such laws has largely been to stem corruption of the political process.[32] Moreover, such laws were, and are still today, defended as a vital means of protecting the electoral process against corruption and the appearance of corruption.[33]

The first major attempt by Congress to restrict corporate campaign spending on federal elections was the Tillman Act, passed in 1907.[34] This Act banned corporations from making direct contributions to federal political candidates and was rooted in Congress's concern that direct contributions easily lead to bribery.[35] Although the constitutionality of the Tillman Act was not resolved by the Supreme Court for a long time, it was eventually upheld.[36]

In 1947, Congress enacted the Taft-Hartley Act, which prohibited corporations and labor unions from using their general treasury funds for "independent expenditures" to fund "express advocacy" concerning an

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30. CHEMERINSKY, *supra* note 1, at 1084.

31. Roger Parloff, *Why the Outcry over 'Citizens United,'* CNNMONEY.COM, Feb. 12, 2010, http://money.cnn.com/2010/02/11/news/companies/supreme_court_citizens_united.fortune/.

32. *See id.* (observing that in addition to federal legislative efforts, many states also started to enact laws reining in the right of corporations to make campaign contributions).

33. *First Amendment and Campaign Finance Reform After* Citizens United*: Hearing Before the Subcomm. on the Constitution, Civil Rights and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 71-72 (2010) [hereinafter *Hearing*] (testimony of Donald J. Simon) (arguing that unchecked money in the political system serves to endanger the integrity of the institution and its members).

34. *See* Tillman Act, Pub. L. No. 59-36, ch. 420, 34 Stat. 884 (1907); Parloff, *supra* note 31. In his 1905 annual message to Congress, President Theodore Roosevelt declared:

> 'All contributions by corporations to any political committee or for any political purpose should be forbidden by law; directors should not be permitted to use stockholders' money for such purposes; and, moreover, a prohibition of this kind would be, as far as it went, an effective method of stopping the evils aimed at in corrupt practices acts.'

United States v. Int'l Union United Auto., Aircraft & Agric. Implement Workers, 352 U.S. 567, 572 (1957) (quoting 40 CONG. REC. 96 (1905)).

35. Parloff, *supra* note 31. The Senate Report on the legislation remarked:

> The evils of the use of [corporate] money in connection with political elections are so generally recognized that the committee deems it unnecessary to make any argument in favor of the general purpose of this measure. It is in the interest of good government and calculated to promote purity in the selection of public officials.

S. REP. NO. 59-3056, at 2 (1906).

36. *See* Fed. Election Comm'n v. Beaumont, 539 U.S. 146, 149 (2003) (upholding a prohibition on corporate campaign contributions even as applied to nonprofit corporations).

election.[37] In its judgment, Congress determined that the existing contribution ban was not enough, and it aimed to bolster existing campaign finance laws and to prevent corporations from unduly influencing the political process.[38] However, the Taft-Hartley Act proved ineffective because it lacked both an enforcement structure and disclosure requirements.[39]

Congress carried the reform effort forward when it enacted the Federal Election Campaign Act of 1971 (FECA).[40] FECA intensified the prohibition on independent expenditures, permitted corporations and unions to create political action committees (PACs),[41] and constructed an enforcement agency, the Federal Elections Commission (FEC).[42]

In the face of FECA's sweeping restrictions on campaign financing, an issue arose before the Court as to whether spending money in connection with a campaign is a form of speech, and thus entitled to First Amendment protection.[43] In *Buckley v. Valeo*, the Court answered that spending money is a form of political speech, implying that the First Amendment may be violated when the government limits an individual's ability to make independent expenditures.[44] However, the Court upheld restrictions on an individual's direct contributions to candidates, thereby affirming that the government has a compelling interest in preventing corruption and the appearance of corruption.[45] In other words, the anticorruption interest was deemed sufficient to justify restrictions on an individual's direct contributions, but not on an individual's independent

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37. 29 U.S.C. § 141(a) (2006).

38. *See* Lloyd Hitoshi Mayer, *Breaching a Leaking Dam?: Corporate Money and Elections*, 4 CHARLESTON L. REV. 91, 98 (2009).

39. *See id.*

40. *See* 2 U.S.C. § 441b(a) (2006). The public was alarmed at high levels of corporate spending intended to influence elections. *See* ROBERT E. MUTCH, CAMPAIGNS, CONGRESS, AND COURTS: THE MAKING OF FEDERAL CAMPAIGN FINANCE LAW 1-52 (1988) (explaining how the pre-Watergate influence of corporations on federal elections dismayed the public).

41. PACs allow corporations and unions to finance contributions and expenditures that the corporation or union is itself prohibited from making. *See* 2 U.S.C. § 441b(c)(2) (2006).

42. Buckley v. Valeo, 424 U.S. 1, 1-4 (1976) (summarizing the history of federal election law and the reasons for the FECA amendments).

43. *Id.* at 15.

44. *Id.* at 19 ("A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money."). *But see* J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001 (1976) (questioning the Court's treatment of spending money as speech, rather than conduct that communicates).

45. *Buckley*, 424 U.S. at 45.

expenditures.[46] Because evidence of actual corruption is inherently elusive, the legislature is not required to provide exhaustive evidence of corruption to justify restrictions on speech; on the contrary, it appears that a few examples of corruption were sufficient to justify restrictions to the Court.[47]

Buckley drew a distinction between campaign contributions and independent expenditures.[48] After all, an individual's independent expenditures to support a candidate does not have the same risk of corruption or the appearance of corruption as campaign contributions do.[49] However, the Court drew this distinction in the context of restrictions on individuals rather than corporations.[50] Moreover, the government's anticorruption interest is not so elastic as to extend to justifying speech restrictions for the purpose of equalizing political influence.[51]

The Court's ruling in *First National Bank of Boston v. Bellotti* gave a partial answer to the burning question that was not addressed in *Buckley*: whether corporate spending—as opposed to individual spending—on independent expenditures constitutes protected speech. Observing that the value of the speech resides in informing the audience, the Court held that the government does not have a sufficient interest to justify a speech restriction on a corporation in the context of a ballot initiative.[52]

However, in an express limitation on its holding, the Court noted that "our consideration of a corporation's right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office."[53] In other words, the Court drew an express distinction between corporate speech on matters of public debate and campaign speech

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46. *Id.* at 26-27 ("To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined. . . . Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.").

47. *Id.* at 27 ("Although the scope of such pernicious practices can never be reliably ascertained, the deeply disturbing examples surfacing after the 1972 election demonstrate that the problem is not an illusory one.").

48. *Id.* at 26-27.

49. CHEMERINSKY, *supra* note 1, at 1076.

50. *Buckley*, 424 U.S. at 26-27.

51. *Id.* at 48-49 ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed to secure the widest possible dissemination of information from diverse and antagonistic sources, and to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." (internal quotation marks and citations omitted)).

52. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 790-92 (1978).

53. *Id.* at 788 n.26.

intended to promote a particular candidate for office. The reasoning behind this distinction is that "[t]he risk of corruption . . . involving candidate elections . . . simply is not present in a popular vote on a public issue."[54] Specifically, most if not all of the risks animating the anticorruption interest are not present in campaign speech, such as the creation of political debts, special interests seeking favor, and threats of retaliation.

Although the Court continued to reject the equalizing interest, it affirmed that numerous "interests of the highest importance" can justify campaign finance regulation, such as "[p]reserving the integrity of the electoral process, preventing corruption, . . . sustain[ing] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government[, and p]reserv[ing] . . . the individual citizen's confidence in government."[55]

In *Austin v. Michigan Chamber of Commerce*, the Court directly addressed the constitutionality of prohibiting corporate independent expenditures in the context of an election.[56] The Court upheld a Michigan law barring corporations in that state from using general treasury funds for independent campaign expenditures.[57] The Court appeared to extend the long established anticorruption rationale to justify the distortions produced by corporate wealth.[58] Indeed, the Court accepted the argument that "[c]orporate wealth can unfairly influence elections."[59] The dissent criticized this ruling as attempting to equalize the resources of different speakers.[60]

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54. *Id.* at 790.

55. *Id.* at 788-89 (internal quotation marks omitted).

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

57. *Id.* at 656.

58. *Id.* at 660. The full statement of the "nondistortion" rationale is that the government has a compelling interest in curbing "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." *Id.*

59. *Id.*

60. *Id.* at 684-85. In his dissent, Justice Scalia described this decision as "Orwellian." He observed:

> [T]he Court today endorses the principle that too much speech is an evil that the democratic majority can proscribe. I dissent because that principle is contrary to our case law and incompatible with the absolutely central truth of the First Amendment: that government cannot be trusted to assure, through censorship, the "fairness" of political debate.

Id. at 679-80.

In 2002, Congress passed the Bipartisan Campaign Reform Act[61] (BCRA), which sought to curb the rise of issue advertisements by corporations and unions intended to support or oppose specific candidates for office.[62] Even though these issue advertisements were independent expenditures that articulated political messages about candidates, they were not covered by previous restrictions because they avoided using the "magic words" like "vote for" or "vote against."[63] During a limited period of time—thirty days before a primary and sixty days before a general election—BCRA prohibited corporations and labor unions from spending general treasury funds[64] to engage in "electioneering communications," which was defined as including any "broadcast, cable, or satellite communication" that could be "received by 50,000 people or more" and that referred to "a clearly identified candidate for Federal office."[65]

In the wake of the passage of the BCRA, there was some debate about whether the Court would uphold this new structure for campaign finance law or strike it down. In *McConnell v. Federal Election Commission*, the Supreme Court upheld virtually all of BCRA and reinforced the reasoning of *Austin*.[66] The Court relied on the antidistortion rationale and the need to preserve the integrity of federal campaigns.[67]

C. Decision

In *Citizens United*, the Court revisited the *Austin* line of cases that permitted the government to restrict independent expenditures made by corporations.[68] The Court held that legislatures may not, under the First Amendment, limit speech based on the speaker's identity.[69] The Court began by extolling the virtues of free speech,[70] describing it as "an essential mechanism of democracy, for it is the means to hold officials

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61. BCRA is informally referred to as the McCain-Feingold Bill, the two sponsors of the bill. Bipartisan Campaign Reform Act, Pub. L. No. 107-155, 116 Stat. 81 (2002).

62. *See, e.g.*, CHEMERINSKY, *supra* note 1, at 1080; McConnell v. Fed. Election Comm'n, 540 U.S. 93, 126-29 (2003).

63. *McConnell*, 540 U.S. at 126-27.

64. These restrictions affected only advertisements paid for with funds from general treasury funds. If a corporation or union paid for the advertisement with PAC funds, it could air them at any time without restriction. *See* 2 U.S.C. § 441b(b)(4) (2006).

65. 11 C.F.R. § 100.29 (2010).

66. *McConnell*, 540 U.S. at 94.

67. *Id.* at 126-29.

68. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 903 (2010).

69. *Id.* at 913.

70. *Id.* at 898.

accountable to the people,"[71] and fashioning itself as the defender of ancient First Amendment principles by repeatedly invoking the marketplace of ideas philosophy.[72]

The *Citizens United* decision broke with precedent in stressing that it is wrong to deny citizens information merely because its source is a corporation, which the Court described favorably as an "association[] of citizens" that has chosen to "take[] on the corporate form."[73] Surely, the Court reasoned, these associations of citizens cannot be penalized for participating in political speech.[74]

According to the Court, the *Buckley* line of cases kept faith with ancient First Amendment principles, standing for the proposition that the government may not suppress political speech on the basis of the speaker's identity.[75] Returning to these principles, the Court reestablished that "restrictions distinguishing among different speakers, allowing speech by some but not others," are prohibited.[76]

Conversely, the Court framed the *Austin* line of cases as an outlier in our First Amendment history, making it necessary to overturn them.[77] The *Citizens United* Court claimed that "the *Austin* Court identified a new governmental interest in limiting political speech," the so-called

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71. *Id.* ("'In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential.'" (quoting Buckley v. Valeo, 424 U.S. 1, 14-15 (1976))).

72. *See id.* at 898-99. The "marketplace of ideas" theory was first set out by Justice Holmes in a stirring dissent:

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. . . . But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.

Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

73. *Citizens United*, 130 S. Ct. at 904, 907.

74. *Id.* at 908; *see id.* at 898-99 (stressing that these protections are aimed at facilitating the citizens' right to hear diverse view points); *id.* at 898 ("[T]he right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.").

75. *Id.* at 900 ("[P]olitical speech does not lose First Amendment protection 'simply because its source is a corporation.'" (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 784 (1978))); *id.* at 902 ("'In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue.'" (quoting *Bellotti*, 435 U.S. at 784-85)).

76. *Id.* at 898.

77. *Id.* at 912.

"antidistortion interest," which circumvented the true precedent of *Buckley* and *Bellotti*.[78] The *Austin* Court defended the antidistortion interest as "a means to prevent corporations from obtaining an unfair advantage in the political marketplace by using resources amassed in the economic marketplace."[79] However, the *Citizens United* Court noted that not only had this proposition been previously rejected as an attempt to equalize speech,[80] but its acceptance would sanction government efforts to "ban political speech simply because the speaker is an association that ha[d] taken on the corporate form."[81]

The Court conceded that speech restrictions burdening certain classes of citizens have been upheld, but maintained that these cases were distinct by reason of being "based on an interest in allowing governmental entities to perform their functions."[82] Some examples of such classes of individuals or institutions include public schools, prisons, military affairs, and federal employees.[83] Conversely, in the context of the political process, the Court has not permitted certain classes of speakers to be excluded from "the general public dialogue."[84]

Justifying its apparent—if less than explicit—suspicion of congressional motives, the Court emphasized that "mistrust of governmental power" is a central premise of the First Amendment.[85] According to the Court, the purpose and effect of BCRA, which it described as "an outright ban, backed by criminal sanctions,"[86] is "to silence entities whose voices the Government deems to be suspect."[87] The law bans corporations from speaking even though they are permitted to speak

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78. *Id.* at 903.

79. *Id.* at 904 (internal quotation marks omitted).

80. *Id.* ("*Buckley* rejected the premise that the Government has an interest in equalizing the relative ability of individuals and groups to influence the outcome of elections." (internal quotation marks omitted)).

81. *Id.*

82. *Id.* at 899 ("These precedents stand only for the proposition that there are certain governmental functions that cannot operate without some restrictions on particular kinds of speech.").

83. *See, e.g.*, Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685-86 (1986) (protecting the function of public school education); Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119, 125 (1977) (furthering the legitimate penological objectives of the corrections system); U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 557 (1973) ("[F]ederal service should depend upon meritorious performance rather than political service, and that the political influence of federal employees on others and the electoral process should be limited.").

84. *Citizens United*, 130 S. Ct. at 899.

85. *Id.* at 898. The Court characterized BCRA as a "troubling assertion of brooding governmental power." *Id.* at 904.

86. *Id.* at 897 (noting that the law makes it a felony to expressly advocate within thirty days of a primary election and sixty days of a general election).

87. *Id.* at 898.

through Political Action Committees (PACs), due to the fact that PACs are separate associations from corporations. Moreover, this allowance does not fix the effect of the ban because PACs are "burdensome alternatives."[88] Not only is the law a ban on corporate speech, but it also verges on totalitarian control of expression.[89]

Because BCRA burdens political speech, it is "subject to strict scrutiny."[90] In the context of political speech, only a very narrow class of government interests is sufficient to justify restrictions on speech. Invoking *Buckley*, the Court reasoned that, while preventing corruption or the appearance of corruption is a compelling government interest, this anticorruption interest is "limited to *quid pro quo* corruption."[91] Corruption, as understood in this narrow manner, means the exchange of votes for expenditures and does not include "influence over or access to elected officials."[92] Whereas formerly the government's interest in guarding against corruption extended to a variety of areas including protecting democratic integrity, preventing undue influence, and offsetting the distortions produced by corporate wealth, now the government's anticorruption interest would be narrowly constricted to the direct exchange of votes for expenditures.

Furthermore, although the anticorruption interest is sufficient to permit restrictions on contributions, this reasoning does not extend to limitations on expenditures because independent expenditures "do not give rise to corruption or the appearance of corruption."[93] According to the Court, this proposition was confirmed by the judicial record in *McConnell*, which failed to contain any direct examples of quid pro quo corruption, despite being over 100,000 pages long.[94] Therefore, the

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88. *Id.* at 897; *see id.* at 895 ("As additional rules are created for regulating political speech, any speech arguably within their reach is chilled."); *id.* at 896 (noting that the "the FEC's 'business is to censor,'" making it less responsive to free speech concerns (quoting Freedman v. Maryland, 380 U.S. 51, 57 (1965))). Moreover, complex regulations will force many persons "to abstain from protected speech-harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas." *Id.* (internal quotation marks omitted).

89. *Id.* at 908 ("When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves.").

90. *Id.* at 898.

91. *Id.* at 909.

92. *Id.* at 910.

93. *Id.* at 909; *see id.* at 908 ("When *Buckley* examined an expenditure ban, it found that the governmental interest in preventing corruption and the appearance of corruption [was] inadequate to justify [the ban] on independent expenditures." (internal quotation marks omitted)).

94. *Id.* at 910. Nevertheless, the Court conceded that "the scope of such pernicious practices can never be reliably ascertained." *Id.* at 908 (internal quotation marks omitted).

Court concluded broadly that "[n]o sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations."[95]

The Court suggested that, in any case, BCRA failed the narrowly tailored requirement of strict scrutiny—particularly because it represents "an outright ban."[96] According to the Court, there is no sufficient government interest in preventing corporate independent expenditures.[97] Hence, this "categorical ban[] on speech [is] *asymmetrical* to preventing *quid pro quo* corruption."[98]

Finally, the Court declined to address the issue of whether the government may restrict foreign influences over domestic elections.[99] The Court observed, "We need not reach the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation's political process."[100] A separate section of the law applies a contribution and expenditure ban on foreign nationals.[101] In contrast, the law before the Court "is not limited to corporations or associations that were created in foreign countries or funded predominately by foreign shareholders. Section 441b therefore would be overbroad even if we assumed, *arguendo*, that the Government has a compelling interest in limiting foreign influence over our political process."[102]

D. Dissent

Justice John Paul Stevens penned an infuriated ninety-page dissent to *Citizens United*.[103] He stated that the Court's extremely broad rationale, that the First Amendment prohibits the government from making regulatory distinctions based on a speaker's identity, is not only an inaccurate statement of the law,[104] but would lead to unfortunate results, such as throwing into question existing bans on political activity by foreigners.[105]

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95. *Id.* at 913.

96. *Id.* at 911 (stressing that the preelection period is a "critical" time for the free exchange of political speech because, inter alia, that is when the public starts to really pay attention).

97. *Id.*

98. *Id.* (emphasis added).

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *See id.* at 929 (Stevens, J., dissenting).

104. *Id.* at 930.

105. *Id.* at 947-48 ("If taken seriously, our colleagues' assumption that the identity of a speaker has *no* relevance to the Government's ability to regulate political speech would lead to

Stevens also stressed that the Court's ruling is dramatically inconsistent with the original intent of the founders.[106] Quoting a law review article by Fordham professor Zephyr Teachout, Stevens wrote: "The notion that Congress might lack the authority to distinguish foreigners from citizens in the regulation of electioneering would certainly have surprised the Framers, whose 'obsession with foreign influence derived from a fear that foreign powers and individuals had no basic investment in the well-being of the country.'"[107] Moreover, the dissent emphasized that there is a long tradition of distinguishing between corporate and individual spending on elections, dating back to the Tillman Act of 1907, which banned all corporate contributions to candidates.[108]

The majority's definition of corruption is so narrow as to be uninformative, according to the dissent.[109] In the past, the Court has recognized that Congress has a legitimate interest in preventing election money from "exerting an undue influence on an officeholder's judgment and from creating the appearance of such influence, beyond the sphere of *quid pro quo* relationships."[110] The majority's "crabbed view of corruption" would prevent Congress from "address[ing] all but the most discrete abuses."[111]

In contrast, an interest in preserving "democratic integrity" encompasses a variety of "interrelated interests" that are imperiled by undue influence.[112] This broader understanding of corruption has undergirded a century of "efforts to regulate the role of corporations in the electoral process."[113] Likewise, the proposition that independent expenditures may lead to corruption was reflected in the recent decision in *Caperton v. A.T. Massey Coal Co.*[114] There, the Court recognized that

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some remarkable conclusions. Such an assumption would have accorded the propaganda broadcasts to our troops by 'Tokyo Rose' during World War II the same protection as speech by Allied commanders. More pertinently, it would appear to afford the same protection to multinational corporations controlled by foreigners as to individual Americans.").

106. *Id.* at 948.

107. *Id.* at 948 n.51.

108. *Id.* at 952. This tradition was reinforced over the years as Congress adapted campaign finance laws to meet new challenges and to curb new forms of abuse. *Id.* at 953.

109. *See id.* at 962.

110. *Id.* at 961 (internal quotation marks omitted).

111. *Id.* at 961-62 (internal quotation marks omitted). The reason is that undue influence is not "easily detected." *Id.* at 963 n.63.

112. *Id.* at 963.

113. *Id.*

114. *Id.* at 967.

sometimes independent expenditures on judicial elections may create an intolerable appearance of corruption.[115]

III. IMPLICATIONS OF THE *CITIZENS UNITED* DECISION ON CURRENT AND POTENTIAL LAWS RESTRICTING FOREIGN INFLUENCES ON DOMESTIC CAMPAIGNS

A. Background and Theoretical Basis for Restricting Foreign Influences in Domestic Politics

From the beginning of the Republic, the American people have jealously guarded their national sovereignty from foreign influences. The Founding Fathers' generation had a strong suspicion of foreign influences[116] that came to be reflected in several constitutional provisions.[117] Moreover, the suspicion of foreign influences runs deep within the American cultural bloodstream; this sentiment continues today in our jurisprudence[118] and in our politics.[119]

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115. *Id.* at 967-68 ("[This proposition] struck the Court as so intuitive that it repeatedly referred to Blankenship's spending on behalf of Benjamin—spending that consisted of 99.97% independent expenditures ($3 million) and 0.03% direct contributions ($1,000)—as a 'contribution.' . . . The reason the Court so thoroughly conflated expenditures and contributions, one assumes, is that it realized that some expenditures may be functionally equivalent to contributions in the way they influence the outcome of a race, the way they are interpreted by the candidates and the public, and the way they taint the decisions that the officeholder thereafter takes.").

116. Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 393 n.245 (2009)("[The Framers'] obsession with foreign influence derived from a fear that foreign powers and individuals had no basic investment in the well-being of the country."); *id.* at 361 ("[They] were deeply concerned that foreign interests would try to use their wealth to tempt public servants and sway the foreign policy decisions of the new government."). They feared that foreigners "had no real interest in the good future of America." *Id.*

117. *See, e.g.*, U.S. CONST. art. I, § 9, cl. 8 ("[N]o Person holding any Office of Profit or Trust . . . shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State"). Professor Teachout relates two insightful accounts illustrating that the Foreign Gifts Clause was intended to prevent corruption.

> During the years between the revolution and the Convention, two small events involving foreign gifts had aroused substantial concern in the young country. First, the king of France gave Arthur Lee a tiny snuffbox. Second, Benjamin Franklin received a diamond-encrusted painting from the French king. After some public uproar, the federation decided that Franklin could keep the painting (and Lee could keep the snuffbox), but there needed to be a structural limitation on the seductions available to foreign powers over American officials.

Teachout, *supra* note 116, at 361 (internal citations omitted).

118. For example, when Justice Kennedy referenced foreign jurisprudence in a constitutional case, it caused an uproar. Lawrence v. Texas, 539 U.S. 558, 598 (2003) ("[T]his Court . . . should not impose foreign moods, fads, or fashions on Americans." (Scalia, J., dissenting)); *see e.g.*, Jason Deparle & David D. Kirkpatrick, *In Battle To Pick Next Justice, Right Says Avoid a Kennedy*, N.Y. TIMES, June 27, 2005, http://query.nytimes.com/gst/fullpage.html

Indeed, the rationale for restricting foreign influences on domestic campaigns is largely based on the concept of sovereignty, which has been defined as "the right of a government to control its own affairs within its own territory. It assumes states' political independence and territorial integrity."[120]

Popular sovereignty is, in fact, a core concept of American constitutionalism that the founding fathers enshrined in the preamble to the Constitution: "WE THE PEOPLE of the United States, in Order to . . . secure the Blessings of Liberty *to ourselves* and our Posterity, do ordain and establish this Constitution for the United States of America."[121] "We the people" represented a profound revolutionary assertion of popular sovereignty by virtue of language that boldly asserted a foundational principle of the nation: that the ultimate power of the state rests with the members of the community, comprised of people who control their own destiny. American citizens are the intended beneficiaries of the blessings of liberty. Of course, noncitizen residents and illegal aliens are afforded many constitutional rights, but these protections do not apply to direct participation in the political process.

Moreover, the principle of sovereignty demands that states will not attempt to manipulate each other's elections, and this commitment is enshrined in international agreements.[122] Finally, such foreign meddling risks undermining the citizenry's political rights, including the right to make political choices free from distortion.[123]

("[S]ome notable conservatives are calling for [Justice Kennedy's] impeachment. . . . Writing in National Review, Mr. Bork called the decision a 'dazzling display of lawlessness' that comes 'close to accepting foreign control of the American Constitution.'").

119. Representing the popular consensus, one prominent politician, Representative Chris Van Hollen, stated, "I don't think anybody wants to see foreign corporations spending money to influence the outcome of American elections in a way that serves foreign interests and not the interests of American citizens." Kenneth P. Vogel, *Obama To Push Hill on Foreign Cash*, POLITICO, Jan. 26, 2010, http://www.politico.com/news/stories/0110/32060.html.

120. Zephyr Teachout, *Extraterritorial Electioneering and the Globalization of American Elections*, 27 BERKELEY J. INT'L L. 162, 185 (2009).

121. U.S. CONST. pmbl. (emphasis added).

122. For example, the United States is a signatory of the Charter for Organization of American States, which states a nonintervention norm:

> No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic and cultural elements.

Charter of the Organization of American States, art. 15, Apr. 30, 1948, 119 U.N.T.S. 3, *available at* http:// www.oas.org/juridico/ English/charter.html.

123. Teachout, *supra* note 120, at 187.

Indeed, the United States has a long history of regulating foreign influences over the political process. In 1798, Congress passed the Alien and Sedition Acts, which aimed to curb foreign influences over American political life.[124] Subsequent laws were designed to prevent the spread of dangerous ideologies such as anarchism and communism.[125] After the shocking discovery in 1938 that the Axis Powers spent money trying to influence American elections, Congress passed the Foreign Agents Registration Act (FARA) requiring agents of foreign principals that distribute political propaganda to disclose their activities.[126] In 1966, Congress amended FARA to prohibit any foreign government, political party, corporation, or foreign national from making political contributions.[127] This legislation was designed to protect the integrity of the government's decision-making process from foreign influences and reflected the view that corporate loyalty is determined by the nationality of a corporation's home country, not its host country.[128]

B. Existing Laws and Regulations

Current law prohibits "foreign nationals" from making contributions or independent expenditures in connection with a federal, state, or local election.[129] The definition of "foreign national" includes foreign governments, political parties, and individuals, but does not include American citizens.[130] Additionally, it includes corporations, unions, and other associations that are neither incorporated nor have their principal place of business in the United States.[131] Accordingly, it is illegal for

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124. What are commonly referred to as the Alien and Sedition Acts are four different acts passed over a few weeks: Act of June 18, 1978, ch. 54, 1 Stat. 566 (Naturalization Act); Act of June 25, 1978, ch. 58, 1 Stat. 570 (Alien Friends Acts); Act of July 6, 1978, ch. 66, 1 Stat. 577 (Alien Enemies Act); Act of July 14, 1978, ch. 74, 1 Stat. 596 (Sedition Act); *see also* Note, *"Foreign" Campaign Contributions and the First Amendment*, 110 HARV. L. REV. 1886, 1888 (1997).

125. *See* Note, *supra* note 124, at 1888.

126. *See, e.g.*, Evan Zoldan, *Strangers in a Strange Land: Domestic Subsidiaries of Foreign Corporations and the Ban on Political Contributions from Foreign Sources*, 34 LAW & POL'Y INT'L BUS. 573, 576 (2003).

127. *See* Zoldan, *supra* note 126, at 577.

128. *See* Bruce D. Brown, *Alien Donors: The Participation of Non-Citizens in the U.S. Campaign Finance System*, 15 YALE L. & POL'Y REV. 503, 509 (1996).

129. 2 U.S.C. § 441e(a) (2006).

130. *Id.* § 441e(b).

131. 22 U.S.C. § 611 (2006). A fuller definition is as follows: the term "foreign principal" is defined as including

> (1) a government of a foreign country and a foreign political party; (2) a person outside of the United States, unless it is established that such person is an individual and a citizen of and domiciled within the United States, or that such person is not an individual and is organized under or created by the laws of the United States or of any

foreign corporations to spend money advocating the election or defeat of a candidate for public office.[132]

FEC regulations further prohibit foreign nationals from participating in decisions involving election-related activities.[133] It provides:

> A foreign national shall not direct, dictate, control, or directly or indirectly participate in the decision-making process of any person, such as a corporation, labor organization, political committee, or political organization with regard to such person's Federal or non-Federal election-related activities, such as decisions concerning the making of contributions, donations, expenditures, or disbursements in connection with elections for any Federal, State, or local office or decisions concerning the administration of a political committee.[134]

This regulation is intended to prevent foreign nationals from exerting indirect influence over the election-related activities of corporations.

C. Impact of Citizens United *Generally*

Citizens United defined the anticorruption interest quite narrowly to include only quid pro quo corruption.[135] However, "it is hard to find many examples of elected officials . . . selling their vote [in exchange] for campaign contributions" because the nature of direct bribery is to avoid detection.[136] As a result, the Court's decision renders Congress powerless to address corruption in the broader sense, while permitting Congress to take action against direct bribery, which happens to be the most elusive kind of abuse.

In contrast, the public largely understands corruption to encompass a wide variety of suspect activities beyond the direct exchange of money for votes. A widespread perception exists among the American public that big money corrupts the political process and this frustration extends to a broader conception of corruption, such as the outsized influence of

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> State or other place subject to the jurisdiction of the United States and has its principal place of business within the United States; and (3) a partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country.

Id. § 611(b).

132. 2 U.S.C. § 441e.

133. 11 C.F.R. § 110.20 (2010).

134. *Id.* § 110.20(i).

135. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 909-12 (2010).

136. Michael A. Nemeroff, *The Limited Role of Campaign Finance Laws in Reducing Corruption by Elected Public Officials*, 49 HOW. L.J. 687, 688 (2006).

special interest groups.[137] For example, the media frequently reports on campaign contributions made by special interests that win legislative battles in Congress.

Despite the fact that *Citizens United* opened the door to unlimited corporate campaign expenditures, it is debatable whether this decision will significantly alter corporate behavior. One could argue that corporate expenditures were already largely unfettered by BCRA, so consequences will likely be modest. Although the majority opinion used the sweeping phrase "outright ban" to describe previous legislated limitations on corporate speech, this is a grand exaggeration. First, BCRA allowed corporations to use PACs to support or oppose candidates for federal election, with no character or timing restrictions.[138] Second, wealthy individuals were free to make unlimited independent expenditures outside the corporate form to support or oppose the election of specific candidates.[139] Third, over two dozen states currently permit unlimited corporate spending to support or oppose particular candidates in state campaigns.[140]

Although it might be in a business's best interest to spend money to support or defeat a candidate if a particular piece of legislation is projected to affect its economic interests, businesses are generally risk-averse and do not want to anger customers or alienate broad swaths of their customer base by pouring large sums of money into campaigns.[141] For example, after it came to light that Target donated $150,000 to a pro-business group in Minnesota called MN Forward, a group channeling funds to Minnesota Republican gubernatorial candidate Tom Emmer, Target found itself engaged in a bitter fight with liberal and gay rights

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137. *See, e.g.*, Peter J. Henning, *Public Corruption: A Comparative Analysis of International Corruption Conventions and United States Law*, 18 ARIZ. J. INT'L & COMP. L. 793, 793 (2001) ("There is no single definition of corruption, and the term has described everything from blatant acts of bribery to the use of political power to advance one party or faction's agenda. While every nation has criminal proscriptions on bribing government officials, bribery is only one manifestation of public corruption. . . . Individual officials can abuse their authority in an almost limitless number of ways."); Lisa P. Howle, Note, *Campaign Finance Reform: Meaningful Reform Impinges on Unfettered Political Speech, Violating the First Amendment*, 75 U. DET. MERCY L. REV. 143, 145-46 (1997) ("Some analysts attribute voter apathy, evidenced by fewer than 50% of all registered voters casting ballots in 1996, to the influence of 'Big Money' in political elections.").

138. 2 U.S.C. § 441b (2006).

139. *See id.*

140. It does not appear that this approach has unleashed an overwhelming flood of corporate spending on state elections. *Citizens United*, 130 S. Ct. at 908-09.

141. At least this is likely the case as long as they are required to present themselves openly. However, some corporations chose to conduct their activities under benign-sounding names, like "And For The Sake Of The Kids." *Id.* at 968.

groups that launched a nationwide boycott against Target.[142] As a result of mounting pressure, Target's chief executive, Gregg Steinhafel, penned a letter of apology to Target's employees.[143] This episode illustrates how large corporations risk a public backlash by getting involved in politics. Indeed, it appears that corporations have generally declined to take advantage of the *Citizens United* decision to directly run campaign ads themselves.[144] This logic applies equally to foreign companies, which may be reluctant to jump into American politics for the same reasons as American companies.[145]

D. Immediate Impact of Citizens United *on Laws Restricting Foreign Influences*

Before *Citizens United*, domestic subsidiaries of foreign corporations could participate in U.S. politics in a number of ways and

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142. Jia Lynn Yang & Dan Eggen, *Exercising New Ability To Spend on Campaigns, Target Finds Itself a Bull's-Eye*, WASH. POST, Aug. 19, 2010, at A01. Although the Target imbroglio presents a cautionary tale to corporations that wish to spend money on political campaigns, it probably represents the exception rather than the rule. Target's contributions only came to light because Minnesota law "requires political committees, such as MN Forward, to disclose the money they receive." *Id.* However, "[m]any states do not have similar disclosure requirements." *Id.* In the absence of new federal legislation requiring greater disclosure, corporations and wealthy individuals are free to contribute money to independent groups, such as 501(c) organizations, that can run political advertisements while keeping their donors secret. Michael Luo & Stephanie Strom, *Donor Names Remain Secret as Rules Shift*, N.Y. TIMES, Sept. 20, 2010, http://www.nytimes.com/2010/09/21/us/politics/21money.html.

143. *See* Yang & Eggen, *supra* note 142.

144. *See* Michael Luo, *G.O.P. Allies Drive Ad Spending Disparity*, N.Y. TIMES, Sept. 13, 2010, http://www.nytimes.com/2010/09/14/us/politics/14money.html. For example, Goldman Sachs pledged that it would refrain from using its vast treasury to fund political advertisements. *See* Javier C. Hernandez, *Political Ads Off Limits, Goldman Promises*, N.Y. TIMES, Aug. 2, 2010, http://www.nytimes.com/2010/08/03/nyregion/03goldman.html. However, some corporations "are most likely funneling more money into campaigns through . . . independent groups." Luo, *supra* (noting that current laissez-faire disclosure laws "make it impossible to know for sure" where some independent groups receive their contributions). Indeed, the Chamber of Commerce has been accused of using foreign funds to support Republican candidates. *See* Alan Fram, *Dems: Business Group Using Foreign Cash To Aid GOP*, WASH. POST, Oct. 10, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/10/10/AR201001001850.html. This controversy erupted after it came to light that the Chamber of Commerce has collected $100,000 in membership dues from its 115 foreign member affiliates, which go into its general fund. *See* Eric Lichtblau, *Topic of Foreign Money in U.S. Races Hits Hustings*, N.Y. TIMES, Oct. 8, 2010, http://www.nytimes.com/2010/10/09/us/politics/09donate.html. Despite the fact that money is fungible, the Chamber claims that it has safeguards in place to segregate the money it accepts from foreign entities from its political spending. *Id.*

145. One commentator forecasted that multi-national companies would unlikely chose to weigh in: "If I'm the CEO of a major corporation, I'm going to be very leery of directly supporting or opposing a candidate. . . . It's just not good business to alienate potential customers." Gerstein, *supra* note 11 (internal quotation marks omitted).

were, in practice, often heavily involved in U.S. elections.[146] For example, foreign corporations could create PACs that enabled them to channel money directly to candidates,[147] and hundreds of foreign corporations used their legal financial contributions to become major players in U.S. elections.[148] It is worth noting that this electoral and legal state of affairs has been all but absent from the debate surrounding *Citizens United* and its impact on the U.S. political culture.

Although the *Citizens United* decision leaves the current laws intact with respect to foreign corporations, it appears to have opened a loophole for domestic subsidiaries of foreign corporations. Before *Citizens United*, "the existing statute, 2 U.S.C. § 441e, prohibit[ed] spending by foreign corporations to influence U.S. elections, [but] it [did] not prohibit spending by domestic corporations owned or controlled by foreign nationals."[149] Indeed, it did not need to make such prohibitions, because prior to the *Citizens United* decision BCRA prohibited these corporations from spending general treasury funds on independent expenditures relating to elections.[150] Because *Citizens United* struck down this provision, foreign-controlled domestic companies are now free to spend their treasury funds to directly influence U.S. elections.[151]

To be sure, many domestic subsidiaries like American businesses are owned by foreign shareholders that have no political agenda. These domestic subsidiaries may not have a particularly strong attachment to their home countries. However, despite the manifold similarities between domestic and foreign companies, there are important reasons why American laws have traditionally treated foreign companies differently with respect to participation in domestic elections. For example, in many countries, "the relationship between a corporate interest and the government is less attenuated than it is in the United States."[152]

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146. Eggen, *supra* note 4 ("U.S.-based subsidiaries of overseas firms have contributed more than $20 million to federal campaigns since 2007 and have spent millions more lobbying Congress on issues such as energy and free trade.").

147. Brody Mullins & Jess Bravin, *Foreign Spending on Politics Fought*, WALL ST. J., Jan. 29, 2010, at A5.

148. *Id.*

149. *Hearing*, *supra* note 33, at 13.

150. 2 U.S.C. § 441b(a) (2006).

151. *See, e.g.*, Joe Conason, Op-ed., *On Foreign Influence, Experts Back Obama*, SALON, Jan. 29, 2010, http://www.salon.com/opinion/conason/2010/01/29/journalforeign/index.html?source=rss&aim=/opinion/conason.

152. Teachout, *supra* note 120, at 164 (pointing out that this pattern "holds not just for the partially governmental corporations like Gazprom in Russia, but non-governmental corporations headed by close allies of the party in power").

Even more alarming is the possibility that a domestic subsidiary of a foreign corporation that is controlled by a foreign government could slip through a legal loophole and influence U.S. elections.[153] In this instance, there is a heightened fear that a domestic subsidiary may be operating as an agent of a foreign government when a foreign government has an ownership stake in the corporation.[154] Arguably, in the wake of *Citizens United*, foreign governments like China and Saudi Arabia that own companies operating in the United States have legal license to influence American elections by means of independent expenditures.[155] It would seem to be the responsibility of the current Supreme Court to consider whether the privilege by proxy that it has afforded foreign nationals is a threat to U.S. sovereignty and national interests.

It is worth pointing out that FECA prohibits domestic subsidiaries of foreign companies from using money obtained from the foreign parent company for election-related spending, meaning that domestic subsidiaries may only use profits generated in the United States for election expenditures.[156] This restriction will hold even though *Citizens United* ruled that corporations can spend their treasury funds without limit on independent expenditures.[157] Although this restriction affords a small comfort in principle, in practice it may prove toothless. The reality is that domestic subsidiaries often receive at least their start-up funds from their foreign parent company. Moreover, money transferred by a foreign parent company may prove difficult to trace, not least because

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153. For example, CITGO, formerly the U.S.-owned Cities Services Company, was purchased in 1990 by Petróleos de Venezuela S.A, a company owned by the Venezuelan government. "The Citizens United ruling could conceivably allow Venezuelan President Hugo Chavez, who has sharply criticized both of the past two U.S. presidents, to spend government funds to defeat an American political candidate, just by having CITGO buy TV ads bashing his target." Mike Lillis, *Supreme Court Empowers Foreign Governments to Sway Federal Elections?*, WASH. INDEP., Jan. 22, 2010, http://washingtonindependent.com/74600/supreme-court-empowers-foreign-governments-to-sway-federal-elections.

154. Teachout, *supra* note 120, at 188 ("[S]everal scandals and court cases have involved questions of agency, as poor and middle class donors made magnificent donations that appear to be coming from foreign interests. In 1996, a middle class Indonesian couple donated more than $400,000 to the DNC, sparking questions about whether they, as legal permanent residents, were being used as proxies—basically to launder foreign money—by foreign business interests. The scandal led to investigations, and the DNC returned millions of dollars.").

155. *See, e.g.*, Aaron Mehta & Josh Israel, *Will the* Citizens United *Ruling Let Hugo Chavez and King Abdullah Buy U.S. Elections?*, CTR. FOR PUB. INTEGRITY, Jan. 22, 2010, http://www.publicintegrity.org/articles/entry/1913/ ("The Saudi government owns Houston's Saudi Refining Company and half of Motiva Enterprises. Lenovo, which bought IBM's PC assets in 2004, is partially owned by the Chinese government's Chinese Academy of Sciences.").

156. *See* 11 C.F.R. § 110.20 (2010).

157. *See* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 913 (2010).

corporations are unlikely to keep separate accounts for campaign spending.

Finally, although existing law purports to prohibit foreign money from directly influencing American elections,[158] enforcement of this legality may be difficult to carry out. As an independent regulatory agency, the FEC has been "widely recognized as an abject failure in carrying out its responsibilities to enforce the nation's campaign finance laws."[159] In light of this assessment, the FEC cannot be deemed competent to police the flow of money between domestic firms in the United States and their foreign parents. Not only is the FEC often criticized for ineffectiveness, the scale of the problem is immense; a vast quantity of international business transactions take place each year.[160]

Therefore, this safeguard may prove inadequate to ensure effective protection against foreign influence in domestic elections insofar as foreign owners can easily find ways to get around it. For example, this regulation does not prevent foreign owners from making their political interests and agenda known to their American subsidiaries. Even if a foreign owner does not directly or indirectly participate in the formal decision-making process, one can assume that many managers of domestic subsidiaries will be responsive and attentive to the political interests of their bosses.

E. Proposed Fixes to Citizens United

In light of these perceived shortcomings in existing law, some feel a need to bolster current legislation to ensure that foreign interests cannot use domestic subsidiaries as a vehicle to influence American elections.[161] Congress has considered a variety of proposals aimed at blunting the impact of *Citizens United*.[162] On June 24, 2010, the House has passed the Disclose Act (acronym for Democracy Is Strengthened by Casting Light on Spending in Elections), which would tighten disclosure requirements and sharply limit the ability of foreign related corporations to participate in domestic elections.[163] Specifically, the Disclose Act prohibits corpora-

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158. 11 C.F.R. § 110.20 (2010) (providing that a foreign national—including corporations, unions, associations, etc.—may not "directly or indirectly participate in the decision-making process" of election related activities).

159. Conason, *supra* note 151.

160. Eggen, *supra* note 4.

161. *See, e.g.*, Gross, *supra* note 11.

162. David D. Kirkpatrick, *Democrats Try To Rebuild Campaign-Spending Barriers*, N.Y. TIMES, Feb. 12, 2010, at A19.

163. *See, e.g.*, David M. Herszenhorn, *House Approves Legislation That Mandates the Disclosure of Political Spending*, N.Y. TIMES, June 25, 2010, at A24; Dan Eggen, *Democrats Plan*

tions from making independent expenditures in political campaigns if "a foreign national . . . directly or indirectly owns or controls—(i) 5 percent or more of the voting shares, if the foreign national is a foreign country, a foreign government official, or a corporation principally owned or controlled by a foreign country or foreign government official; or (ii) 20 percent or more of the voting shares."[164] However, the Disclose Act stalled in the Senate in July 2010 due to uniform Republican opposition.[165] The Disclose Act's chances of passing the Senate appear increasingly dim because it is widely forecasted that the Democrats will suffer steep losses in the 2010 mid-term elections.[166] Yet, one must consider: what is the likely outcome of a First Amendment challenge to such legislation?

F. Implications of Citizens United*'s Logic and Reasoning to Laws Restricting Foreign Influences*

1. Distinctions Based on the Speaker's Identity

Citizens United held that the First Amendment prohibits "restrictions distinguishing among different speakers, allowing speech by some but not others."[167] In other words, legislatures may never restrict speech based on the speaker's identity, including corporate identity.[168] The logic of the majority's reasoning strongly suggests that this holding could invalidate restrictions on foreign related corporations.[169]

To Introduce Bill To Blunt Ruling on Political Spending, WASH. POST, Apr. 23, 2010, at A03. These proposals have angered some business leaders, who characterize them as misguided in today's global economy. *See* Eggen, *supra* note 4 ("They say it is futile to single out companies with overseas connections in a global economy in which U.S. automakers assemble cars in Mexico and Japanese firms build them in the United States.").

164. H.R. 5175, 111th Cong. § 102 (2010) (internal quotation marks omitted). This latter provision could affect a large number of high-profile companies, such as Budweiser and T-Mobile. Eggen, *supra* note 163.

165. David M. Herszenhorn, *Campaign Finance Bill Grinds to Halt in Senate*, N.Y. Times, July 28, 2010, http://query.nytimes.com/gst/fullpage.html?res=9E05E6DB163BF93BA15754C0A9669D8B63&scp=15&sq=%22citizens+united%22&st=nyt.

166. *See, e.g.*, Jeff Zeleny & Carl Hulse, *House Majority Still Uncertain, Republicans Say*, N.Y. Times, Oct. 2, 2010, http://www.nytimes.com/2010/10/03/us/politics/03campaign.html; Jeff Zeleny & Carl Hulse, *Democrats Plan Political Triage to Retain House*, N.Y. Times, Sept. 4, 2010, http://www.nytimes.com/2010/09/05/us/politics/05dems.html.

167. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 898 (2010).

168. *See id.*

169. *Id.* at 947-48 (Stevens, J., dissenting) ("If taken seriously, our colleagues' assumption that the identity of a speaker has *no* relevance to the Government's ability to regulate political speech would lead to some remarkable conclusions. Such an assumption would have accorded the propaganda broadcasts to our troops by 'Tokyo Rose' during World War II the same protection as speech by Allied commanders.").

Indeed, current laws restricting the speech of foreign nationals and foreign corporations appear, under the logic of *Citizens United*, to elevate impermissibly one class of speakers, who happen to be humans, over others, which happen to be artificial entities.[170] Despite this absolutist rhetoric, however, the dissent pointed out that it is "implausible . . . that *all* corporations and *all* types of expenditures enjoy the same First Amendment protections, which *always* trump the interests in regulation."[171] Indeed, Justice Stevens argued that the identity of the speaker is a proper subject for regulation, and pointed out how the Court has sustained many different forms of identity-based restrictions in the past.[172]

Interestingly, the *Citizens United* Court did twice emphasize the distinction between citizens and foreigners in its holding. First, the Court stated, "If the First Amendment has any force, it prohibits Congress from fining or jailing *citizens*, or *associations of citizens*, for simply engaging in political speech."[173] Second, the majority noted that under the BCRA, "certain disfavored associations of citizens—those that have taken on the corporate form—are penalized for engaging in [otherwise protected] political speech."[174] This citizen-foreigner distinction may lay the foundation for a future ruling upholding restrictions on foreign corporations or domestic subsidiaries of foreign corporations.

Moreover, the Court affirmatively declined to answer the burning issue of whether this sweeping holding would reach so far as to wash away laws aimed at restricting foreign influence in American elections.[175] The majority stated:

> We need not reach the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing

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170. *Id.* at 948.

171. *Id.* at 936 n.12.

172. *Id.* at 945-46 ("[I]n a variety of contexts, we have held that speech can be regulated differentially on account of the speaker's identity, when identity is understood in categorical or institutional terms. The Government routinely places special restrictions on the speech rights of students, prisoners, members of the Armed Forces, foreigners, and its own employees. When such restrictions are justified by a legitimate governmental interest, they do not necessarily raise constitutional problems. In contrast to the blanket rule that the majority espouses, our cases recognize that the Government's interests may be more or less compelling with respect to different classes of speakers." (Stevens, J., dissenting)).

173. *Id.* at 904 (emphasis added).

174. *Id.* at 908.

175. *Id.* at 911. The Court refused to address this controversial point directly, choosing instead to proceed cautiously because the issue of campaign spending by a foreign related corporation was not before the Court. This solemn exercise of judicial modesty is ironic considering the unusual procedure of the case, where the Court abandoned all pretense of judicial restraint, deciding a host of issues they did not need to on the facts and procedural posture of the case before it. *Id.* at 932 (Stevens, J., dissenting).

> our Nation's political process [because] Section 441b [the provision under consideration in *Citizens United*] is not limited to corporations or associations that were created in foreign countries or funded predominately by foreign shareholders.[176]

Although the Court purported to leave open Congress's authority to restrict electioneering speech based on the speaker's foreign identity, this reasoning contradicts its absolutist rhetoric.[177] The Court indicated that its decision might have been different if the law only restricted speech of corporations predominately controlled or funded by noncitizens.[178] By using the word "predominately," the Court suggested that it may be inclined to uphold a law that restricts domestic subsidiaries that are controlled by foreign interests. However, in the world of corporate law, a shareholder may achieve "controlling" status with well under 51% of the total voting power.[179] As a result, whether a corporate shareholder has "controlling" status is a relative matter.

Notably, the Disclose Act appears to fall short of the Court's "predominately funded" standard.[180] For example, the legislation would cover a corporation with exactly twenty-five percent foreign voting shares; however, such a corporation is hardly "funded predominately by foreign shareholders."[181] This is especially so if the corporation's remaining shares are in the hands of a large controlling shareholder—for example, a shareholder who holds the remaining seventy-five percent of the shares. Conversely, if the corporation's remaining shares are in the hands of a fluid aggregation of shareholders with small ownership interests, there is a stronger case to be made that the corporation is funded predominately by foreign shareholders, who have more clout with the corporation's management.

The central controversy of this issue pertains to the nature of Justice Alito's objection during his now famous "not true" moment. What exactly did he regard as untrue when he reacted to Obama's condemnation of the Court's ruling in *Citizen's United*? Perhaps he merely disagreed with President Obama's statement that the *Citizens*

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176. *Id.* at 911.

177. *Id.* at 948 n.51 (Stevens, J., dissenting) ("The Court all but confesses that a categorical approach to speaker identity is untenable when it acknowledges that Congress might be allowed to take measures aimed at 'preventing foreign individuals or associations from influencing our Nation's political process.' Such measures have been a part of U.S. campaign finance law for many years." (internal citation omitted)).

178. *Id.* at 911.

179. *See, e.g.*, Zetlin v. Hanson Holdings, Inc., 397 N.E.2d 387, 388-89 (N.Y. 1979) (holding that 44.4% ownership "represented effective control").

180. *See* Eggen, *supra* note 163.

181. *See Citizens United*, 130 S. Ct. at 911.

United ruling had "reversed a century of law."[182] On the other hand, considering the timing of the "not true" moment, perhaps Justice Alito meant to object to the President's forecast that the Court's ruling would invalidate laws restricting foreign influences in American elections. Assuming the latter "is true," there are probably five votes on the Court to uphold a law prohibiting foreign entities from bankrolling American elections.

2. Deregulatory Bias

In *Citizens United*, the Court showed a stunning lack of deference to Congress's carefully considered, bipartisan legislative determinations in the realm of campaign finance law, handing down a ruling that was rooted in suspicion of congressional motives and based on the majority's shared ideology rather than a factual record.[183] The Court revealed a strong deregulatory bias, which indicates that the Court will be less likely to back down from a showdown with Congress over restrictions on corporate independent expenditures.[184] This represents an about-face for the Court; whereas previously the Court showed deference to Congress in the area of campaign finance regulation, the era starting with the ascendance of Chief Justice Roberts and Justice Alito to the Court has been marked by a movement to undo safeguards intended to limit the effect of special interest money in politics.[185]

The Court also revealed a profound, and arguably unwarranted, suspicion of congressional motives. For instance, Justice Kennedy simply assumed, without the benefit of a factual record, that Congress had invidious motives when it enacted BCRA, declaring that "[i]ts *purpose* and effect [were] to silence entities whose voices the Government deems to be suspect."[186] Thus, it appears that the majority

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182. Eggen, *supra* note 4.

183. *See Hearing*, *supra* note 33, at 2 (testimony of Laurence H. Tribe).

184. *See generally* Richard L. Hasen, *Beyond Incoherence: The Roberts Court's Deregulatory Turn in* FEC v. Wisconsin Right to Life, 92 MINN. L. REV. 1064 (2008) (tracing the Roberts' decisions and arguing that it has been driven by an agenda to deregulate campaign finance laws).

185. *Hearing*, *supra* note 33, at 4 (testimony of Laurence H. Tribe).

186. *Citizens United*, 130 S. Ct. at 898 (emphasis added). In oral argument, Justice Scalia provided another example of unwarranted suspicion:

> Congress has a self-interest. I mean, we—we are suspicious of congressional action in the First Amendment area precisely because we—at least I am—I doubt that one can expect a body of incumbents to draw election restrictions that do not favor incumbents. Now is that excessively cynical of me? I don't think so.

Transcript of Oral Argument at 50-51, Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2009) (No. 08-205).

believes that Congress designed BCRA to silence potential challengers who otherwise would have access to corporate funds.

The Court's suspicion of Congress's motives is further revealed by the fact that the Court made its sweeping decision without the benefit of a factual record. Indeed, it seems that the Court's censorship analysis rests primarily on the personal opinions of the Justices. For instance, the Court's assertions that "[t]he censorship we now confront is vast in its reach [and t]he Government has muffle[d] the voices that best represent the most significant segments of the economy" are not based on any evidence, but rather on mere assumptions.[187]

3. Surviving Strict Scrutiny

The Court's strong deregulatory bias drove it to dramatically narrow the class of compelling governmental interests, making it more difficult for a law restricting foreign-related corporations to survive strict scrutiny. Courts apply strict scrutiny to legislation that burdens a fundamental right.[188] In *Citizens United*, the Court ruled that any restrictions on corporate election spending must be treated as a burden on free speech; thus the Court will apply strict scrutiny, meaning that the government must demonstrate a compelling state interest and such laws must be narrowly tailored to meet that compelling interest. In the past, the Court recognized that many governmental interests are sufficient to justify speech restrictions, but *Citizens United* dramatically narrowed the definition of corruption and denied that there are any legitimate grounds for making distinctions based on a speaker's identity.[189] In short, the Court has greatly constricted the acceptable class of interests that may justify restricting speech.

How will this case impact existing and potential laws restricting foreign influences over domestic elections? First, it is far less likely that the government can justify such laws under the banner of preventing corruption or the appearance of corruption. As we have seen, *Citizens United* defined the anticorruption interest quite narrowly to include only quid pro quo corruption.[190] A broader understanding of the anticorruption interest, even one falling short of the antidistortion rationale, would include protecting democratic integrity and preventing

187. *Citizens United*, 130 S. Ct. at 907 (internal quotation marks omitted).

188. Fundamental rights include the rights stipulated in the Bill of Rights. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

189. *Citizens United*, 130 S. Ct. at 912-13.

190. *Id.* at 909.

undue influence.[191] Such a broader understanding would clearly support an effort by the government to restrict foreign influences over domestic elections. In contrast, *Citizen United*'s narrow conception of the anticorruption interest would probably not support such efforts, not least because § 441e's prohibition on contributions by foreign nationals—and, for that matter, section 102 of the Disclose Act—represent a stronger ban than the one struck down in *Citizen United*. Unlike the law in *Citizens United*, which prohibited corporate independent expenditures only in limited circumstances—the spending of general treasury funds on "electioneering communications" made within thirty days of a general election—§ 441e represents a complete ban.[192] Because a strong restriction burdens speech to a greater extent than a weak restriction, one would expect that the government would need to present an even more compelling anticorruption argument. For instance, the government might argue that the particular form of corruption at issue—the possibility that foreign corporations are buying off American politicians—raises severe national security concerns that warrant a stronger response.[193]

The Court hinted that it may, in the future, be open to the argument that the "[g]overnment has a compelling interest in limiting foreign influence over our political process."[194] It is revealing that the Court appeared to describe this interest as a separate, free-standing interest, rather than fitting it in under the umbrella of anticorruption, because it could provide a conceptual window to uphold such laws outside of the anticorruption interest framework. If so, the government would probably have to show a compelling state interest in prohibiting the speech of certain speakers that might favor foreign interests. Alternatively, the government may wish to limit direct participation in political campaigns to citizens for largely the same reason why the government limits voting and holding public office to citizens.[195]

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191. *Id.* at 963 (Stevens, J., dissenting).

192. 2 U.S.C. § 441b (2006).

193. Brown, *supra* note 128, at 544.

194. *Citizens United*, 130 S. Ct. at 911.

195. *See* Note, *supra* note 124, at 1895. Indeed, the Court has recognized the government's interest in limiting "political functions" to citizens based on popular sovereignty. On these grounds the Court has upheld state laws forbidding the employment of aliens as public school teachers, police officers, and probation officers. However, these cases are distinguishable because they concern the equal protections clause rather than the First Amendment. *Id.* at 1898-1900.

Although the standard of strict scrutiny articulated by the Court is a notoriously high bar to meet,[196] several campaign finance reform laws have survived strict scrutiny in the past.[197] The game changer in this scenario could be action by Congress to develop a strong factual record indicating that a problem truly exists with respect to foreign influence over U.S. elections and the effectiveness of regulations to mitigate such a threat.[198] In other words, the door is open for Congress to create narrow regulations based on a strong factual showing of a relationship between such expenditures and a compelling state interest.[199]

If, on the other hand, the threat of foreign influence over domestic elections turns out to be minimal, then Congress probably lacks a compelling state interest sufficient to justify speech restrictions on foreign-related corporations. Still, the issue retains populist appeal, arguably showing that the popular outrage of *Citizens United* is less based on an urgent problem that needs to be addressed, and more on the idea that Congress would be prohibited from taking steps to restrict foreign influences if it saw the need to do so.

Even assuming that Congress manages to compile a factual record demonstrating the dangers of foreign corporations bankrolling U.S. campaigns, Congress must show how the restriction is narrowly tailored to address a compelling state interest. Placing additional restrictions on domestic subsidiaries is not practical because, in today's global economy, foreign influence permeates corporate culture and affairs. The business community has become globally oriented due to the trend of liberalizing global investment, and, as a result, businesses compete with each other for both national and international investment.[200]

Moreover, globalization has blurred the line between domestic corporations and global corporations. The traditional distinction between U.S. corporations and domestic subsidiaries of foreign corporations is rooted in the notion that the interests of U.S. corporations are more

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196. Professor Gerald Gunther has noted that such a nondeferential standard of review is often considered "'strict' in theory and fatal in fact." Gerald Gunther, *The Supreme Court 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

197. *See, e.g.*, Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 844-45 (2006) (pointing out that in cases between 1990 and 2003, twenty four percent of cases survived strict scrutiny as applied to campaign finance laws).

198. *Hearing*, *supra* note 33, at 7-8 (testimony of Laurence H. Tribe).

199. *Id.*

200. Zoldan, *supra* note 126, at 582-83.

closely aligned with those of U.S. citizens.[201] However, it is often difficult to distinguish U.S. corporations from foreign-related corporations. Many corporations that sound as American as apple pie, such as Dr. Pepper, Burger King, Dunkin' Donuts, and Baskin Robbins, are domestic subsidiaries owned by foreign corporations.[202] To the extent that citizens believe that a domestic subsidiary is a U.S. corporation, the citizens will not be concerned with an appearance of corruption from foreign influences when the domestic subsidiary contributes money to sway U.S. elections.

Finally, it will be difficult to narrowly target the problem without hindering the rights of U.S. citizens. *Citizens United* permits individuals to exercise their freedom of speech through associations. The complicating factor is that corporate associations often include a mix of citizens and noncitizens. If Congress were to place restrictions on the ability of corporate associations to speak due to the fact that they have some fraction of foreign ownership, such restrictions would substantially burden the First Amendment rights of those U.S. citizens that are either shareholders or employees of the corporation. In other words, such a ban would prevent citizens within the corporation from joining together to voice their political views. Indeed, the government will have a difficult time justifying why the U.S. citizen shareholders and employees of Coca-Cola, a wholly domestic corporation, are permitted to express their political views freely as an association, whereas the U.S. citizen shareholders and employees of Dr. Pepper, a domestic subsidiary, are forbidden from expressing their political views simply because those citizens are associated with Dr. Pepper rather than Coca-Cola. Therefore, such restrictions would probably fail the narrowly tailored requirement of strict scrutiny.

IV. CONCLUSION

There is a popular saying that politics stop at the water's edge. A corollary is that foreign influences should stop at the water's edge as well, and finances from overseas should be forbidden from influencing American elections. *Citizens United* raises the fear that money from abroad may fill the coffers of American politicians, turning them against

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201. *But see id.* at 604 ("[M]ultinational corporations—wherever they are located—act in their *own* interests, which to a large degree converge with the interests of their host states. Domestic Subsidiaries can therefore be expected to act not as agents of any state, but rather to behave in ways largely indistinguishable from their American multinational corporate counterparts operating alongside them in the United States.").

202. Note, *supra* note 124, at 1902.

the best interests of their own citizenry. As a sovereign nation, the United States has the right to limit electoral participation to citizens. The exclusion of foreign interests from domestic elections is hardly a deficiency of our representative democracy, but rather it is a necessary consequence of defining the scope of the community. Foreign-related corporations are by definition outside of this community. Time will tell, but the reasoning of *Citizens United* will likely create an obstacle to congressional efforts to prevent foreign influences from swaying American elections.