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# The First Amendment Lost in Translation: Preventing Foreign Influence in U.S. Elections After Citizens United v. FEC

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**THE FIRST AMENDMENT LOST IN  
TRANSLATION: PREVENTING FOREIGN  
INFLUENCE IN U.S. ELECTIONS AFTER  
*CITIZENS UNITED V. FEC***

*Matt A. Vega\**

*This Article invites readers to consider an unusual approach to curtailing the threat of foreign corruption: limiting political speech. This Article argues that permitting foreign-owned and foreign-controlled corporations to pour money into U.S. elections has undermined self-governance and threatens our democracy. By exploring both constitutional and extra-constitutional theory, this Article adds several novel arguments to the ongoing debate on the First Amendment's relationship to campaign finance laws governing foreign corporations.*

*The basic question this Article addresses is whether the First Amendment protects political spending by foreign-controlled or foreign-owned U.S. corporations. This issue has become more pressing since the Supreme Court in *Citizens United v. FEC* decided, in a 5–4 vote, to strike down virtually any limits on independent expenditures by domestic corporations. However, the conclusions reached in that case are not binding on the very different question of whether the government has a compelling state interest in preventing foreign influence or distortion vis-à-vis the financial participation of foreign-controlled or foreign-owned domestic corporations in U.S. elections.*

*Understanding the potential impact of *Citizens United* on legislative efforts to prevent foreign influence on U.S. politics is an extremely timely topic. In his 2010 State of the Union Address, President Obama criticized the *Citizens United* decision for opening the*

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*floodgates on political spending by foreign corporations' U.S. subsidiaries. He called for a congressional response in the form of stronger campaign finance laws. On June 21, 2010, the House passed the DISCLOSE Act which, among other things, would extend the current ban on foreign contributions and independent expenditures to foreign-controlled and foreign-owned corporations. The Senate, however, has thus far failed to reach agreement on the Senate version of the bill.*

*This Article provides an analytical and historical framework for predicting whether the current legislative proposal would pass constitutional muster. I offer three possible approaches: (1) lowering the standard from traditional strict scrutiny to intermediate scrutiny, (2) applying an "antidistortion" rationale limited to cases involving foreign influence, or (3) classifying the restricted political speech as impermissibly "coordinated" with foreign principals as suggested by dicta in the Supreme Court's latest free speech case *Holder v. Humanitarian Law Project*.*

*The United States has long been the global leader in fighting corruption abroad. However, a great deal of foreign corruption remains in our own back yard. For example, the recent BP oil spill may prove to be a direct consequence of BP using its political clout to get regulators to look the other way. My hope is this Article will further the dialogue on how foreign corruption occurs in the United States in the form of foreign corporate influence on (and distortion of) our political process, even as it offers some possible solutions for determining when and how foreign-controlled corporate political speech may be limited for the benefit of our society.*

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## I. INTRODUCTION

The recent Supreme Court case *Citizens United v. FEC*<sup>1</sup> has prompted the Obama administration and Congress to push for stricter campaign finance laws.<sup>2</sup> As Justice Stevens pointed out in his partial dissent, the decision overruled decades of campaign finance law precedent.<sup>3</sup> It effectively rendered any limits on “independent expenditures” by corporations—or at least by domestic corporations—unconstitutional.<sup>4</sup> Last year the House passed the DISCLOSE Act,<sup>5</sup> which—among other things—would have required stricter methods of campaign finance disclosure<sup>6</sup> and prohibited foreign influence in federal elections.<sup>7</sup> Although current law already bans direct contributions and independent expenditures by foreign citizens and foreign corporations,<sup>8</sup> this legislation would have extended to foreign-controlled domestic corporations and their political action committees (PACs) to close the loopholes permitting the expenditure of foreign money in U.S. elections.<sup>9</sup> However,

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1. 130 S. Ct. 876 (2010).

2. In his January 23 radio address, the president argued that “[e]ven foreign corporations may now get into the act” of spending “an unlimited amount of special interest money” for political purposes. President Barack Obama, Weekly Address (Jan. 23, 2010), available at <http://www.whitehouse.gov/the-press-office/weekly-address-president-obama-vows-continue-standing-special-interests-behalf-amer>.

3. *Citizens United*, 130 S. Ct. at 936.

4. *Id.* at 913. An “independent expenditure” is defined as any expenditure “expressly advocating the election or defeat of a clearly identified candidate” (e.g., a “vote for,” “vote against” or other so-called “magic word” communication), which is “not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate’s authorized political committee, or their agents, or a political party committee or its agents.” 2 U.S.C. § 431(17)(A)–(B) (2006).

5. DISCLOSE Act is short for Democracy Is Strengthened by Casting Light On Spending in Elections Act. See WE WANT THE DISCLOSE ACT, <http://www.discloseact.com> (last visited May 23, 2011).

6. DISCLOSE Act, H.R. Res. 5175, 111th Cong. §§ 201–301 (2010) (enacted).

7. *Id.* § 102.

8. For purposes of this Article, “foreign corporation” means a corporation that is not created or organized in the United States. “Contributions” are legally defined as “any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal Office” or “the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose.” 2 U.S.C. § 431(8)(A). The key detail that separates contributions from expenditures is that contributions are made directly to a candidate, campaign, or political party.

9. It is illegal for foreign individuals and corporations to financially participate in federal

legislators have been unable so far to push the DISCLOSE Act through the Senate.<sup>10</sup> In the interim, the Federal Election Commission (FEC) has suspended enforcement of any regulations that are inconsistent with the *Citizens United* decision but has rejected the first two drafts of a notice of proposed rulemaking because the FEC is deadlocked over the proper scope of the regulations to implement the Supreme Court's decision.<sup>11</sup>

The growing political influence of foreign corporations poses a very real threat to our nation's sovereignty and to our right to political self-determination.<sup>12</sup> Foreign money may affect not only

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elections, but foreign-controlled and foreign-owned corporations, subsidiaries, trade associations and PACs can contribute and expend funds to influence federal elections. *See infra* Part II.B.

10. *See infra* text accompanying notes 175–77.

11. *See* Press Release, Fed. Election Comm'n, FEC Statement on the Supreme Court's Decision in *Citizens United v. FEC* (Feb. 5, 2010), available at <http://www.fec.gov/press/press2010/20100205CitizensUnited.shtml> (stating among other things that the FEC "will no longer enforce statutory and regulatory provisions prohibiting corporations and labor union from making either independent expenditures or electioneering communications"); Press Release, Fed. Election Comm'n, FEC Votes on Two Drafts of an NPRM on Independent Expenditures and Electioneering Communications, Approves Final Audit Report (Jan. 20, 2011), available at <http://fec.gov/press/20110120OpenMeeting.shtml> (stating that Draft A included revisions to the regulations governing financial participation by foreign nationals in the U.S. electoral process, while Draft B did not); *Statement of Vice Chair Caroline C. Hunter and Commissioners Donald F. McGahn II and Matthew S. Petersen on Notice of Proposed Citizens United Rulemaking*, Federal Election Commission (Jan. 20, 2011), <http://www.fec.gov/members/statements/GOPCommissionersCNPRMStatement1-20-11.pdf> (providing a statement by the three commissioners appointed by Republicans explaining that "our colleagues [the three commissioners appointed by Democrats] support a much broader rulemaking"). The FEC has reportedly delayed taking any action on new regulations because of divisions among the three Democratic and three Republican FEC commissioners. *Campaign Spending: FEC, IRS Unlikely to Act Soon to Clarify Regulations for Disclosure, Officials Say*, BNA MONEY & POL. REP. (Dec. 7, 2010) [hereinafter *Campaign Spending*] (on file with author). The Commission did, however, publish a Supplemental Notice of Proposed Rulemaking (NPRM) for the NPRM on Coordinated Communications originally published on October 21, 2009, to elicit comments addressing the impact of *Citizens United* on the Commission's proposed rules on coordinated communications. Supplemental NPRM, 75 Fed. Reg. 6590 (proposed Oct. 21, 2009) (to be codified at 11 C.F.R. pt. 109.21).

12. *See* 156 CONG. REC. S6277–78 (daily ed. July 27, 2010) (remarks by Sen. Sherrod Brown) (stating, prior to the vote denying cloture to the Senate version of the DISCLOSE Act blaming foreign special interests for thwarting legislative reform efforts in the past, "We saw the big companies that outsource jobs write trade agreements, such as NAFTA and CAFTA. [W]e were all unsuccessful in the Bush years—with regard to writing energy legislation, we saw the oil companies [many of them foreign owned] do that."); *see also* 156 CONG. REC. H4787 (daily ed. June 24, 2010) (remarks by Rep. McGovern) (pointing to the potential danger that now looms with China controlling so many domestic corporations within the U.S. and stating "[s]overeign wealth funds, the investment funds controlled by foreign governments of foreign interests, could be controlled by China. If they're here in the United States, they have the right to be able to under an innocuous name spend millions and millions of dollars in negative ads against a candidate or positive ads for a candidate.").

election outcomes but also policy decisions of incumbent politicians who are mindful of future campaign needs. As they expand their operations here, foreign corporations exert political influence primarily through lobbying and campaign spending. During the last presidential election, foreign entities spent an unprecedented amount of money on both political parties.<sup>13</sup> Records show that U.S. subsidiaries of foreign companies donated more than \$15.5 million in the 2010 federal election cycle through foreign-controlled PACs.<sup>14</sup> That figure does not include millions of dollars donated by these corporations' individual employees.<sup>15</sup> Now under *Citizens United*, as Justice Stevens warned in his dissent, foreign corporations, through their American subsidiaries, stand to gain even more influence over the body politic.<sup>16</sup>

This situation is made worse by the so-called secret money loophole in current campaign finance law, which permits tax-exempt organizations to receive large donations from undisclosed corporate donors.<sup>17</sup> In the 2010 congressional midterm elections, spending by such tax-exempt organizations was up five-fold from 2006.<sup>18</sup> Half of the \$293 million spent by organizations other than candidates and parties during that election cycle came from groups that refused to

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13. The majority of the money comes from individual officers and employees of foreign-controlled or foreign-owned domestic corporations or affiliated PACs. *Presidential Donor Lookup Results*, CTR. FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/pres08/search.php?cid=&name=%28all%29&employ=Credit+Suisse+Securities&state=%28all%29&zip=%28any+zip%29&submit=OK&amt=a&sort=A> (last visited Jan. 22, 2011); see *Presidential Campaign Finance Records*, FED. ELECTION COMM'N, <http://www.fec.gov/DisclosureSearch/mapApp.do> (last visited Jan. 22, 2011).

14. *Foreign-Connected PACs*, CTR. FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/pacs/foreign.php?cycle=2010> (last visited July 2, 2011).

15. While lists of individual donors are available from the FEC, analyzing the data can prove tricky as not all donors choose to disclose their occupation and place of employment, and many choose to list their business affiliations in different ways. This can lead to totals that are fuzzy at best. *111th Congress*, CTR. FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/politicians/candlist.php?congno=111&sort=S> (last visited Jan. 22, 2011) (listing campaign financing for each member of the 111th Congress); *Presidential Campaign Finance*, FED. ELECTION COMM'N, <http://www.fec.gov/DisclosureSearch/mapApp.do> (last visited Jan. 22, 2011) (providing an opportunity to search for individual donors). A sampling of data taken August 1, 2010, for purposes of this Article totaled over \$2.6 million, and is on file with the author.

16. *Citizens United*, 130 S. Ct. at 971 (Stevens, J., dissenting) (warning that corporations are very different from natural persons because “[u]nlike voters in U.S. elections, corporations may be foreign controlled”).

17. *Campaign Spending*, *supra* note 11.

18. T.W. Farnam & Dan Eggen, *Interest-Group Spending for Midterm Up Fivefold from 2006; Many Sources Secret*, WASH. POST (Oct. 4, 2010, 3:01 AM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/10/03/AR2010100303664.html>.

reveal their funding sources.<sup>19</sup> For example, the U.S. Chamber of Commerce has expanded its fundraising considerably since *Citizens United* and has received hundreds of thousands of dollars in donations from foreign businesses in Saudi Arabia, the Kingdom of Bahrain, India, and many other countries.<sup>20</sup>

There is little reason to believe that these foreign companies act in the United States' best interest. Take, for example, BP and the explosion of the Deepwater Horizon oil drilling rig in the Gulf of Mexico in April 2010. Many experts believe that the resulting oil spill, the largest such disaster in U.S. history, was because of BP and other foreign oil and gas companies influencing the federal government to allow deep-water oil drilling to go virtually unsupervised.<sup>21</sup> In 2009, according to the Center for Responsive Politics, BP spent nearly \$16 million lobbying Congress and the federal government.<sup>22</sup> Individual BP directors, officers, and employees donated at least \$160,000 to congressional candidates and their political parties.<sup>23</sup> If campaign donations to PACs are counted, the total amount spent by BP employees in 2009 is over \$1 million.<sup>24</sup> During his time in the Senate and while running for president, Barack Obama received a total of \$77,051 from BP and is the top recipient of BP PAC and individual donations over the past twenty years.<sup>25</sup> It now appears these "foreign" dollars, and the political

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19. *Half of Outside Spending in Campaigns Came from Groups Not Revealing Donors*, BNA MONEY & POL. REP. (Nov. 12, 2010) (on file with author).

20. Lee Fang, *Foreign-Funded 'U.S.' Chamber of Commerce Running Partisan Attack Ads*, THINK PROGRESS (Oct. 5, 2010, 10:22 AM), <http://thinkprogress.org/2010/10/05/foreign-chamber-commerce/>. Foreign firms like BP, Shell Oil, and Siemens are active members of the Chamber. *Id.*

21. See Brian Montopoli, *BP Spent Millions on Lobbying, Campaign Donations*, CBS NEWS (May 5, 2010, 3:27 PM), [http://www.cbsnews.com/8301-503544\\_162-20004240-503544.html](http://www.cbsnews.com/8301-503544_162-20004240-503544.html).

22. Michael Beckel, *Federal Contributions from Political Action Committee of Beleaguered Oil Giant BP Slow to a Trickle*, OPEN SECRETS BLOG CENTER FOR RESPONSIVE POL. (July 20, 2010, 11:44 AM), <http://www.opensecrets.org/news/2010/07/federal-contributions-from-politica.html>. BP was on track to spend a similar amount for 2010, spending \$3.5 million on lobbying during the first three months of the year. Alan Fram & Sharon Theimer, *Will BP's D.C. Connections Help It Now?*, CBS NEWS (May 10, 2010), <http://www.cbsnews.com/stories/2010/05/10/politics/main6470916.shtml>. However, BP became politically radioactive after the spill, causing several politicians to return their monies. Beckel, *supra*.

23. Gina-Marie Cheeseman, *How BP Money Spent on Lobbying and Campaign Contributions Pays Off*, TRIPLE PUNDIT (May 13, 2010), <http://www.triplepundit.com/2010/05/how-bp-money-spends-on-lobbying-and-campaign-contributions-pays-off/#ixzz0sAHwGjSg>.

24. *Id.*

25. Erica Lovely, *Obama Biggest Recipient of BP Cash*, POLITICO (May 5, 2010, 5:37 PM), <http://www.politico.com/news/stories/0510/36783.html#ixzz0sAMk1mjD>.



influence they bought, may have caused the U.S. Minerals Management Service to rubber-stamp the Deepwater Horizon oil rig's safety inspection.<sup>26</sup>

This Article examines the little-scrutinized political speech rights of foreign corporations and their American affiliates and concludes that, despite some strong arguments to the contrary, federal legislation may constitutionally restrict these rights.<sup>27</sup> Part II briefly reviews the historical efforts of the Framers, the legislature, and the FEC to limit foreign influence over the American political process. Part III addresses the Supreme Court's treatment of corporate political spending in *Citizens United* as "central to the meaning and purpose of the First Amendment."<sup>28</sup> In particular, Part III considers the decision's effect on the existing regulatory ban on campaign spending by foreign corporations. Part IV then explores several possible theories under which Congress may restrict the financial participation of foreign-controlled or foreign-owned domestic corporations in U.S. elections under the Constitution, or alternatively under extra-constitutional principles that weigh against judicial interference in foreign policy.

The Article concludes that financial participation by foreign corporations in U.S. elections should be categorized as wholly

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26. See NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL & OFFSHORE DRILLING, DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING (2011), available at [http://www.oilspillcommission.gov/sites/default/files/documents/DEEPWATER\\_ReporttothePresident\\_FINAL.pdf](http://www.oilspillcommission.gov/sites/default/files/documents/DEEPWATER_ReporttothePresident_FINAL.pdf). Specifically, the Final Report found that "pockets of corruption" contributed to Minerals Management Service inspectors' lax enforcement along with problems with understaffing, underfunding, and lack of training. *Id.* at 76–79, 254–55; see also Laura Strickler, *Oil Spill: Feds Won't Release BP Inspection Records*, CBS NEWS (May 11, 2010, 5:10 PM), [http://www.cbsnews.com/8301-31727\\_162-20004695-10391695.html](http://www.cbsnews.com/8301-31727_162-20004695-10391695.html).

27. Adeno Addis, *Who's Afraid of Foreigners? The Restrictions on Alien Ownership of Electronic Media*, 32 COLUM. HUM. RTS. L. REV. 133 (2000); Richard M. Esenberg, *The Lonely Death of Public Campaign Financing*, 33 HARV. J.L. & PUB. POL'Y 283 (2010); Ian M. Rose, *Barring Foreigners from Our Airwaves: An Anachronistic Pothole on the Global Information Highway*, 95 COLUM. L. REV. 1188 (1995); Note, "Foreign" Campaign Contributions and the First Amendment, 110 HARV. L. REV. 1886 (1997); Katherine L. Pringle, Note, *Silencing the Speech of Strangers: Constitutional Values and the First Amendment Rights of Resident Aliens*, 81 GEO. L.J. 2073 (1993); see also Hartwin Bungert, *Equal Protection for Foreign and Alien Corporations: Towards Intermediate Scrutiny for a Quasi-Suspect Classification*, 59 MO. L. REV. 569 (1994) (arguing for application of at least intermediate scrutiny for classifications of "corporate nationality" under the Equal Protection clause). See generally J. Robert Abraham, *Saving Buckley: Creating a Stable Campaign Finance Framework*, 110 COLUM. L. REV. 1078, 1081 (2010) (discussing constitutional limits on American campaign finance regulations after *Buckley*).

28. *Citizens United*, 130 S. Ct. at 892. The Court also described it as "archetypical political speech." *Id.*

unprotected speech under the First Amendment and lawfully banned.<sup>29</sup> This conclusion is based on the extra-constitutional principles of sovereignty and the right to self-determination, as well as national security concerns. The Article then explores whether Congress should expand the current ban on foreign campaign spending to foreign-controlled and foreign-owned domestic corporations. It considers whether the political-question doctrine requires judicial deference to congressional legislation or whether the enforcement of such legislation may be based on the United States' inherent sovereignty. Because foreign-controlled or foreign-owned domestic corporations are still technically American speakers, however, the Article predicts that the Supreme Court would likely refuse to abdicate its judicial role of evaluating the First Amendment claims arising from such legislation. Nevertheless, the Article argues that the First Amendment may permit foreign-controlled and foreign-owned domestic corporations to be restricted, even banned, from participating financially in U.S. elections under three possible approaches: (1) lowering the standard of judicial review in such cases to intermediate scrutiny, (2) applying an "antidistortion" rationale limited to cases involving foreign influence,<sup>30</sup> or (3) classifying the restricted political speech as impermissibly "coordinated" with foreign principals as suggested by dicta in *Holder v. Humanitarian Law Project (HLP)*.<sup>31</sup>

The prospect of lowering the applicable standard of scrutiny is based on the *HLP* decision, which held that the proper standard for evaluating a similar restriction on speech was whether the law is "necessary" to further a government interest of "the highest order."<sup>32</sup> The second option argues that the Supreme Court's rejection of the antidistortion rationale in *Citizens United* should be limited to the facts in that case, which involved a purely domestic corporation; therefore, *Citizens United* is not controlling in First Amendment cases involving foreign-owned or foreign-controlled speakers. The third option recognizes that even if extending the ban from 2 U.S.C.

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29. This argument assumes that the speaker is both alien and outside the United States.

30. *Citizens United*, 130 S. Ct. at 903.

31. 130 S. Ct. 2705, 2711 (2010). The Court held that the U.S. government could ban speech by American individuals and nonprofit groups coordinated with, directed at, or controlled by foreign terrorist organizations. *Id.* at 2710.

32. *Id.* at 2724.

§ 441e<sup>33</sup> (“Section 441e”) to foreign-controlled or foreign-owned American companies is subject to strict scrutiny, a legislative proposal could be narrowly tailored. For example, such a narrowly tailored proposal could cover only coordinated expenditures (which are broadly defined under *HLP*) to achieve a compelling state interest in preventing foreign influence in U.S. elections.

## II. PAST, CURRENT, AND FUTURE EFFORTS TO LIMIT FOREIGN INFLUENCE IN THE AMERICAN POLITICAL PROCESS

### A. *Historical Background*

#### 1. Fears of Foreign Corruption in Colonial America

One of the Framers’ greatest fears during the Federal Convention of 1787 was foreign corruption.<sup>34</sup> The delegates to the Constitutional Convention “were concerned that the small size of the young country (compared to the great European powers) would open it up to foreign corruption.”<sup>35</sup> They debated whether a stronger national government or something more akin to the existing league of states was better equipped to “secure the Union against the influence of foreign powers over its members.”<sup>36</sup> New York delegate Melancton Smith stressed that “[f]oreign corruption is . . . to be guarded against.”<sup>37</sup> Charles Pinckney, who represented South Carolina at the Convention, spoke of the “peculiar danger and impropriety in opening [the Senate’s] door to those who have foreign attachments.”<sup>38</sup> Similarly, Massachusetts delegate Elbridge Gerry

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33. 2 U.S.C. § 441e (2006).

34. Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 347 (2009).

35. *Id.* at 353. Although Teachout argues that the Framers had broader concerns about the internal corruption of America’s politicians and citizenry, she admits those concerns were “often intermingled” with concerns about foreign power. *Id.* at 358. While the majority in *Citizens United* gave short shrift to Teachout’s concerns about moral decay, *Citizens United*, 130 S. Ct. at 928, the Court would be well advised to pay greater deference to the long-standing determination that foreign powers and individuals have no place in American politics. I argue in this Article that concerns about foreign influence preclude political spending by both foreign corporations and their American subsidiaries that have inherent “foreign” (read non-patriotic) allegiances.

36. James Madison, Opposition to the New Jersey Plan (June 19, 1787), in *THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES* 79, 83 (Ralph Ketcham ed., 1986).

37. Speeches of Melancton Smith (June 20–27, 1788), in *THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES*, *supra* note 36, at 336, 346.

38. Citizenship for Immigrants (Aug. 9, 1787), in *THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES*, *supra* note 36, at 156, 156 (quoting Charles

feared that new states “may even be under some foreign influence” and might “participate in the negative on the will of the other states.”<sup>39</sup> James Madison worried that the proposed Senate’s small size made it “more liable to be corrupted” by foreign influence than the legislature as a whole.<sup>40</sup>

Similarly, the Federalist Papers, authored by “Publius” (a pseudonym of Alexander Hamilton, James Madison, and John Jay), contain a total of twenty-three references to corruption.<sup>41</sup> Publius considered “cabal, intrigue and corruption” to be the “most deadly adversaries of Republican government.”<sup>42</sup> And although there were other contributing factors, Publius was “chiefly” concerned with foreign sources of “the business of corruption.”<sup>43</sup> Writing between October 1787 and August 1788, “Publius . . . was concerned that the blatant weaknesses of the central government under the Articles of Confederation constituted a standing invitation for European powers to meddle in American affairs.”<sup>44</sup>

Hamilton lamented that the Republic’s chief weakness was its susceptibility to foreign corruption. Based on the lessons of the ancient Greeks and Romans as well as the fate of European nations, Hamilton argued the republican form of government “afford[s] too easy an inlet to foreign corruption.”<sup>45</sup> In Federalist 66, he explained the concept of separation of powers as “security essentially intended by the Constitution against corruption and treachery” like “a few leading individuals in the Senate . . . prostitut[ing] their influence in that body as the mercenary instruments of foreign corruption.”<sup>46</sup>

Likewise, Madison in Federalist 41 said that “security against

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Pinckney).

39. Debate on Veto of State Laws (June 8, 1787), in THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES, *supra* note 36, at 58, 60.

40. Notes of James Madison (Aug. 17, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 314, 319 (Max Farrand ed., 1911), available at [http://www.college-defrance.fr/media/rat\\_soc/UPL51221\\_Farrand\\_III.pdf](http://www.college-defrance.fr/media/rat_soc/UPL51221_Farrand_III.pdf).

41. The Federalist Papers were a series of eighty-five essays written in support of ratifying the Constitution.

42. THE FEDERALIST NO. 68, at 441 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

43. *Id.* (stating corruption and related threats “might naturally have been expected to make their approaches from more than one quarter, but chiefly from the desire in foreign powers to gain an improper ascendant in our councils”).

44. STEPHEN MILLER, SPECIAL INTEREST GROUPS IN AMERICAN POLITICS 66 (1983).

45. *Id.* at 297.

46. THE FEDERALIST NO. 66, *supra* note 42, at 435 (Alexander Hamilton).

foreign danger . . . is an avowed and essential object of the American Union.”<sup>47</sup> For him, the separation of powers principle was first and foremost to keep in check “ambition or corruption.”<sup>48</sup> In Federalist 55, Madison praised the first Congress for not being so “easily corrupt[ed]” by “foreign gold” during the Revolution.<sup>49</sup> He then argued the requirement that the president and members of the Senate “must all be American citizens” ensured that their “private fortunes . . . cannot possibly be sources of danger.”<sup>50</sup> Although he did not elaborate on the argument, Madison appears to have assumed that foreign money posed a greater danger of public corruption than did domestic wealth.<sup>51</sup> His fears now appear almost prophetic, considering how many current members of Congress are heavily invested in international markets.<sup>52</sup>

Finally, Jay in Federalist 64 uses the separation of powers argument to counter concerns that the president and Senate might act “corruptly” and make “disadvantageous treaties” based on “private interests distinct from that of the nation.”<sup>53</sup> Because a treaty must be signed by the president and confirmed by two-thirds of the Senate, there was no “supposable” (or at least no “probable”) danger of foreign corruption.<sup>54</sup> But if a treaty was ever the result of foreign corruption, Jay posited that “the treaty so obtained from us would, like all other fraudulent contracts, be null and void by the law of nations.”<sup>55</sup>

The result of the Federal Convention of 1787 was a new Constitution and a new form of government informed, in many

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47. THE FEDERALIST NO. 41, *supra* note 42, at 295 (James Madison).

48. THE FEDERALIST NO. 62, *supra* note 42, at 409 (James Madison).

49. THE FEDERALIST NO. 55, *supra* note 42, at 377 (James Madison).

50. *Id.* at 378.

51. *Id.* at 379.

52. For example, several well-known members of Congress have made investments in BP and other big oil stock. See Paul Kane & Karen Yourish, *Congress Members Overseeing Firms Involved in Gulf Spill Held Oil, Gas Stock*, WASH. POST (June 17, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/16/AR2010061605369.html>; *List of Congressional Members with Investments in BP*, CTR. FOR RESPONSIVE POLITICS, [http://www.opensecrets.org/pfds/search\\_results\\_detail.php?filtertype=H&year=2008&org=BP&srchorg=BP&srctype=O](http://www.opensecrets.org/pfds/search_results_detail.php?filtertype=H&year=2008&org=BP&srchorg=BP&srctype=O) (last visited Feb. 16, 2011); David Osborne, *Congress Members Have Funds Invested in BP Stock*, INDEP. (June 18, 2010), <http://www.independent.co.uk/news/world/americas/congress-members-have-funds-invested-in-bp-stock-2003670.html>.

53. THE FEDERALIST NO. 64, *supra* note 42, at 425 (John Jay).

54. *Id.*

55. *Id.*

aspects, by concerns about undue foreign influence.<sup>56</sup> For example, the seven-years-of-residency clause<sup>57</sup> stemmed from the delegates' concerns about "foreigners and adventurers mak[ing] laws for us [and] govern[ing] us."<sup>58</sup> Fearing that foreign principals would try to use their wealth to influence American statesmen, the delegates also quickly passed the nobility clause.<sup>59</sup> Similar concerns led to the emoluments clause,<sup>60</sup> the incompatibility clause,<sup>61</sup> the appointments clause,<sup>62</sup> the elections clause,<sup>63</sup> the carefully crafted definition of treason,<sup>64</sup> the treaty-making power,<sup>65</sup> and, of course, the requirement of elections "by the people."<sup>66</sup>

Shortly after the formation of the new government in 1789, Federalists and Republicans increasingly accused each other of being corrupted by foreign influence. As Richard Hofstadter explained,

Each party saw the other as having a foreign allegiance, British or French, that approached the edge of treason. Each

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56. I am indebted to Professor Teachout for her compilation of several of these cross-references. See Teachout, *supra* note 34, at 355.

57. U.S. CONST., art. I, § 2.

58. Notes of James Madison (Aug. 8, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 40, at 216; see also Notes of James Madison (Aug. 9, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 40, at 238 ("The men who can shake off their attachments to their own Country can never love any other. . . . [A]dmit a Frenchman into your Senate, and he will study to increase the commerce of France: An Englishman, he will feel an equal bias in favor of that of England." (recording the statement of Gouverneur Morris)).

59. U.S. CONST. art. I, § 9, cl. 2; DAVID ROBERTSON, DEBATES AND OTHER PROCEEDINGS OF THE CONVENTION OF VIRGINIA 330–32 (2d ed. 1805) (1788) (recording Edmund Randolph's statement that the clause was plainly written "to prevent corruption" and cited as an example a snuff box that was given to a U.S. ambassador by the king of France); see also JOHN T. NOONAN, JR., BRIBES 431 (1984) (recounting the public outcry when Benjamin Franklin received a diamond-encrusted snuff box from the king of France as a token of appreciation).

60. U.S. CONST. art. I, § 6, cl. 2; ROBERTSON, *supra* note 59, at 321–45.

61. U.S. CONST. art. I, § 6, cl. 2; Notes of Robert Yates (June 22, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 40, at 376.

62. U.S. CONST. art. II, § 2, cl. 2; William Findley in the House of Representatives (Jan. 23, 1798), in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 40, at cclxxvii.

63. U.S. CONST. art. I, § 4.

64. U.S. CONST. art. III, § 3.

65. U.S. CONST. art. II, § 2, cl. 2; Notes of James Madison & Rufus King (Aug. 8–9, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 40, at 215–41; Notes of James Madison (Sept. 8, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 40, at 547–53.

66. U.S. CONST. art. I, § 2, cl. 1; Notes of Robert Yates (June 6, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 40, at 140–41; Notes of Robert Yates, *supra* note 61, at 376–83.

also saw the other as having a political aspiration or commitment that lay outside the republican covenant of the Constitution: the Federalists were charged with being “Monocrats,” with aspiring to restore monarchy and the hereditary principle; the Republicans with advocating a radical, French-inspired democracy hostile to property and order.<sup>67</sup>

Parting ways with Hamilton because of irreconcilable Federalist-Republican differences, Madison accused Hamilton of fostering, through fiscal policies he had implemented as secretary of the treasury, “a government operating by corrupt influence.”<sup>68</sup> Madison feared Hamilton’s anti-Republican monetary policies would amount to a “motive of private interest in place of public duty” that would permanently control the country.<sup>69</sup> Madison’s fears are supported by some credible evidence that Hamilton was trading in foreign influence. In 1790, for example, Hamilton coached the English ambassador on how best to negotiate a commercial treaty between the United States and Great Britain.<sup>70</sup> When the Jay Treaty—named after its chief negotiator John Jay—was eventually ratified five years later, it was not well received by the American public. Hamilton and his followers were accused of betraying American interests and being under the influence of the British monarchy.<sup>71</sup> Jay was burned in effigy throughout the country and Hamilton was pelted with stones while trying to defend the treaty in New York.<sup>72</sup>

Ironically, the Jay Treaty owed its existence to an unrelated scandal involving foreign bribery. Late in 1795, George

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67. RICHARD HOFSTADTER, *THE IDEA OF A PARTY SYSTEM: THE RISE OF LEGITIMATE OPPOSITION IN THE UNITED STATES, 1780–1840*, at 90 (1969).

68. James Madison, *Spirit of Governments*, NAT’L GAZETTE, Feb. 20, 1792, available at [http://www.constitution.org/jm/17920220\\_spirit.htm](http://www.constitution.org/jm/17920220_spirit.htm).

69. *Id.*

70. MILLER, *supra* note 44, at 73.

71. *Id.* A letter from James Madison to James Monroe, who was the ambassador to France at the time, indicated Madison’s suspicion that the Jay Treaty was an attempt to increase English influence and his anger with the state banks and chambers of commerce whom he blamed for helping to stall the public fury against the treaty. Letter from James Madison to James Monroe (Dec. 20, 1795), available at [http://www.constitution.org/jm/17951220\\_monroe.htm](http://www.constitution.org/jm/17951220_monroe.htm). Madison also suspected that many of the banks and bodies of trade were influenced by British capitalists. *See id.*

72. Letter from James Madison to James Monroe, *supra* note 71.

Washington's administration learned that Secretary of State Edmund Rudolph had served as a conduit for French bribes to American politicians.<sup>73</sup> Despite some reservations, President Washington decided to sign the Jay Treaty with Britain in an effort to counter French influence that he feared had reached the highest levels of the U.S. government.<sup>74</sup> Initially, the French continued to exert considerable influence on American politics with the help of pro-French Republicans such as James Monroe, who was appointed by Washington as ambassador to France during that time.<sup>75</sup> But by 1797 the Jay Treaty had bolstered the American economy, and most Americans had turned against France for its incessant interference in American politics.<sup>76</sup>

During the Quasi-War with France,<sup>77</sup> Congress sought to further reduce French influence by passing the Alien and Sedition Acts of 1798.<sup>78</sup> This series of laws included the Naturalization Act, which extended the residency requirement for aliens to become citizens to fourteen years; the Alien Friends Act, which authorized the President to deport any resident alien deemed to be a danger to the "peace and safety"<sup>79</sup> of the United States; the Alien Enemies Act, which authorized deportation of any resident alien whose home country was at war with the United States; and the Sedition Act, which made it a crime to publish "false, scandalous and malicious" writings against the government or its officials.<sup>80</sup> The Sedition Act was the most controversial of the four laws,<sup>81</sup> but the Supreme Court never directly

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73. MILLER, *supra* note 44, at 73.

74. *Id.* Madison, in writing to Monroe, indicated that Washington had been advised against signing the treaty. Letter from James Madison to James Monroe, *supra* note 71.

75. See MILLER, *supra* note 44, at 73.

76. *Id.*

77. See *The Reestablishment of the Navy, 1787–1801*, NAVAL HISTORICAL CENTER, <http://www.history.navy.mil/biblio/biblio4/biblio4a.htm> (last visited June 15, 2011). Fought between 1798 and 1800, the Quasi-War was an undeclared maritime conflict between the United States and France. *Id.*

78. The Alien and Sedition Acts of 1798 were actually four separate laws: An Act to Establish a Uniform Rule of Naturalization, ch. 54, 1 Stat. 566 (1798); An Act Concerning Aliens, ch. 58, 1 Stat. 570 (1798); An Act Respecting Alien Enemies, ch. 66, 1 Stat. 577 (1798); An Act for the Punishment of Certain Crimes Against the United States, ch. 74, 1 Stat. 596 (1798).

79. An Act Concerning Aliens, ch. 58, 1 Stat. 570.

80. An Act for the Punishment of Certain Crimes Against the United States, ch. 74, 1 Stat. 596.

81. See *Virginia Resolutions Against the Alien and Sedition Acts* (Dec. 21, 1798), available



decided its constitutionality because it expired on March 3, 1801.<sup>82</sup>

## 2. The Rise of and Response to Foreign Corporate Influence

Despite the fact that only six corporations existed in the early Republic,<sup>83</sup> Jefferson and Madison greatly feared all factions, including corporations, and sought to limit their power.<sup>84</sup> In colonial America most states prohibited corporations from engaging in any activities not specified in their charters (known as the *ultra vires* doctrine), including owning property not directly related to those authorized activities.<sup>85</sup> Foreign trading companies established the Massachusetts Bay, Plymouth, Virginia, and Carolina colonies, and their charters restricted each colony to trading exclusively with its respective foreign parent company.<sup>86</sup> For example, both the Dutch West India Company and the Hudson Bay Company enjoyed a monopoly over trade in their respective areas, which prevented the colonists from dealing with the local Native Americans and non-sponsoring countries.<sup>87</sup> The colonists viewed such restrictions on free trade as exerting undue foreign influence over their way of life and eventually began to reject the charters. Most notably, the Sons of Liberty in Massachusetts strongly opposed English attempts to force the colonies to do business with the East India Company. Their

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at [http://www.constitution.org/jm/17981221\\_virres.htm](http://www.constitution.org/jm/17981221_virres.htm). The State Assembly of Virginia publicly condemned the Act as an intrusion by the federal government on the rights of people to free press and speech. *Id.*

82. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 276 (1964) (“Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history.” (footnote omitted)). Subsequently, Congress passed other laws to control participation by non-citizens in the American political process. *See also* Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended at 47 U.S.C. § 310 (2006)) (restricting alien ownership of a broadcasting license); Immigration and Nationality (McCarran-Walter) Act of 1952, 66 Stat. 163, 182–88 (codified as amended at 8 U.S.C. §§ 1101–1537 (1994)) (excluding communists from the U.S.); Internal Security Act of 1950, 64 Stat. 987, 1006–13 (codified as amended at 50 U.S.C. §§ 831–835 (1994)); Act of Mar. 3, 1903, ch. 1012, 32 Stat. 1213, 1214, 1221–22 (repealed 1907 and 1917) (forbidding the admission of anarchists to the United States).

83. Dale Rubin, *Corporate Personhood: How the Courts Have Employed Bogus Jurisprudence To Grant Corporations Constitutional Rights Intended for Individuals*, 28 QUINNIPIAC L. REV. 523, 526 (2010).

84. *Id.* at 526–28.

85. *Id.* at 532.

86. GERARD CARL HENDERSON, *THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW* 12–13 (1918).

87. *Id.* (explaining the charters generally gave the companies the exclusive power to make treaties with the Native Americans and the power to enforce these trading rights through the use of arms).

efforts led to the Boston Tea Party and ultimately to the American Revolution.<sup>88</sup>

After the Civil War, corporations grew significantly more powerful. New Jersey was the first state to change its corporate charters to permit free incorporation.<sup>89</sup> The Garden State was quickly followed by Delaware, New York, and other states abandoning the grant theory of incorporation<sup>90</sup> and joining in the race to the bottom.<sup>91</sup> These changes gave rise not only to hundreds of new corporations but also to tremendous increases in corporate revenue.<sup>92</sup> As these corporations became wealthier, they increased their spending in federal, state, and local elections to further their own interests.<sup>93</sup> In fact, state legislative efforts to bar corporate campaign contributions began in the 1890s, in tandem with the rise of corporate spending in elections.<sup>94</sup>

To stem this free flow of corporate political money, Congress passed the Tillman Act of 1907.<sup>95</sup> As the first major federal campaign finance law, its primary purpose was to prevent corruption or the appearance of corruption by corporations.<sup>96</sup> The Tillman Act banned all direct corporate contributions in connection with any federal or state election.<sup>97</sup> Although it provided for civil and criminal fines and

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88. EDWIN J. PERKINS, *THE ECONOMY OF COLONIAL AMERICA* 204 (2d ed. 1988).

89. HENDERSON, *supra* note 86, at 32–33.

90. The “grant theory of incorporation” viewed the corporation as an artificial entity “that owed its existence to the state, with its powers limited by its charter of incorporation.” Rubin, *supra* note 83, at 535. In contrast, modern incorporation statutes permit the formation of a company without having to first seek specific legislative permission.

91. *Id.* at 538.

92. See LOUISE OVERACKER, *MONEY IN ELECTIONS, POLITICS AND PEOPLE: THE ORDEAL OF SELF-GOVERNMENT IN AMERICA* 294 (1932).

93. See Richard Briffault, *Corporations, Corruption, and Complexity: Campaign Finance After Citizens United*, 20 CORNELL J.L. & PUB. POL’Y 643, 646 (2011).

94. *Id.* By 1905, five states had barred corporate campaign contributions, and by 1928 that number had grown to twenty-seven. *Id.*

95. Tillman Act of 1907, Pub. L. No. 59-36, 34 Stat. 864. The legislative history suggests two distinct rationales for the Act: “preventing corrupt practices acts” and preventing directors from using shareholders’ money without consent. H.R. REP. NO. 59-6397, at 1–2 (1907).

96. *FEC v. Beaumont*, 539 U.S. 146, 154 (2003) (citing *FEC v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 496–97 (1985)).

97. The Tillman Act provided, “[t]hat it shall be unlawful for any national bank, or any corporation organized by authority of any laws of Congress, to make a money contribution in connection with any election to any political office.” Tillman Act of 1907, Pub. L. No. 59-36, 34 Stat. 864

even imprisonment,<sup>98</sup> the statute had three fundamental shortcomings. First, it contained no disclosure requirements, so enforcement was virtually impossible.<sup>99</sup> Second, employers could reimburse corporate directors for making “personal” contributions.<sup>100</sup> Lastly, the Tillman Act only covered general elections, not primaries.<sup>101</sup> In 1910, Congress enacted the Federal Corrupt Practices Act (also known as the Publicity Act) to remedy the Tillman Act’s deficiencies.<sup>102</sup>

In 1938 Congress enacted the Foreign Agent Registration Act (FARA) because of growing concerns about foreign influence over U.S. policy-making.<sup>103</sup> A House Un-American Activities Committee initiative, FARA established disclosure requirements for certain kinds of political expression sponsored by foreign principals but did not place any restrictions on the speech itself. Initially, all “agents” of “foreign principals” in the United States were required to register with the federal government.<sup>104</sup> Congress intended this to prevent foreign efforts “to influence the external and internal policies of this country, thereby violating both the letter and the spirit of international law, as well as the democratic basis of our own American institutions of government.”<sup>105</sup> During World War II, Congress amended FARA to require foreign agents to place a written disclosure statement on all political propaganda and to provide the government with a detailed dissemination report including at least two copies of the propaganda material within forty-eight hours of

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98. The Tillman Act required that violators, “be punished by a fine of not exceeding one thousand and not less than two hundred and fifty dollars, or by imprisonment for a term of not more than one year, or both such fine and imprisonment in the discretion of the court.” *Id.* at 865.

99. See Anthony Corrado, *Money and Politics: A History of Federal Campaign Finance Law*, in THE NEW CAMPAIGN FINANCE SOURCEBOOK 7, 13 (2005) (stating that even after the Tillman Act’s passage, the NPLO continued to call for disclosure of party campaign receipts and expenditures so that voters would know which interests were financing which campaigns).

100. See Justin A. Nelson, *The Supply and Demand of Campaign Finance Reform*, 100 COLUM. L. REV. 524, 534 (2000).

101. *Id.*

102. Publicity Act of 1910, ch. 392, 36 Stat. 822 (repealed 1972); see also Nelson, *supra* note 100, at 534 (describing the “limited” effects of both the Publicity Act and Congress’s subsequent attempts at more stringent modifications to it in 1911).

103. Foreign Agents Registration Act of 1938, ch. 327, 52 Stat. 631 (1938) (current version at 22 U.S.C. §§ 611–621 (2006)).

104. 22 U.S.C. § 611(c)(1). FARA defines an “agent of a foreign principal” as “any person who acts . . . under the direction or control, of a foreign principal . . .” *Id.*

105. H.R. REP. NO. 75-1381, at 1–3 (1937).

any publication.<sup>106</sup> Congress intended these 1942 amendments to limit foreign involvement in U.S. politics because of the “vast amount of propaganda which the Axis powers sent into this country during World War II.”<sup>107</sup> FARA enabled the federal government to evaluate and subject to public scrutiny the “un-American activities” of foreign agents trying to establish a “foreign system of government” in this country.<sup>108</sup> Portions of FARA, as amended, are still in effect today.<sup>109</sup>

In 1943, Congress passed the Smith-Connally Act prohibiting corporations and unions from making campaign contributions in federal elections for the duration of the war.<sup>110</sup> Congress later passed the Taft-Hartley Act of 1947, which permanently banned any corporate or union contributions or expenditures relating to any federal primary, nominating convention, or general election.<sup>111</sup> According to the Court in *United States v. UAW-CIO*,<sup>112</sup> Congress intended for the Taft-Hartley Act “to protect the political process from what it deemed to be the corroding effect of money employed in elections by aggregated power.”<sup>113</sup> Congressional fear of foreign

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106. 22 U.S.C. § 614(a)–(b); see *Canadian Films and the Foreign Agents Registration Act: Oversight Hearing Before the Subcomm. Civil and Constitutional Rights of the H. Comm. of the Judiciary*, 98th Cong. 76–77 (1983) (statement of Mr. Edwards, and pursuant to his request, adoption of the dissemination report as a part of the record); *Amending Act Requiring Registration of Foreign Agents: Hearings on H.R. 6045 Before Subcomm. No. 4 of the H. Comm. on the Judiciary*, 77th Cong. (1941).

107. Robert G. Waters, Note, *The Foreign Registration Act: How Open Should the Marketplace of Ideas Be?*, 53 MO. L. REV. 795, 799 (1988) (providing additional legislative history); see also 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 (1997) (summarizing the Fulbright hearings); Rodney A. Smolla & Stephen A. Smith, *Propaganda, Xenophobia, and the First Amendment*, 67 OR. L. REV. 253, 267 (1988) (noting that propaganda was one of the reasons that FARA was amended in 1967).

108. H.R. REP. NO. 75-1381, at 2.

109. Lobbying Disclosure Act of 1995, Pub. L. No. 104-65, 109 Stat. 691. Under this Act, foreign agents representing foreign individuals, corporations, partnerships, and associations are allowed to provide less information than agents of foreign governments and political parties. *Id.* § 9; see also *Foreign Agents Registration Act*, U.S. DEP’T OF JUSTICE, <http://www.fara.gov/> (last visited Feb. 27, 2011) (providing a current overview of FARA).

110. Smith-Connally Act, ch. 144, 57 Stat. 163, 167–68 (1943) (terminated 1946); see also Corrado, *supra* note 99, at 17 (explaining the Act was only adopted as a wartime measure, and as such was due to expire after six months).

111. See Labor Management Relations Act of 1947, ch. 120, 61 Stat. 136 (1947). Informally known as the Taft-Hartley Act, the law was first codified at 18 U.S.C. § 610 (1946) and then later, as amended, at 29 U.S.C. §§ 151–166 (2006).

112. 352 U.S. 567 (1957).

113. *Id.* at 582.

influence was evident from language in the Taft-Hartley Act denying certification to any labor organization with officers tied to the Communist Party or who promoted communist ideas.<sup>114</sup>

The 1950s brought the treason-by-propaganda cases.<sup>115</sup> These cases involved individuals who had colluded with Nazi Germany to produce propaganda to demoralize the American troops and people. The decisions in these cases emphasized that simple words or actions indicating disagreement or criticism of the United States were not enough to sustain a conviction for treason.<sup>116</sup> The First Circuit Court of Appeals, for example, required proof that the defendant intended to betray the nation, such as an overt act of coordination with the enemy.<sup>117</sup> Being employed by the enemy as a propagandist, however, was enough for an individual to be prosecuted for treason.<sup>118</sup> The Supreme Court vigorously opposed easing the standards for proving treason, but it acknowledged that the government had a legitimate interest in protecting national security when threatened by individuals who coordinate their actions with a foreign entity.<sup>119</sup>

In 1966, Congress strengthened its restrictions on foreign-controlled political activities by amending FARA to make it a felony for a foreign principal to use an agent to make campaign contributions or for a candidate to solicit such contributions.<sup>120</sup> In

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114. H.R. REP. NO. 80-510, at 20–21 (1947) (Conf. Rep.), *reprinted in* 1947 U.S.C.C.A.N. 1135, 1154–55 (stating that it should be remembered that in 1947, the nation was only a couple of years removed from World War II and now found itself facing the threat of the Soviet Union and the potential spread of communism).

115. *See Gillars v. United States*, 182 F.2d 962, 966 (D.C. Cir. 1950) (stating that multiple witnesses testified that Gillars used speech with the intent of betraying American interests in favor of Germany); *Cramer v. United States*, 325 U.S. 1, 32–33 (1948) (stating that Cramer had been known to associate with Nazi sympathizers and had made remarks that were critical of the U.S. government but had not committed acts that demonstrated an outright intent to betray the United States in favor of Germany).

116. The Supreme Court in *Cramer* ruled there was insufficient evidence to convict, arguing that the Founders had intended for the term overt act to indicate a blatant demonstration of treasonous intent against the U.S. *Cramer*, 325 U.S. at 45.

117. *See Chandler v. United States*, 171 F.2d 921, 929 (1st Cir. 1948).

118. *See United States v. Provo*, 215 F.2d 531, 537 (2d Cir. 1954); *D'Aquino v. United States*, 192 F.2d 338, 349 (9th Cir. 1951); *Burgman v. United States*, 188 F.2d 637, 639 (D.C. Cir. 1951); *Best v. United States*, 184 F.2d 131, 137–38 (1st Cir. 1950).

119. *See Cramer*, 325 U.S. at 45–48. In its ruling the Court made it clear that it was not opposed to the U.S. government protecting its interests; it even acknowledged that certain coordination with foreign entities could present a threat. It simply declared that treason is an extremely volatile tool that should not be wielded lightly and urged the government to pursue other avenues in protecting itself against foreign influence. *Id.*

120. Foreign Agents Registration Act of 1966, Pub. L. No. 89-486, 80 Stat. 248–49 (1966)

particular, Congress designed these 1966 amendments to reach “the lawyer-lobbyist and the public relations counsel whose object [was] not to subvert or overthrow the U.S. Government, but to influence its policies to the satisfaction of the particular client.”<sup>121</sup> Unfortunately, even as amended, FARA focused exclusively on foreign principals’ agents rather than the principals themselves.<sup>122</sup> This created a glaring “agents-only” loophole that foreign corporations generously exploited.<sup>123</sup>

### 3. Modern Political Scandals Involving Foreign Corporations

The Federal Election Campaign Act of 1971 (FECA)<sup>124</sup> ushered in the modern era of federal campaign finance law. Congress passed FECA primarily out of concern that wealthy candidates could use family money to gain an unfair advantage in a campaign.<sup>125</sup> FECA’s passage was also motivated by general concerns about the rising cost of elections.<sup>126</sup> In 1974, however, Congress amended FECA to close the loophole in FARA that had permitted foreign nationals and corporations to provide campaign funds directly to candidates.<sup>127</sup>

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(current version at 2 U.S.C. § 441e (2006)). See H.R. REP. NO. 89-1470, at 2–4 [hereinafter HOUSE REPORT], reprinted in 1966 U.S.C.C.A.N. 2397, 2397–99.

121. Waters, *supra* note 107, at 800. For example, major clients included Philippine sugar manufacturers who wished to influence legislation concerning sugar import quotas. Jeffrey K. Powell, *Prohibitions on Campaign Contributions from Foreign Sources: Questioning Their Justification in a Global Independent Economy*, 17 U. PA. J. INT’L ECON. L. 957, 960 (1996).

122. See 22 U.S.C. § 611(c) (corresponds to 80 Stat. 244, 244) (2006) (defining the “agent of a foreign principal” as any person who acts “under the direction or control, of a foreign principal or of a person . . . directly or indirectly supervised, directed, controlled, financed, or subsidized in whole or in major part by a foreign principal”). Business associations that are organized in the U.S. are not classified as foreign principals. 22 U.S.C. § 611(b)(2).

123. Senator Bentsen later noted this when pressing for the extension of the ban to cover all foreign nationals: “The law is ambiguous and confusing . . . Congress thought it had taken care of the matter long ago but the Department of Justice said that the law . . . only applies to those who had agents within this country.” 120 CONG. REC. S4714 (1974). The exploitation of the loophole became all too obvious during the investigation of the scandals that plagued the Nixon administration. See Martin Tolchin, *Foreign Role in U.S. Politics Questioned*, N.Y. TIMES, Jan. 8, 1986, at B7.

124. Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. §§ 431–455 (2006)). The bill went into effect on April 7, 1972. Bryan R. Whittaker, *A Legislative Strategy Conditioned on Corruption: Regulating Campaign Financing After McConnell v. FEC*, 79 IND. L.J. 1063, 1068–69 (2004).

125. See SUZANNE M. COIL, CAMPAIGN FINANCING 10 (1994).

126. See *id.* at 12. Ironically, some of these concerns came from members of Congress who were worried that they might not be able to afford the rising costs of campaigning. See Whittaker, *supra* note 124, at 1068–69.

127. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263

Although FARA had been abused in this manner for almost a decade, the American public was largely unaware of the law's giant loophole until the Watergate scandal.<sup>128</sup>

During the investigation of that scandal, it was revealed that President Nixon, in his 1972 presidential election campaign, had accepted well over \$10 million in overseas donations.<sup>129</sup> In response, Senator Lloyd Bentsen proposed an amendment to FECA ("the Bentsen Amendment") that would bar all foreign nationals, except permanent resident aliens (PRAs), from making any campaign contributions in federal, state, or local elections.<sup>130</sup> It also banned

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(1974). Congressional concerns about the rise of foreign influence within domestic corporations are further evidenced by the passage of the Foreign Corrupt Practices Act of 1977 (FCPA). *See* Pub. L. 95-213, §§ 101-04, 91 Stat. 1494, 1494-98 (1977) (codified as amended at 15 U.S.C. §§ 78dd-1-3). It prohibits U.S. individuals and corporations from paying bribes or anything of value to a foreign government official. *Id.* Among other things, the FCPA prohibits U.S. companies from making political contributions overseas. *Id.* The assumption is U.S. domestic law is sufficient to address any bribery here in the United States. However, the Domestic and Foreign Investment Improved Disclosure Act of 1977 includes provisions mandating that anyone who acquires or attempts to acquire shares of U.S. domestic securities or interests is required to notify the Securities and Exchange Commission of his or her residence and nationality. Pub. L. No. 95-213, §§ 201-04, 91 Stat. 1494, 1298-300 (1977) (codified as amended at 15 U.S.C. §§ 78a note, 78m, 78o).

128. *See generally* John W. Dean, III, *Watergate: What Was It?*, 51 HASTINGS L.J. 609, 645-49 (2000) (discussing the details of the Watergate scandal).

129. *See* Powell, *supra* note 121, at 961 n.21. The Watergate scandal involved almost \$20 million dollars in unreported, corporate campaign contributions. For example, the Amerada Hess Corporation made secret donations of more than \$575,000 to the campaigns of President Nixon and Senator Henry Jackson (Chair of the Interior Committee). A short time later, the Department of Interior dropped an investigation into one of the company's oil refineries. *See Senate Panel Data Show Donor Hid Gifts to Jackson's '72 Race*, N.Y. TIMES, Aug. 8, 1974, at B25. There were many other reported stories of the money being used for corrupt, illegal purposes. *See* ROBERT E. MUTCH, CAMPAIGNS, CONGRESS AND COURTS: THE MAKING OF FEDERAL CAMPAIGN FINANCE LAW 47 (1988). Perhaps most famously, two Washington Post reporters, Bob Woodward and Carl Bernstein, broke the story that some of the illegal corporate money had been laundered through a Mexico City bank and used to pay the men who bugged and burglarized Democratic National Committee headquarters in the Watergate hotel-apartment building. *Id.* In addition to the money laundering through Mexico banks, Nixon allegedly received \$1.5 million from the Shah of Iran, approximately \$10 million from Arab interests, and \$2 million from a wealthy French man named Paul Louis Weiller. Powell, *supra* note 121, at 961 n.20. *But see* MAURICE H. STANS, THE TERRORS OF JUSTICE 182-84 (1978) (denying that Nixon's campaign committee actually received these funds and arguing that such allegations were false).

130. Martin Tolchin, *Foreign Role in U.S. Politics Questioned*, N.Y. TIMES, Jan. 8, 1986, at B7. The law was first adopted in 1976 as an amendment to the Federal Election Campaign Act and was later recodified at Section 441e. *See* 2 U.S.C. § 441e (2006). The term "foreign national" included any "foreign principal," as defined in FARA, as well as any individual who is neither a U.S. citizen nor a permanent resident of the United States. 120 CONG. REC. 8782 (1974). The definition proposed by the U.S. General Accounting Office further included any corporation (or other group or organization) that was not created under the laws of the U.S. or that did not maintain its principle place of business with in the U.S. *Id.*; Daniel S. Savrin, Note, *Curtailing Foreign Financial Participation in Domestic Elections: A Proposal to Reform the Federal*

candidates from soliciting or accepting funds from foreign nationals.<sup>131</sup> Other FECA amendments were also proposed in 1974, including one establishing the FEC.<sup>132</sup> During the Senate debates on the 1974 amendments, Bentsen convincingly argued that foreign principals do not have “any business in our political campaigns. They cannot vote in our elections so why should we allow them to finance our elections? Their loyalties lie elsewhere; they lie with their own countries and their own governments.”<sup>133</sup> The Bentsen Amendment passed as part of the 1974 amendments.<sup>134</sup> However, it was not until 1976 that Congress granted the FEC jurisdiction to implement and enforce the Bentsen Amendment, which was eventually codified at 2 U.S.C. § 441e.<sup>135</sup>

In 1989, the FEC issued rules extending the prohibition on contributions to, among other things, independent expenditures by foreign nationals.<sup>136</sup> The FEC also formalized its official position that

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*Election Campaign Act*, 28 VA. J. INT’L L. 783, 794 n.41 (1988) (discussing the legislative history of 2 U.S.C. § 441e).

131. 120 CONG. REC. 8782.

132. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263.

133. 120 CONG. REC. 8783. Senator Bentsen repeatedly expressed his concern over stories . . . in recent months of the enormous amounts of money contributed in the last political campaign by foreign nationals. We have heard of the hundreds of thousands of dollars sloshing around from one country to another, going through foreign banks, being laundered through foreign banks; and we have heard allegations of concessions being made by the Government to foreign contributors.

120 CONG. REC. 8782. He added,

Many in this country have expressed concern over the inroads of foreign investment in this country, over the attempts by foreigners to control U.S. business. Is it not even more important to try to stop some of these foreigners from trying to control our politics? . . . American political campaigns should be for Americans . . .

120 CONG. REC. 8783. Bentsen intended his amendment to limit the “privilege to contribute [campaign funds in American political campaigns] . . . to U.S. citizens and to those who have indicated their intention to live here, are here legally, and are permanent residents.” 120 CONG. REC. 8784.

134. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974). The Amendment was passed by a unanimous vote of 89-0. 120 CONG. REC. 8786. However, until the 1976 Amendments placed the ban under the jurisdiction of the FEC, the Bentsen Amendment would have been considered an amendment to the criminal code. *See* 18 U.S.C. § 613 (repealed 1976).

135. *See* Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 112(2), 90 Stat. 475, 484-95 (1976) (codified as amended at 2 U.S.C. § 441e (2006)) (adding the prohibition on foreign contributions as section 324 of FECA); *see also* Savrin, *supra* note 130, at 794-95 (discussing the FEC’s role in administering the Bentsen Amendment).

136. *See* Brown, *supra* note 107, at 503 n.48 (citing *Restrictions on Foreign Nationals Extended*, reprinted in 4 FED. ELECTION CAMP. FIN. GUIDE (CCH) ¶ 9276 (Nov. 17, 1989)); *see*



a foreign national with control or ownership of a domestic subsidiary could not make decisions with regard to that subsidiary's participation in the U.S. political process.<sup>137</sup> This quickly devolved into the regulatory loophole for foreign-controlled and foreign-owned domestic corporations that Congress and the courts find themselves confronting today.<sup>138</sup>

In 1996, another scandal involving foreign corporate campaign spending arose. That year the Democratic National Committee (DNC) received several large contributions from PRAs with foreign business connections. The controversy regarding these donations caused the DNC to return millions of dollars in questionable contributions, but not before allegations surfaced that foreign governments, including China's, may have attempted to funnel money to the Democratic party.<sup>139</sup> In response, Senators John McCain and Russell Feingold introduced a bill that would have barred PRAs from making contributions in federal elections.<sup>140</sup> Related bills were introduced in the House, and President Clinton endorsed the idea in his State of the Union address.<sup>141</sup> Although the bill changed dramatically before it passed,<sup>142</sup> eventually the McCain-Feingold Act was signed into law as the Bipartisan Campaign

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also 2 U.S.C. § 431(17); 11 C.F.R. §§ 100.16, 109.1 (2010).

137. See 11 C.F.R. § 110.20(i) ("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."); see also Brown, *supra* note 107, at 513–14.

138. See 29 Op. Fed. Election Comm'n 2–3 (1989) (deducing that a corporation organized under U.S. laws was exempt from the ban on foreigners even if it was a subsidiary of a foreign parent and could create a SSF for contribution purposes, provided its foreign owners did not fund or participate in the decision-making concerning the SSF). *But see* 29 Op. Fed. Election Comm'n Dissent 5–6 (arguing that the Commission's separation of the domestic subsidiary and its foreign parent into two entities was an error). The problem created by this ruling came to fruition in the Supreme Court's ruling in *Citizens United*. See *infra* text accompanying notes 159–61.

139. See Brown, *supra* note 107, at 505–06.

140. See LIBRARY OF CONGRESS THOMAS, Bill Summary & Status 107th Congress (2001–2002) S.27, <http://thomas.loc.gov/cgi-bin/bdquery/z?d107:S.27>: (last visited June 15, 2011).

141. Brown, *supra* note 107, at 507.

142. In fact, it is ironic that the law is still commonly referred to as the McCain-Feingold Act because the Senate version is not the bill that became law. Instead, the companion legislation, H.R. 2356—introduced by Rep. Christopher Shays (R-Connecticut)—is the version that became law. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002). Shays-Meehan was originally introduced as H.R. 380.

Reform Act of 2002 (BCRA).<sup>143</sup> Among other things, section 303 of the BCRA amended FECA to expand the ban on campaign contributions from foreign nationals and foreign-based groups to include donations, expenditures, independent expenditures, disbursements for electioneering communications, and contributions or donations to any political party committee.<sup>144</sup> Since its passage, the BCRA has faced a series of legal challenges before the Supreme Court.<sup>145</sup>

*B. Current Campaign Finance Laws Covering  
Foreign-Controlled Corporate Political Spending*

Corporate campaign financing is currently governed by section 203 of the BCRA (“Section 203”), which continues to be more commonly referred to as the McCain-Feingold Act.<sup>146</sup> Among other things, Section 203 prohibits corporations from making campaign contributions out of their general treasury funds in connection with federal elections and also imposes various disclosure requirements.<sup>147</sup> Until *Citizens United*, Section 203 also prohibited all corporations—including nonprofit advocacy groups—from making independent expenditures expressly advocating candidates’ election or defeat and from engaging in electioneering communication.<sup>148</sup> An electioneering

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143. *Id.*

144. *Id.* § 303.

145. See *Citizens United*, 130 S. Ct. 876 (2010); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007); *McConnell v. FEC*, 540 U.S. 93 (2003).

146. Bipartisan Campaign Reform Act § 203.

147. The McCain-Feingold Act extended disclosure requirements to the national committees, national congressional campaign committees of political parties, and any other political committees with receipts and disbursements aggregating \$5000; local and state parties were included as well to force disclosure of soft-money use. See *id.* § 103. The McCain-Feingold Act also tightened down disclosure requirements for electioneering communications by requiring those who spent \$10,000 or more on electioneering communications to file a report containing the identity of the financier, his place of occupation, the identity of the person who helped contribute to the communication’s creation, and whether or not the person was a foreign national; such reports had to be filed within twenty-four hours of a disclosure date. See *id.* § 201. Strict disclosure requirements for independent expenditures were also put in place; for example, anyone who made an independent expenditure of \$1000 or more in less than twenty days but more than twenty-four hours before an election would be required to report the expenditure within twenty-four hours of having made it. See *id.* § 212.

148. Unless the corporation is federally chartered or a national bank, these limits under 2 U.S.C. § 441b only apply in federal elections, not state or local elections. Anthony Corrado, *Introduction to Party Soft Money*, in *CAMPAIGN FINANCE REFORM* 167, 169 (1997). Additionally, corporations—including American subsidiaries of foreign corporations—were and still are permitted, because of a loophole in the laws, to make unlimited soft-money donations to

communication is defined as “any broadcast, cable, or satellite communication” that “refers to a clearly identified candidate for Federal office” and is made within thirty days of a primary election or sixty days before a general election.<sup>149</sup> In 2010, however, the Supreme Court in *Citizens United* struck down Section 203’s ban on corporate independent expenditures, including the blackout periods imposed on electioneering communications.<sup>150</sup> This decision overturned *Austin v. Michigan Chamber of Commerce*,<sup>151</sup> and partially overturned *McConnell v. FEC*,<sup>152</sup> both of which had previously upheld the ban.<sup>153</sup> However, Section 203’s limits on corporate contributions remain intact.<sup>154</sup> In addition, the Court upheld and even encouraged a possible expansion of the BCRA’s disclosure requirements.<sup>155</sup>

FECA subjects foreign corporations to additional restrictions, which are codified at 2 U.S.C. § 441e.<sup>156</sup> It bars all “foreign nationals” except PRAs from making any contributions in connection with a federal, state, or local election.<sup>157</sup> Section 441e, as interpreted by the FEC and as later amended by the BCRA, also bans foreign nationals from making any independent expenditures or

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national political parties and 527 groups for nonpartisan registration and get-out-the-vote drives or issue ads. *See id.* at 167–77. But foreign-controlled subsidiaries are only permitted to donate money earned in the United States. Bipartisan Campaign Reform Act § 101.

149. *Id.* § 201. Section 203 bans electioneering communications funded by corporations. *See* 29 Op. Fed. Election Comm’n 3 (1989). This provision may have unintentionally encouraged the proliferation of negative ads by permitting issue advocacy ads that did not expressly advocate the election or defeat of a particular candidate. *See* Corrado, *supra* note 99, at 32–33.

150. 130 S. Ct. 876, 913 (2010). The *Citizens United* decision is also likely to affect laws in twenty-four states that currently prohibit or restrict corporate spending on candidate elections. *Life After Citizens United*, NAT’L CONFERENCE OF STATE LEGISLATURES (Jan. 4, 2011), <http://www.ncsl.org/default.aspx?tabid=19607>. These state laws will have to be revised to comport with this new standard. *See id.*

151. 494 U.S. 652 (1990).

152. 540 U.S. 93 (2003).

153. *Citizens United*, 130 S. Ct. at 913. The Court then declared its return to the *Belotti* mindset that corporations cannot be banned from political speech simply because they are corporations. *Id.* *See generally infra* text accompanying notes 202–08 (providing further background on *Austin* and *McConnell*).

154. *Id.* at 901–02.

155. *Id.* at 914–17.

156. Campaign finance regulations currently impose “unique and complex rules” on “71 distinct entities.” *Id.* at 895. These entities are subject to separate rules for thirty-three different types of political speech. *Id.*

157. 2 U.S.C. § 441e(a)(1)(A)–(B) (2006).

disbursements for electioneering communications.<sup>158</sup> The definition of “foreign national” includes any corporation that was not created under U.S. law or that does not maintain its principal place of business in the United States.<sup>159</sup> Based on this definition, the FEC has interpreted Section 441e to exempt foreign-controlled or foreign-owned domestic corporations.<sup>160</sup> After *Citizens United*, this interpretation means foreign corporations’ American subsidiaries may make unlimited independent expenditures, including those for electioneering communications.<sup>161</sup> They may also establish, administer, and solicit funds for PACs,<sup>162</sup> which are subject to contribution limits but have always been exempt from the ban on independent expenditures.<sup>163</sup>

However, foreign-controlled domestic corporations’ independent expenditures are not free from regulation. For example, foreign-controlled domestic corporations can only use monies earned in the United States for their political activities directed here.<sup>164</sup> A foreign parent entity cannot provide any of the funds, and it may not

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158. *Id.* § 441e(a)(1)(C).

159. 22 U.S.C. § 611(b) (2006). It also includes foreign governments, political parties and individuals without permanent resident status. *Id.* § 611(a).

160. See 11 C.F.R. § 110.20 (2010); see also 29 Op. Fed. Election Comm’n 2–3 (1989) (“Under U.S.C. § 611(b), a corporation organized under the law [of] any state within the United States whose principal place of business is within the United States is not a foreign principal and, accordingly, would not be a foreign national under 2 U.S.C. § 441e.”). Since 1975 the FEC has issued over 568 pages of regulations, 1,278 pages of explanations for those regulations, and 1,771 advisory opinions. *Citizens United*, 130 S. Ct. at 895.

161. See Louis Jacobson, *Why Alito Shook His Head: Obama Exaggerates Impact of Supreme Court Ruling on Foreign Companies*, ST. PETERSBURG TIMES (Jan. 27, 2010, 11:56 PM), <http://www.politifact.com/truth-o-meter/statements/2010/jan/27/barack-obama/obama-says-supreme-court-ruling-allows-foreign-com/>. Corporations previously gave soft money to national political parties earmarked for get-out-the-vote efforts and other nonpartisan activities to get around the limits on independent expenditures. After *Citizens United*, this has become unnecessary.

162. 2 U.S.C. § 441b(b)(2). The regulations refer to PACs as “separated segregated funds” (SSFs). *Id.* In 1996, close to 100 foreign-controlled PACs actively supported U.S. political campaigns. Today more than 140 PACs with foreign connections do. See *Foreign-Connected PACs*, CTR. FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/pacs/foreign.php?cycle=2008> (last visited Jan. 21, 2011).

163. PACs are committees organized for the purpose of raising and spending money in order to elect or defeat certain candidates, but PACs have their own natural dollar limits based on the disposable income of their individual members. See *What Is A PAC?*, CTR. FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/pacs/pacfaq.php> (last visited Jan. 21, 2011).

164. See 29 Op. Fed. Election Comm’n 2–3 (1995). This stems from the FEC’s mandate that PAC members consist only of U.S. citizens and PRAs and that a PAC solicit its donations from only those members. See 15 Op. Fed. Election Comm’n 2–4 (1995).

“replenish all or any portion of the subsidiary’s political contributions.”<sup>165</sup> In fact, a foreign national cannot have any decision-making role regarding the domestic corporation’s political contributions or expenditures.<sup>166</sup>

Likewise, foreign parent PACs have to be funded exclusively by money provided by U.S. citizens and permanent residents associated with the sponsoring corporation, such as stockholders and employees.<sup>167</sup> According to various FEC advisory opinions, PACs cannot accept contributions from foreign nationals, and no foreign national may be involved in the administration of the fund or in any decisions regarding how the fund’s money should be spent.<sup>168</sup> The foreign parent may not even pay for a PAC fund’s administrative costs.<sup>169</sup>

### C. Recent Congressional Proposals to Prevent Foreign Influence

In the past, the FEC has invited Congress to review its decisions concerning foreign financial participation in U.S. elections to ensure that the FEC resolved the policy questions correctly.<sup>170</sup> Although the legislative history and strong dissents by some FEC members suggest that the FEC has gotten it wrong some of the time,<sup>171</sup> Congress has repeatedly declined to undo the FEC’s most controversial rulings. The Supreme Court’s controversial decision in *Citizens United*, however, appears to have upended this balance. All of the Framers’ fears of foreign influence on the American political

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165. Powell, *supra* note 121, at 966 n.63.

166. See Brown, *supra* note 107, at 514 n.52.

167. 2 U.S.C. § 441b(b)(2).

168. See 17 Op. Fed. Election Comm’n 6–8 (2000).

169. See *id.* at 8.

170. See Savrin, *supra* note 130, at 807.

171. For example, the FEC ruled that domestic subsidiaries of foreign corporations could contribute to elections through PACs so long as there was no foreign involvement in the funding and administration of the PAC. 17 Op. Fed. Election Comm’n 6–10 (2000). The FEC also ruled that foreign nationals may work or perform services for campaigns so long as there are not any finances involved. 25 Op. Fed. Election Comm’n. 1–2 (1987). These rulings were inconsistent with congressional intent. Senator Bentsen said, “I do not think that foreign nationals have any business in our political campaigns.” 120 Cong. Rec. 8783. Bentsen reasoned that foreigners are not loyal to this country; therefore, they should not be allowed to financially participate in the selection of a government to represent and carry out the nation’s interests. *Id.* For this reason, several commissioners dissented from the FEC advisory opinions. See 17 Op. Fed. Election Comm’n Dissent 1 (2000); 28 Op. Fed. Election Comm’n Dissent 1 (1999); 16 Op. Fed. Election Comm’n Dissent 1 (1992); 29 Op. Fed. Election Comm’n Dissent 1 (1989).

process have resurfaced, prompting several congresspersons to offer new reform bills as the cure.<sup>172</sup>

The Obama administration maintains that *Citizens United* opened the floodgates for political spending not only by U.S. corporations but more particularly by foreign corporations' U.S. subsidiaries. In his State of the Union address, Obama criticized the Supreme Court's decision in *Citizens United*, declaring:

With all due deference to separation of powers, last week the Supreme Court reversed a century of law that I believe will 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.<sup>173</sup>

While the *Citizens United* decision avoided striking down the existing ban on foreign political money, its elimination of the blackout period on corporate electioneering has significantly widened the door for foreign-controlled or foreign-owned domestic corporations to exploit the administrative loophole created by the FEC's interpretation of Section 441e. In response, several members of Congress have stepped forward to challenge the FEC's interpretation of Section 441e as a whole.<sup>174</sup>

The campaign finance reform bills introduced in the 111th Congress addressed the issue of foreign influence on U.S. politics in a variety of ways. A majority of the proposed bills would have

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172. See *Democrats Move to Blunt Citizens United Ruling*, POLITICO (Apr. 24, 2010, 11:47 PM), <http://www.politico.com/news/stories/0410/36303.html>.

173. President Barack Obama, 2010 State of the Union Address (Jan. 27, 2010). These remarks prompted Justice Samuel Alito to frown and mouth the words "not true." Alan Silverleib, *Gloves Come Off After Obama Rips Supreme Court Ruling*, CNN (Jan. 28, 2010, 1:26 PM), <http://www.cnn.com/2010/POLITICS/01/28/alito.obama.sotu/index.html?iref=allsearch>.

174. See 156 CONG. REC. S531 (daily ed. Feb. 9, 2010) (statement by Sen. Leahy) ("The court's ruling exacerbates the already existing loophole allowing campaign contributions from American subsidiaries of foreign corporations. Today, an American subsidiary of a multinational corporation is treated as an American corporation under the campaign finance laws. . . . How will the Federal Elections Commission be able to police whether the *actual* source of a campaign contribution comes solely from the domestic entity, and not its foreign affiliations? When a multinational corporation funds a political advertisement, is the FEC expected to audit the foreign and domestic sides of the corporation, to ensure that the source of the contribution came purely from the U.S. subsidiary? How can the FEC ensure that American subsidiaries of foreign corporations do not become a front for foreign interests who want to influence American elections?" (emphasis added)).

extended the ban on foreign nationals to any domestic corporation in which one or more foreign nationals had any ownership interest whatsoever.<sup>175</sup> Other bills would have extended the ban to domestic corporations in which foreign nationals own at least half of the voting shares.<sup>176</sup> A few bills would have extended the ban based on smaller percentages of ownership by foreign nationals.<sup>177</sup> At least one bill would have prohibited corporations that are considered foreign-owned from having PACs that could spend money on elections.<sup>178</sup> The common thread among all of these proposals was that they would have limited foreign-controlled and foreign-owned domestic corporations' influence on the U.S. political process.

The House passed one of the proposed reform bills, known as the DISCLOSE (Democracy Is Strengthened by Casting Light On Spending in Elections) Act, on June 21, 2010, but it failed twice to pass in the Senate.<sup>179</sup> Obama called the Senate's inaction "a victory for special interests and U.S. corporations—including foreign-

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175. *See* America Is for Americans Act, H.R. 4510, 111th Cong. § 2 (2010) (proposing to amend Section 441e to include corporations in which a foreign national possesses a direct or indirect ownership interest) (introduced by Rep. Alan Grayson); Prohibiting Foreign Influence in American Elections Act, H.R. 4522, 111th Cong. § 2 (2010) (containing amendment language identical to that of H.R. 4510) (introduced by Rep. Bill Pascrell Jr.); Save Our Democracy from Foreign Influence Act of 2010, H.R. 4523, 111th Cong. § 2 (2010) (proposing to amend Section 441e to include corporations with one or more foreign nationals as shareholders) (introduced by Rep. Thomas Perriello); Prohibiting Foreign Influence in American Elections Act, S. 2954, 111th Cong. § 2 (2010) (containing language identical to H.R. 4510 and H.R. 4522) (introduced by Sen. Robert Menendez).

176. *See* Prevent Foreign Influence in our Elections Act, H.R. 4540, 111th Cong. § 2 (2010) (proposing to amend the language of Section 441e to include corporations that have 50 percent or more of their outstanding shares controlled directly or indirectly owned by foreign nationals) (introduced by Rep. Rosa L. DeLauro); Ethics in Foreign Lobbying Act of 2009, H.R. 3859, 111th Cong. § 2 (2009) (proposing to extend the ban on foreign contributions and expenditures to the PACs of corporations in which foreign nationals hold 50 percent or more of the ownership interests) (introduced by Rep. Marcy Kaptur).

177. *See* American Elections Act of 2010, S. 2959, 111th Cong. (2010) (proposing to extend the ban to corporations with 20 percent of their voting shares or a majority of their board of directors controlled by foreign nationals) (introduced by Sen. Al Franken); Freedom from Foreign-Based Manipulation in American Elections Act of 2010, H.R. 4517, 111th Cong. (2010) (proposing to extend the ban on contributions and expenditures by foreign nationals to domestic corporations if they have 5 percent or more of their outstanding shares owned by foreign principals, or if a foreign national sits on the board of directors, or if one or more foreign nationals is employed in a senior executive position, and severely increasing the monetary penalties for violations) (introduced by Rep. John J. Hall).

178. *See* H.R. 3859 (proposing to extend the ban on foreign contributions and expenditures to the PACs of corporations in which foreign nationals hold 50 percent or more of the ownership interests) (introduced by Rep. Marcy Kaptur).

179. The bill failed to achieve cloture on July 28, 2010, and again on September 23, 2010, by one vote short of the sixty votes needed to reach the Senate floor for action.

controlled ones—who are now allowed to spend unlimited money to fill our airwaves, mailboxes and phone lines right up until election day.”<sup>180</sup> Among other things, the DISCLOSE Act would have extended the ban on contributions and expenditures by foreign-owned and foreign-controlled domestic corporations and their PACs.<sup>181</sup> Under the bill, a domestic corporation would have been deemed ineligible to participate in the funding of the U.S. political process if 5 percent or more of its voting shares were controlled by a foreign government, a foreign government official, or a corporation principally owned by a foreign government or its officials or by multiple foreign citizens.<sup>182</sup> A domestic corporation would also have been considered ineligible if 20 percent or more of its voting shares were owned or controlled by a foreign citizen who is not a government official. The ban would also have extended to domestic corporations that have foreign nationals serving as a majority of their board of directors.<sup>183</sup> At the start of the 112th Congress Senate majority leader Harry Reid made the DISCLOSE Act one of his top priorities by filling one of the first ten legislative slots of the new Congress with the Political Reform and Gridlock Elimination Act (S.9), which “expresses the sense of the Senate that Congress should pass the DISCLOSE Act to prevent a corporate takeover of our elections and ensure that our democracy is open, transparent, and controlled by the people.”<sup>184</sup> Regardless of Congress’s intentions, the constitutional question remains whether foreign-controlled and foreign-owned American corporations have First Amendment rights, and if they do, whether and to what extent Congress may constitutionally restrict their freedom of speech and association

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180. Michael A. Memoli, *Disclose Act Fails to Advance in Senate*, L.A. TIMES, Sept. 24, 2010, at A2.

181. See DISCLOSE Act, H.R. 5175, 111th Cong. § 201 (2010). The bill also imposed enhanced disclaimers in advertising, stricter disclosure rules to allow shareholders and the public to know where the corporate money was going, and tightened coordination rules to prevent corporations from “sponsoring” candidates. *Id.*

182. *Id.* § 102.

183. See *id.* It is worth noting that the Senate version of this bill was not as strict. Rather than extend the ban to any corporation that has even 5 percent of its shares owned by a foreign government or a foreign government official, the Senate bill simply applied the 20 percent voting share requirement to all corporations. If this bill had cleared the Senate, it would have been interesting to see which requirements would have been adopted in the conference committee. See S. 3295, 111th Cong. § 102 (2010).

184. See Political Reform and Gridlock Elimination Act, S.9, 112th Cong. (2011). However, Senator Reid did not reintroduce the text of the DISCLOSE Act itself. *Id.*



rights.

### III. SUPREME COURT JURISPRUDENCE ON CORPORATE POLITICAL SPEECH

The constitutional issues raised by the DISCLOSE Act and the other proposed reform bills occupy a gray area between *Citizens United* and *HLP*. As a threshold matter, it should be noted that a court has never examined the constitutionality of Section 441e's current ban on foreign corporations' campaign spending.<sup>185</sup> The Court in *Citizens United* expressly stated it was reserving judgment on that question.<sup>186</sup> As Justice Kennedy explained:

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. Cf. 2 U.S.C. § 441e (contribution and expenditure ban applied to "foreign national[s]"). Section 441b[, the provision at issue in that case,] 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.<sup>187</sup>

It is even more difficult to predict what the Court will do when faced with limits on foreign influence vis-à-vis restrictions on foreign-controlled and foreign-owned American companies. However, before tackling that issue it is important to understand the evolution of corporate campaign spending laws in general and how the Supreme Court came to view them as political speech.

#### A. Pre-Citizens United

##### First Amendment protection for corporate campaign spending

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185. *Citizens United*, 130 S. Ct. at 947 (Stevens, J., dissenting) ("Although we have not reviewed them directly, we have never cast doubt on laws that place special restrictions on campaign spending by foreign nationals."). *Contra* United States v. Kanchanalak, 192 F.3d 1037, 1047-48 (D.C. Cir. 1999) (finding the FEC reasonably interpreted Section 441e, barring foreign nationals from making hard money contributions and soft money donations in connection with election to "any political office" as applying to federal, state, and local elections).

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

187. *Id.*

has evolved significantly over the last thirty years. Most importantly, in the seminal case of *Buckley v. Valeo*<sup>188</sup> the Supreme Court concluded that laws that limit campaign spending threaten basic First Amendment rights.<sup>189</sup> The Court's finding that "money is speech" rendered virtually every campaign finance regulation constitutionally suspect.<sup>190</sup> However, federal contribution limits and disclosure requirements were upheld because a majority of the Court concluded that they served the governmental interests of limiting "corruption and the appearance of corruption."<sup>191</sup>

But the Court struck down expenditure limits because it found that the "government interest in preventing corruption and the appearance of corruption is inadequate to justify section 608(e)(1)'s ceiling on independent expenditures," which "do[] not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions."<sup>192</sup> In the Court's estimation, "the absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate."<sup>193</sup> The Court rejected the government's argument that steps needed to be taken to "level the playing field" in campaigns.<sup>194</sup> The Court also brushed aside the government's suggestion that such limitations were needed because the amount of money being spent on campaigns was too high.<sup>195</sup> The

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188. 424 U.S. 1 (1976).

189. *Id.* at 84.

190. *Id.* at 262 (White, J., concurring in part and dissenting in part).

191. *Id.* at 45 (majority opinion).

192. *Id.* at 45–46.

193. *Id.* at 47.

194. *Id.* at 56 ("The interest in equalizing the financial resources of candidates competing for federal office is no more convincing a justification for restricting the scope of federal election campaigns. Given the limitation on the size of outside contributions, the financial resources available to a candidate's campaign, like the number of volunteers recruited, will normally vary with the size and intensity of the candidate's support. There is nothing invidious, improper, or unhealthy in permitting such funds to be spent to carry the candidate's message to the electorate. Moreover, the equalization . . . might serve . . . to handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign.").

195. *Id.* at 57 ("The First Amendment denies government the power to determine that spending to promote one's political views wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government, but the people . . . who must retain control over the quantity and range of debate on public issues.").

Court clarified, however, that expenditures by a non-candidate that are “controlled by or coordinated with the candidate and his campaign” may be treated as indirect contributions subject to FECA’s source and amount limitations to “prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions.”<sup>196</sup>

In 1976, the Supreme Court held in *First National Bank of Boston v. Bellotti*<sup>197</sup> that “speech that otherwise would be within the protection of the First Amendment” did not “lose[] that protection simply because its source is a corporation . . . .”<sup>198</sup> The Court ruled a Massachusetts criminal statute that prohibited banks and business corporations from making contributions and expenditures to influence the vote on referendum proposals “amount[ed] to an impermissible legislative prohibition of speech based on the identity . . . of the speaker.”<sup>199</sup> This decision to protect corporate speech was “based not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas.”<sup>200</sup> In a footnote, however, the Court left open the possibility that independent expenditures by corporations might someday beget quid pro quo corruption.<sup>201</sup>

In 1990, the Court embraced a broader antidistortion rationale for campaign spending limits. In *Austin* the Court held that the government had “articulated a sufficiently compelling rationale to support its restriction on independent expenditures by corporations” by pointing to 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

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196. *Id.* at 46–47.

197. 435 U.S. 765 (1978).

198. *Id.* at 784.

199. *Id.*

200. *Id.* at 783. According to the Court, “[a] commercial advertisement is constitutionally protected not so much because it pertains to the seller’s business as because it furthers the societal interest in the ‘free flow of commercial information.’” *Id.* (quoting *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 764 (1976)).

201. *Id.* at 788 n.26. By 1985, however, Justice White in *FEC v. National Conservative Political Action Committee* was convinced that “large independent expenditures” do not “appear to pose dangers of real or apparent corruption comparable to those identified with large [direct] campaign contributions.” 470 U.S. 480, 510 n.7 (J. White, dissenting) (quoting *Buckley*, 424 U.S. at 46).

support for the corporation's political ideas."<sup>202</sup> Under this new standard for corruption, the Court found that "[c]orporate wealth can unfairly influence elections when it is employed in the form of independent expenditures, just as it can when it assumes the guise of political contributions."<sup>203</sup> The Court concluded that the Michigan law banning corporate contributions and expenditures in state elections was "precisely targeted to eliminate the distortion caused by corporate spending while also allowing corporations to express their political views."<sup>204</sup> Thus, *Austin* held that political speech may be banned based on the speaker's corporate identity.

In *McConnell* a majority of the Court again emphasized governmental concerns about corruption and distortion of the political process.<sup>205</sup> The Court invoked the same antidistortion rationale used in *Austin* to uphold a federal ban on corporate disbursements for electioneering communications under section 203 of the BCRA.<sup>206</sup> The Court also relied on *Buckley* to treat coordinated expenses like contributions.<sup>207</sup> It even recognized that such restrictions on corporate electoral involvement were necessary to "hedge against 'circumvention of [valid] contribution limits.'"<sup>208</sup>

### B. Citizens United

*Citizens United* sets forth the Supreme Court's latest framework for analyzing what regulations are acceptable to curb the influence of corporate money in the political process. The decision did not create any new legal concepts per se, but it attempted to resolve a conflict in the earlier cases. Whether it succeeded has yet to be seen.<sup>209</sup> But

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202. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990).

203. *Id.* The Court indicated that this new "corporate-form corruption" could only occur if the spending were directed toward express advocacy on a candidate's behalf rather than merely advocacy for a particular issue. *Id.* These two realms of advocacy were not new to the *Austin* Court; they had been proposed and discussed at length by the Court in *Buckley*. *Buckley*, 424 U.S. at 44. Eventually, the two categories were distinguished by the presence or absence of "magic words" such as "elect" or "vote against" which would indicate whether a particular advertisement expressly advocated a candidate's election or defeat. *Id.*

204. *Austin*, 494 U.S. at 660.

205. 540 U.S. 93, 333 (2003).

206. *Id.* at 205.

207. *Id.* at 219; *see also* *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 447 (2010) (upholding the government's characterization of party-coordinated spending as the functional equivalent of contributions).

208. *Id.* at 205 (quoting *FEC v. Beaumont*, 539 U.S. 146, 155 (2003)).

209. *But see* Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L.

*Citizens United* has certainly generated a strong guttural reaction in the media, in the White House, and in the legislature.<sup>210</sup>

The case involved a well-funded conservative nonprofit advocacy group.<sup>211</sup> At issue was the organization's video-on-demand political documentary entitled *Hillary: The Movie*. The group feared that the FEC would prevent it from showing this independent movie on satellite television because the movie criticized then-presidential candidate Hillary Clinton within thirty days of a primary election and constituted an "electioneering communication" paid for with corporate funds; therefore, the group filed for declaratory and injunctive relief.<sup>212</sup> The *Citizens United* Court took the rare step of ordering reargument and supplemental briefing on whether it should overrule *Austin* and *McConnell* to the extent those two opinions upheld limits on corporations' independent expenditures that involved express advocacy based on an antidistortion rationale.<sup>213</sup>

The majority in *Citizens United* held, by a 5–4 vote, that federal laws censoring corporate electioneering expenditures violated the First Amendment.<sup>214</sup> The majority opinion, written by Justice Kennedy, overturned *Austin* and partially overturned *McConnell*.<sup>215</sup>

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REV. 581, 603–17 (2011) (predicting the decision will likely lead to new incoherence in campaign finance law).

210. See Obama, *supra* note 173; 156 CONG. REC. S531 (see *supra* text accompanying note 180); 156 CONG. REC. S6689 (remarks by Sen. Specter) (discussing "the status of an ideological battleground"); Kasie Hunt, *John McCain, Russ Feingold Diverge on Court Ruling*, POLITICO (Jan. 21, 2010, 6:04 PM), <http://www.politico.com/news/stories/0110/31810.html>; Bradley A. Smith, *President Wrong on Citizens United Case*, NAT'L REV. ONLINE (Jan. 27, 2010, 11:00 PM), <http://www.nationalreview.com/corner/193894/president-wrong-i-citizens-united-i-case/bradley-smith>.

211. See David Bossie, *Written Testimony of David N. Bossie, President of Citizens United*, CITIZENS UNITED (on file with author). Citizens United is an IRC 501(c)(4) organization with 500,000 members and supporters. *Id.* at 1.

212. See *Citizens United*, 130 S. Ct. at 886–87. Then-Solicitor General Elena Kagan argued the FEC's case as the respondent. *Id.* at 886.

213. *Id.* at 888. The case was initially dismissed on March 24, 2008, for lack of jurisdiction. Some critics argue that the case could have been decided on much narrower grounds. See *id.* at 932 (Stevens, J., dissenting) ("Essentially, five Justices were unhappy with the limited nature of the case before us, so they changed the case to give themselves an opportunity to change the law.").

214. *Id.* at 913 (majority opinion). Although the case dealt with federal election law, the decision also rendered unconstitutional state and local laws prohibiting corporate independent expenditures. Half of the states already allowed corporate and union treasury funds to be used in state and local elections. The restrictions in those states that did not are now invalid.

215. *Id.* Justice Kennedy's majority opinion was joined by Chief Justice Roberts and Justices Scalia and Alito, with Justice Thomas joining all but Part IV. However, they all filed or joined concurring opinions as well. The published decision totaled more than 106 pages in length.

Relying heavily on *Bellotti*,<sup>216</sup> the Court held that the government cannot restrict a person's right to speak even if that "person" is a corporation.<sup>217</sup> The Court reaffirmed that the government cannot make distinctions or impose regulations based on the identity of the speakers who are exercising their First Amendment rights.<sup>218</sup> The Court highlighted the inconsistency of protecting media corporations' political speech but not the political speech of corporations in other lines of business.<sup>219</sup>

Justice Stevens authored a strongly worded dissent, consisting of five objections to the majority opinion, which was joined by Justices Ginsburg, Breyer and Sotomayor.<sup>220</sup> Justice Stevens would have allowed Section 203's thirty- or sixty-day black out period restriction on a broadcast independently paid for by a wealthy nonprofit corporation.<sup>221</sup> More importantly, Justice Stevens raised a fundamental concern about the implications of the majority's opinion for regulations preventing foreign influence on American politics.<sup>222</sup>

*Citizens United* signaled a dramatic shift in the Court's paradigm for corporate political speech.<sup>223</sup> Although a full analysis of the opinion is beyond the scope of this Article, there are a few key propositions in *Citizens United* that will impact future efforts to prevent foreign influence in American politics. First, the Court completely abandoned the antidistortion rationale as a basis for justifying federal regulation of campaign elections. The Court

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216. 435 U.S. 765 (1978) (holding that the First Amendment does not allow political speech restrictions based on a speaker's corporate identity).

217. *Citizens United*, 130 S. Ct. at 904.

218. *Id.*

219. *Id.* at 905–06.

220. This case was argued before the Court on September 9, 2009. It was the first case Justice Sotomayor heard as a member of the Court. See Norman Olch, *Justice Sotomayor's First Oral Argument Tomorrow Morning*, FULL COURT PASS (Sept. 8, 2009), <http://www.fullcourtpass.com/2009/09/justice-sotomayors-first-oral-argument.html>.

221. See *Citizens United*, at 929–30.

222. *Citizens United*, 130 S. Ct. at 945 (Stevens, J., dissenting) ("The government routinely places special restrictions on . . . foreigners . . ."); see, e.g., *id.* at 946 n.44 ("2 U.S.C. § 441e(a)(1) (foreign nationals may not directly or indirectly make contributions or independent expenditures in connection with a U.S. election).").

223. But some of the groundwork, such as the concept of "corporate personhood," was in place long before this case was decided. *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 780 n.15, (1978) ("It has been settled for almost a century that corporations are persons within the meaning of the Fourteenth Amendment." (citing *Santa Clara Cnty. v. S. Pac. R.R. Co.* 118 U.S. 394 (1886))).

expressly overruled *Austin*'s holding that a compelling governmental interest existed in preventing the "corrosive and distorting effects" of corporate political spending.<sup>224</sup> *Citizens United* reaffirmed *Buckley*'s rejection of the argument to "level the playing field," stating such attempts are "foreign to the First Amendment."<sup>225</sup> Without the antidistortion rationale, the justification for regulating express ads, but not issue ads, disappeared.<sup>226</sup> This made it not only possible but also logical for *Citizens United* to extend Chief Justice Roberts's conclusion in *FEC v. Wisconsin Right to Life, Inc.*<sup>227</sup>—that section 441b of FECA was unconstitutional as applied to issue ads—to express advocacy as well.<sup>228</sup>

Second, the Court found that corruption is the only compelling state interest that justifies the regulation of corporate political speech and associational rights.<sup>229</sup> Furthermore, the Court also returned to *Buckley*'s narrow definition of corruption as bribery or other quid pro quo activity.<sup>230</sup> Even though "[t]he centerpiece of a [legal] charge of corruption is intent,"<sup>231</sup> the Court adopted an overly simplistic view of criminal bribery. In the Court's view, bribery would likely include a monetary payment to a candidate to procure the improper performance of his or her official duties, but it would not include threats to use the same corporate money or influence to defeat the candidate if he or she did not cooperate.<sup>232</sup> The Court missed an opportunity to move beyond quid pro quo bribery in the corruption context just as it moved from quid pro quo sexual harassment to hostile work environment sexual harassment in the employment law context.<sup>233</sup> However, the Court did uphold the government's interest

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224. *Citizens United*, 130 S. Ct. at 913. The Court noted that *Austin*'s rationale was inconsistent with the prior determinations of *Bellotti*. *Id.* at 883–84.

225. *Id.* at 904–05 (citing *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976)).

226. Express ads favor or oppose clearly identified candidates by using so-called "magic words" including "vote for" or "reject," while issue ads do not. *See Buckley*, 424 U.S. at 44, n.52.

227. 551 U.S. 449 (2007).

228. *Citizens United*, 130 S. Ct. at 894 (citing *FEC v. Wis. Right to Life, Inc.*, 55 U.S. 449, 481 (2006)).

229. *Id.* at 883, 908–11.

230. *Id.* at 885, 908.

231. *See Teachout*, *supra* note 34, at 382.

232. *Citizens United*, 130 S. Ct. at 885.

233. *See* Heather S. Murr, *The Continuing Expansive Pressure to Hold Employers Strictly Liable for Supervisory Sexual Extortion: An Alternative Approach Based on Reasonableness*, 39 U.C. DAVIS L. REV. 529, 533–34 (2006) (describing the evolution of sexual harassment

in preventing the “appearance of corruption,” which may leave the door sufficiently ajar to make that argument by analogy.<sup>234</sup> The Court also expressly reserved judgment on whether preventing foreign influence might be a compelling state interest.<sup>235</sup>

Third, the Court reinforced *Buckley*’s rigid distinction between expenditures and contributions. This was a logical consequence of the two propositions discussed, *supra*. The categories of “expenditures” and “contributions” have become less-than-ideal proxies for whether strict scrutiny or intermediate scrutiny applies.<sup>236</sup> However, the keystone of the *Citizens United* analysis was the exclusion of coordinated expenses from the definition of “independent expenditures.”<sup>237</sup> Earlier, in *McConnell*, the Court opined that “expenditures made after a wink or nod often will be as useful to the candidate as cash[, so] . . . Congress has always treated expenditures made at the request or suggestion of a candidate as

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jurisprudence). This Article is focused on foreign corporations and the use of external regulations to exclude them from the political process altogether, while a future article will focus on domestic corporations and their use of internal regulations. Using corporate anti-harassment policies and ethics compliance programs as a model, corporations can take several practical steps to limit the corrupting effect of their political speech. *See, e.g.*, FedEx, Code of Business Conduct and Ethics, Dec. 6, 2010, available at <http://files.shareholder.com/downloads/FDX/1312281530x0x138778/6b957b1f-ac83-4b37-835b-8b24e63b338f/code.pdf>. These steps include adopting both objective and subjective standards for corruption not unlike the standards for sexual harassment. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22–23 (1993) (stating sexual harassment requires both an objective and subjective inquiry). It also includes recognizing the role of shareholders and customers in vetting and enforcing these standards through a private right of action or economic boycott. For example, gay groups recently boycotted Target and Best Buy for making corporate donations in the amounts of \$150,000 and \$100,000 respectively to advocacy group MN Forward. *See David Gura, Mad About Corporate Political Donations, Customers Boycott Target, Best Buy*, NPR NEWS BLOG (Aug. 4, 2010, 9:21 AM), <http://www.npr.org/blogs/thetwo-way/2010/08/04/128974389/mad-about-corporate-political-donations-customers-boycott-target-best-buy>. Even though the monies were used to fund an independent expenditure campaign, the gay groups objected to the donations because MN Forward also supported Republican Minnesota gubernatorial candidate Tom Emmer, who opposes abortion and same-sex marriage and supports Arizona’s controversial immigration law S.B. 1070. *Id.*

234. *Citizens United*, 130 S. Ct. at 908.

235. *Id.* at 911.

236. *See, e.g.*, *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*, -- S.Ct. --, 2011 WL 2518813 at 17–21 (June 27, 2011) (applying strict scrutiny to an Arizona law that burdened independent expenditures); *In re Cao*, 619 F.3d 410, 435 (5th Cir. 2010) (stating that strict scrutiny applies to regulation of independent expenditures for political speech); *McComish v. Bennett*, 611 F.3d 510, 524–26 (9th Cir. 2010) (examining campaign contributions limits under intermediate scrutiny); *Real Truth About Obama, Inc. v. FEC*, 2011 WL 2457730 at 7 (E.D. Va. June 16, 2011) (stating that expenditure limits are subject to strict scrutiny while contribution limits are subject to intermediate scrutiny).

237. *Id.* at 910.



coordinated.”<sup>238</sup> Even after *Citizens United*, as discussed *infra*, the definition of coordinated expenses is still subject to interpretation and needs to be more clearly defined. It is not clear, for example, whether this definition would cover threats to spend money opposing a candidate to gain his or her cooperation. However, clarifying this third category is critical to preventing foreign influence in U.S. elections through American subsidiaries and their PACs.

Finally, the Court seemed to show a preference for a less-intrusive approach to combating corruption in the future; namely, the disclaimer and disclosure requirements of BCRA sections 201 and 311.<sup>239</sup> The Court concluded that the public’s “informational interest[s]” were sufficient to uphold the BCRA provisions that make the political process more transparent by requiring that the sources for the funding of political speech be identified.<sup>240</sup> The Court hinted that even more rigorous requirements could be constitutionally imposed as a “less restrictive alternative to more comprehensive regulations of speech.”<sup>241</sup> The Court did, however, acknowledge “that § 201 would be unconstitutional as applied to an organization if there were a reasonable probability that the group’s members would face threats, harassment, or reprisals if their names were disclosed.”<sup>242</sup>

As of publication, 170 published lower court decisions have applied *Citizens United* with mixed results.<sup>243</sup> A majority of the courts have cited the opinion for its clear distinction between contributions and independent expenditures and interpreted the decision to mean restrictions on contributions are permissible but limits on independent expenditures are generally not allowable.<sup>244</sup>

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238. *McConnell v. FEC*, 540 U.S. 93, 221–22 (2003) (citation omitted) (internal quotation marks omitted). Coordinated expenditures are currently defined as payments, gifts, and loans not only made on a candidate’s behalf but coordinated with the supported candidate, campaign, or political party. According to federal regulations, evidence of coordination includes “a written contract, promise, or agreement to make an expenditure.” 2 U.S.C. § 431(9)(a)(ii) (2006).

239. *Citizens United*, 130 S. Ct. at 886, 914.

240. *Id.* at 915–16.

241. *Id.* at 915.

242. *Id.* at 916 (citing *McConnell*, 540 U.S. at 198).

243. A list of court decisions as of January 8, 2011, citing *Citizens United* is on file with the author.

244. *See, e.g., Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684, 691–92, 694–95 (9th Cir. 2010) (quoting *Citizens United*, 130 S. Ct. at 899) (stating “‘the Supreme Court has generally approved statutory limits on contributions to candidates and political parties,’ but it ‘has rejected expenditure limits on individuals, groups, candidates, and parties’” (citation omitted)).

The Seventh Circuit Court of Appeals, however, has concluded that “a narrow class of speech restrictions” affecting either category is still constitutionally permissible under *Citizens United* if such a restriction is “based on an interest in allowing governmental entities to perform their functions.”<sup>245</sup> At the opposite extreme, the District Court for the Southern District of California refused to uphold a municipal law banning contributions because the city failed to demonstrate that the law would actually prevent any corruption.<sup>246</sup> At least one court suggested that the *Citizens United* decision signaled a rejection of any sharp distinction between facial and as-applied challenges to the statute.<sup>247</sup> A few courts distinguished *Citizens United* on its facts and declined to extend the holding in slightly different circumstances.<sup>248</sup> The D.C. Circuit held that FECA’s organizational and continuous reporting requirements did not violate the First Amendment; such disclosure requirements were justified by a compelling state interest in determining and helping to “expose violations of other campaign finance restrictions, such as those

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245. *Siefert v. Alexander*, 608 F.3d 974, 980–81, 984 (7th Cir. 2010) (quoting *Citizens United*, 130 S. Ct. at 899) (concluding that while *Citizens United* broadly prohibited restrictions on “political speech,” it reconfirmed the validity of the *Letter Carriers* line of cases, which specifically targeted political activity by government employees).

246. *Thalheimer v. City of San Diego*, 706 F. Supp. 2d 1065, 1073–74 (S.D. Cal. 2010) (declining to uphold a ban on contributions when the city had failed to demonstrate that the contribution bans in question would actually prevent any corruption or that the ban was “closely” drawn enough and noting that while the Supreme Court had upheld limitations and bans on contributions, it had done so only when the threat of corruption had been proven); *see also* *Thalheimer v. City of San Diego*, No. 09-CV-2826-IEG, 2010 WL 1201885, at \*7 (S.D. Cal. Mar. 23, 2010) (denying the city’s request for a stay so that it could enact new laws—including new disclosure requirements to deal with contributions made by U.S. subsidiaries of foreign corporations—in response to *Citizens United*).

247. *Sonnier v. Crain*, 613 F.3d 436, 469–70 (5th Cir. 2010) (stating that *Citizens United* “has contradicted the erroneous idea that there is one single test for all facial challenges; on the contrary, the facial/as-applied distinction does not have any ‘automatic effect’ on the disposition of a case”).

248. *N.M. Youth Organized v. Herrera*, 611 F.3d 669, 676 (10th Cir. 2010) (rejecting the New Mexico government’s claim that *Citizens United* abandoned the requirement that for a regulation of campaign-related speech to be constitutional it must be “unambiguously campaign related”); *Preminger v. Shinseki*, No. C 04-2012 JF (HRL), 2010 WL 2077151, at \*2 (N.D. Cal. May 21, 2010) (concluding *Citizens United* is not directly on point because it addresses speech in the context of campaign spending rather than voter registration); *Citizens in Charge v. Brunner*, No. 2:10-cv-95, 2010 WL 519814, at \*3 (S.D. Ohio Feb. 10, 2010) (concluding *Buckley*, not *Citizens United*, controlled the case because “‘ballot initiatives do not involve the risk of ‘quid pro quo’ corruption present when money is paid to, or for, candidates’”) (quoting *Buckley v. Valeo*, 424 U.S. 1, 203) (1976); *Dallman v. Ritter*, 225 P.3d 610, 621 (Colo. 2010) (rejecting a challenge to certain contribution limits noting that the *Citizens United* Court was dealing with independent expenditures).

barring contributions from foreign corporations or individuals.<sup>249</sup> Finally, the Fifth Circuit declined to extend *Citizens United* to restrict expenditure limits as applied to a coordinated radio advertisement that a political-party committee planned to run as its own.<sup>250</sup>

*C. Foreign Campaign Money:  
Unprotected Speech or Unconstitutional Xenophobia?*

Campaign spending by foreign corporations is best categorized as wholly unprotected speech. Despite the Court's herculean efforts in *Citizens United* to get at the constitutional issues surrounding campaign finance laws, foreign spending on U.S. campaigns is the one major area of campaign finance law not yet constitutionalized. The regulation of political expenditures by foreign corporations is the 800-pound gorilla that the Supreme Court has never confronted. The *Citizens United* Court expressly reserved judgment on whether the same restrictions were constitutional as applied to foreign corporations.<sup>251</sup> Several times, Justice Stevens in his dissent warned of the ominous threat foreign corporations pose to the majority's analysis, to no avail.<sup>252</sup> The majority's silence could be interpreted as acquiescence to unconstitutional xenophobia. However, I argue that both logic and history support the conclusion that the First Amendment should not protect foreign campaign money.

Under *Citizens United*, the government can only limit corporate speech if it poses a great risk of corruption or the appearance of corruption.<sup>253</sup> This absolutist test, while extremely protective of freedom of speech, does not adequately address the danger posed by *foreign* corporations. The rationale for regulating foreign corporations is actually much broader than the anti-corruption

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249. See *SpeechNow.org v. FEC*, 599 F.3d 686, 698 (D.C. Cir. 2010), *cert. denied*, Keating v. FEC, 131 S. Ct. 553 (2010).

250. *In re Cao*, 619 F.3d 410, 422–23 (5th Cir. 2010).

251. *Citizens United*, 130 S. Ct. at 911–12.

252. *Id.* at 936 n.12 (Stevens, J., dissenting) (“[T]he majority . . . appears to suggest . . . domestic corporations have a better claim than foreign corporations.”); *id.* at 945 (“The Government routinely places special restrictions [such as § 441e] on . . . foreigners. . . .”); *id.* at 947 (“Although we have not reviewed them directly, we have never cast doubt on laws [like § 441e] that place special restrictions on campaign spending by foreign nationals.”); *id.* at 971 (warning that corporations are very different from natural persons because “[u]nlike voters in U.S. elections, corporations may be foreign controlled”).

253. *Id.* at 908–11.

justification for regulating their domestic counterparts because foreign financial participation in U.S. elections subverts American citizens' right of self-government. Most legal commentators that have considered this question have reached the same conclusion.<sup>254</sup> Some have convincingly argued the domestic subsidiary loophole created by the FEC is inconsistent with legislative intent.<sup>255</sup> Others have discussed favorably the reasons and incentives for states to deny foreign nationals certain political rights.<sup>256</sup> Even those that have argued against extending the ban on contributions by foreign nationals have recognized that the right of Congress to prevent foreign influence in American politics likely outweighs any rights possessed by foreign nationals.<sup>257</sup>

Likewise, many public officials have taken a similar stand.<sup>258</sup> During the amendments to FARA in 1966, Senator J. William Fulbright chaired hearings that cast a shadow of suspicion over foreign powers pumping money into the U.S. political system and influencing policy in the process.<sup>259</sup> During the campaign finance

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254. See Brown, *supra* note 107, at 548–52; Adam B. Cox & Eric A. Posner, *The Rights of Migrants: An Optimal Contract Framework*, 84 N.Y.U. L. REV. 1403, 1441–43 (2009); Lori Fisler Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence over Domestic Affairs*, 83 AM. J. INT'L L. 1, 49–50 (1989); Savrin, *supra* note 130, at 818. See generally Fang, *supra* note 20 (discussing the U.S. Chamber of Commerce practice of obtaining foreign funding to attack and defeat Democratic candidates).

255. See, e.g., Savrin, *supra* note 130, at 803–04 (criticizing the FEC for ruling in its advisory opinions that FARA's strict definition of foreign nationals does not include domestic corporations that are owned by foreign nationals).

256. See, e.g., Cox & Posner, *supra* note 254, at 1441–48 (discussing how a state may hesitate to offer voting or political rights to foreigners because they may either be under-informed of the issues surrounding national, state, and local politics or they may be hostile or opposed to the interests usually favored by the nation, state, or local community).

257. See, e.g., Brown, *supra* note 107, at 527–29 (contrasting the numerous ways the government lawfully bars aliens from participating in the American democratic process with a few of the avenues that are open for aliens to participate in politics in the United States). But Brown contends First Amendment scrutiny should be applied to cases regarding political spending by PRAs because the United States' history of denying voting rights to aliens does not necessarily ensure that they have no rights to political speech. *Id.* at 530–34.

258. See 156 CONG. REC. S6266 (daily ed. July 27, 2010) (statement of Sen. Al Franken) (“The fact is, after Citizens United, the U.S. subsidiaries of foreign companies will be able to spend as much as they want in our elections, even if they are under foreign control.”); 120 CONG. REC. 8782–83 (1974).

259. See Damrosch, *supra* note 254, at 22 (commenting that the hearings by Senator J. William Fulbright and his committee “vividly document the efforts of certain foreign interests to ensure the reelection of sympathetic legislators by channeling campaign contributions through lawyers or other agents in Washington”). Senator Fulbright spoke of preserving “the integrity of the decision-making process of our Government” and needing to deal with the “growing use” of foreigners of “nondiplomatic means to influence Government policies.” 111 CONG. REC. 6984–

reforms of 1974, Senator Bentsen emphatically denounced any notion that foreigners had a right to participate in the U.S. political process.<sup>260</sup> His amendment was criticized by Senators Barry Goldwater and Robert Griffin for not going far enough.<sup>261</sup> Most recently, President Obama and several leading Democrats have come out strongly in favor of preventing foreign influence in elections.<sup>262</sup>

Not unexpectedly, public opinion takes a dim view of extending political-speech rights to foreign corporations, particularly when it comes to financial participation in U.S. campaigns and elections.<sup>263</sup> A recent poll conducted by the *Washington Post* showed that eight in ten Americans disagreed with the Court's decision in *Citizens United*.<sup>264</sup> Further, the poll indicated that opposition was prevalent on both sides of the political aisle: 85 percent of Democrats opposed the Court's decision along with 76 percent of Republicans.<sup>265</sup>

Finally, the courts are no exception. No foreign corporation located outside the United States has ever been formally extended the right to participate in our political process or even been given political-speech rights. In other contexts the Supreme Court has extended constitutional protections to aliens subjected to the

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85 (1965) (statement of Sen. Fulbright). His sentiments were shared in the House by Representative Emanuel Celler, who criticized the "highly questionable conduct" and "unethical practices" of foreigners and their agents in their attempts to influence the U.S. political arena. 112 CONG. REC. 10,537 (1966). Representative William Dorn "particularly commend[ed]" the bill for its ability to prevent "foreign agents from making political contributions." *Id.* at 10,538.

260. 120 CONG. REC. 8783. *But see id.* at 8784 (statement of Sen. Cannon) (challenging the need to ban contributions by aliens within the United States by saying that "[i]f [Senator Bentsen] were to restrict the amendment to money coming from abroad, from foreign nationals abroad, or foreign nationals living abroad, or foreign contributions of any sort, [Sen. Cannon] would completely agree with him").

261. *Id.* at 8782. Senators Goldwater and Griffin sought to amend the laws to ban money that was issued from foreign banks even if American citizens were using them. *Id.*

262. Dan Eggen & Scott Wilson, *Obama Steps Up Attack on Chamber*, WASH. POST, Oct. 11, 2010, at A1.

263. Dan Eggen, *Poll: Large Majority Opposes Supreme Court's Decision on Campaign Financing*, WASH. POST (Feb. 17, 2010, 4:38 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/17/AR2010021701151.html>; Lydia Saad, *Public Agrees with Court: Campaign Money Is "Free Speech"*, GALLUP (Jan. 22, 2010), <http://www.gallup.com/poll/125333/public-agrees-court-campaign-money-free-speech.aspx> (citing a Gallup poll concluding that 55 percent of Americans polled felt that campaign donations were a form of free speech but that a majority also felt that limitations on campaign contributions were needed anyway).

264. Eggen, *supra* note 263. Conservatives criticized this poll for "poorly worded" questions, claiming the poll slanted results. Sean Parnell, *Poorly Worded Poll on Citizens United Decision*, CENTER FOR COMPETITIVE POL. (Feb. 17, 2010, 11:00 AM), <http://www.campaignfreedom.org/blog/detail/poorly-worded-poll-on-citizens-united-decision>.

265. Eggen, *supra* note 263.

extraterritorial activity of the U.S. government.<sup>266</sup> For example, in the Guantanamo Bay cases, the Court declared that foreign prisoners are entitled to habeas corpus rights under the U.S. Constitution.<sup>267</sup> But no case has ever been successfully brought by a foreign individual or corporation under the First Amendment.

Within the boundaries of the United States, the Supreme Court has also been willing to yield to Congress's judgment.<sup>268</sup> This has been true even when foreign nationals have engaged in political activity.<sup>269</sup> The lower courts have also favored allowing Congress to restrict foreign political speech.<sup>270</sup>

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266. See *Boumediene v. Bush*, 553 U.S. 723, 732 (2008) (ruling that foreign nationals are entitled to rights of habeas corpus and that the military tribunals were an inappropriate substitute for habeas corpus); *Hamdan v. Rumsfeld*, 548 U.S. 557, 567 (2006) (holding that Muslims taken prisoner during the War on Terror were entitled to protections under the Uniform Code of Military Justice); *Rasul v. Bush*, 542 U.S. 466, 473 (2004) (concluding that American courts do have jurisdiction to consider challenges to the legality of the detention of foreign nationals incarcerated at Guantanamo Bay).

267. In *Boumediene*, for example, a Bosnian citizen detained at Guantanamo Bay after being captured in Afghanistan successfully challenged the legality of his detainment as well as the constitutionality of the military tribunals being used by the U.S. government to try prisoners from the War on Terror. *Boumediene*, 553 U.S. at 770–73, 791–96. *Contra* *Johnson v. Eisentrager*, 339 U.S. 763, 790–91 (1950) (ruling that German prisoners held by the U.S. Army during World War II had no rights to habeas corpus).

268. *Mathews v. Diaz*, 426 U.S. 67, 79–80 (1976) (declaring that Congress possesses “broad power” over immigration and naturalization matters that allows Congress to create “rules that would be unacceptable if applied to citizens”); see also *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (noting that the Supreme Court “has repeatedly emphasized that ‘over no conceivable subject is the legislative power of Congress more complete than it is over’ the admission of aliens” and that “[o]ur cases ‘have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control’”) (quoting *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909) and *Shaughnessy v. Mezei*, 345 U.S. 206, 210 (1953)).

269. *Sugarman v. Dougall*, 413 U.S. 643, 649 (1973) (not addressing the question of whether the Fourteenth Amendment guarantees aliens the right to vote, but noting that “implicit in many of [its] voting rights decisions is the notion that citizenship is a permissible criterion for limiting such rights”); see *Foley v. Connelie*, 435 U.S. 291, 296 (1978) (declaring the rights of the states to deny involvement in democratic activities to foreigners). “[I]t is clear that a State may deny aliens the right to vote, or to run for elective office, for these lie at the heart of our political institutions.” *Id.* The Supreme Court has also ruled that states have the power to ban aliens from certain government jobs. *Cabell v. Chavez-Salido*, 454 U.S. 432, 439 (1981) (“The exclusion of aliens from basic governmental processes is not a deficiency in the democratic system but a necessary consequence of the community’s process of political self-definition.”). *Contra* *United States v. Schwimmer*, 279 U.S. 644, 654–55 (1929) (Holmes, J., dissenting) (issuing in a case involving the denial of citizenship to a pacifist alien, a passionate declaration that “if there is any principle of the Constitution that more imperatively calls for attachment than any other[,] it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate”).

270. *E.g.*, *Moving Phones P’ship L.P. v. FCC*, 998 F.2d 1051, 1056 (D.C. Cir. 1993) (recognizing that national security required rational basis scrutiny of the prohibition of alien

Foreign campaign spending serves no purpose other than to corrupt and distort the political process in the United States in furtherance of the foreign corporations' interests. First, allowing foreign entities to financially participate in the election process poses an unacceptable risk of quid pro quo corruption. A large percentage of foreign companies doing business in the United States are based in countries like China, India, and Mexico, where cultures of bribery exist that are far worse than in the United States.<sup>271</sup> Political contributions are commonly used in those countries to gain improper business advantages once a candidate is in office.<sup>272</sup> The risk of bribery is particularly acute in the defense industry, which also raises national security concerns. If foreign campaign contributions are unrestricted, successful political candidates and incumbents will not be able to avoid considering foreign interests when making U.S. policy in these critical areas. Therefore, the FEC should be allowed to continue to enforce existing regulatory bans on foreign contributions. In addition, the federal government (and potentially private actors) should be allowed to apply criminal and civil liability against foreign corporations seeking to gain undue influence over the U.S. political process.<sup>273</sup>

Second, foreign money distorts the political process in a way that cannot be justified after *Citizens United*, because the speakers are noncitizens. Its implication for the right of self-determination goes beyond the potential corruption caused by foreign money. Foreign financing can change the outcome of an election. It can enable a candidate to receive more support and exposure in the media than would be possible absent foreign advocates. This unfairly props up a marginal candidate who would otherwise likely drop out of an election race due to a lack of financial support from other Americans. More importantly, it drowns out American voices that

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ownership of American media rather than strict scrutiny); *Perkins v. Smith*, 370 F. Supp. 134, 139 (D. Md. 1974) (concluding that federal and state law may require one to be a citizen to serve as a member of a jury without violating the Equal Protection Clause under the Fourteenth Amendment).

271. Matt A. Vega, *The Sarbanes-Oxley Act and the Culture of Bribery: Expanding the Scope of Private Whistleblower Suits to Overseas Employees*, 46 HARV. J. ON LEGIS. 425, 440–41 (2009).

272. *Id.* at 427–29.

273. See 2 U.S.C. § 437g(d)(1)(A)(i)–(ii) (2006) (stating that current penalties consist of fines decided on by the FEC or imprisonment for up to five years depending on the significance of the violation).

remain unsubsidized by foreign principals. Self-determination constitutes the “right of a people to freely determine its political and legal status without interference by any foreign individual or organization.”<sup>274</sup> Even if money is speech and corporations are persons, the right to political self-determination demands the ability to exclude foreign corporations from participating financially in U.S. elections. Congress might choose, for various political reasons, to extend some political-speech privileges to noncitizens (and it has with PRAs),<sup>275</sup> but such an exercise of legislative power does not by itself create a constitutional mandate. On the contrary, in a democratic society the system is designed to reflect the will of its citizens, and only its citizens.<sup>276</sup>

#### IV. RESTRICTING THE FIRST AMENDMENT RIGHTS OF FOREIGN-CONTROLLED CORPORATIONS

The political branches of the U.S. government should enjoy wide constitutional latitude to regulate the political speech of not only foreign corporations but foreign-controlled and foreign-owned American corporations as well. The arguments in favor of this second proposition are more complicated than the case for regulating foreign corporations as set forth in Part III *supra*. There are, however, at least three potential approaches to making this argument. The first approach would be to use the political-question doctrine to insist that the Court defer to the political branches’ judgment because it is a foreign relations issue.<sup>277</sup> The problem is this deference may not extend to constitutional violations under the separation of powers doctrine. A second approach would be to argue that the matter falls within Congress’s plenary authority to regulate immigration.<sup>278</sup> The

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274. Savrin, *supra* note 130, at 787.

275. 120 CONG. REC. 8783 (1974) (statement of Sen. Bentsen) (“My amendment would exempt foreigners with resident immigrant status from the ban on contributions by foreigners. There are many resident immigrants in the United States who have lived here for years and who spend most of their adult lives in this country; they pay American taxes and for all intents and purposes are citizens of the United States except perhaps in the strictest legal sense of the word. These individuals should not be precluded from contributing to the candidate of their choice . . .”).

276. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 19 (2d ed. 1986) (stating that the distinguishing characteristic of our system of government is “the policy-making power of representative institutions, born of the electoral process”).

277. See *infra* text accompanying notes 288–309.

278. See *infra* text accompanying notes 310–49.



Court has long recognized this power as resting in the United States' inherent sovereignty as a nation-state, but there is little evidence that the Law of Nations (the ultimate source of national sovereignty which today is more commonly referred to as customary international law (CIL))<sup>279</sup> demands national rules limiting foreign participation in domestic politics. Therefore, we are left with only one other viable option: confronting the First Amendment issue head-on.<sup>280</sup> The Court in *HLP* explored each of these paths to varying degrees; therefore, the case makes a good starting point for this discussion.

*HLP* involved a content-based restriction on speech under 18 U.S.C. § 2339B, which outlaws “knowingly provid[ing] material support or resources to a foreign terrorist organization” with “material support resources.”<sup>281</sup> The statute restricts “a narrow category of speech to, under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations.”<sup>282</sup> It covers speech that teaches a “specific skill” or imports “specialized knowledge” like legal advice.<sup>283</sup> It also includes engaging in “political advocacy.”<sup>284</sup>

The majority in *HLP* held that the restriction was not unconstitutionally vague and did not violate the plaintiffs' free speech or association rights.<sup>285</sup> The Court also noted that the

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279. See Matt A. Vega, *Balancing Judicial Cognizance and Caution: Whether Transactional Corporations Are Liable for Foreign Bribery Under the Alien Tort Law*, 31 MICH. J. INT'L L. 385, 412–13 (2010).

280. See *infra* text accompanying notes 352–74.

281. The statute defines “material support or resources” as “any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel . . . , and transportation, except medical and religious materials.” 18 U.S.C. § 2339A(b) (2006).

282. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2723 (2010) (footnote omitted). The Supreme Court rejected the appellants' claim that the statute impeded “pure political speech” because nothing in the statute prevented the appellants from discussing the issue of the Patiya Karkeran Kurdistan or the Liberation Tigers of Tamil or advocating the different causes independently; all the statute required was that the groups not coordinate their speech with foreign terrorist groups. *Id.* at 2722–23.

283. *Id.* at 2724.

284. *Id.* at 2723 n.4. According to the Court, political advocacy only falls into this narrow category if it is coordinated with a foreign organization that is known to be engaged in terrorism. *Id.* at 2723.

285. *Id.* at 2721–22. The Court rejected the plaintiffs' claim that the statutory language was too vague for them to be aware of what would be held acceptable under the statute and what

petitioners failed to sufficiently describe the speech in which they intended to engage, which made it impossible for the Court to rule on whether the statute was overly vague concerning their intentions.<sup>286</sup> Thus, the Court rejected the plaintiffs' claim that restrictions on "political advocacy" violated their First Amendment rights, because the Court found that it was impossible to decide the issue without more details.<sup>287</sup> Although the Supreme Court did not fully explore the First Amendment path in *HLP*, it did leave a bread crumb trail of dicta to follow in future cases. As I argue in more detail *supra*, the *HLP* opinion suggests that the government may be justified in limiting some forms of speech by American individuals and nonprofit advocacy groups (and, by extension, any domestic corporation) when the speech is coordinated with a foreign entity.

#### A. More Than a Political Question

The first line of argument for extending the Section 441e ban on foreign campaign contributions and independent expenditures to foreign-owned or foreign-controlled U.S. subsidiaries is that the foreign relations interests at stake require deference to the legislative branch's decision to limit foreign influence on American politics. The argument can be taken a step beyond mere deference by invoking the political-question doctrine, which is a constitutional limitation on Article III's judicial power and bars courts from resolving issues more appropriately committed to other branches of government.<sup>288</sup> If the U.S. Constitution shows that the people made a "textually demonstrable constitutional commitment" to entrusting a constitutional provision's ultimate interpretation to either the legislative or executive branches, as the argument goes, then that text's interpretation may be completely the duty of that branch, and not of the judiciary.<sup>289</sup> Other relevant factors in determining whether a case presents a political question include the lack of "judicially discoverable and manageable standards" for resolving an issue and the existence of other prudential considerations that counsel for

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would not. *Id.*

286. *Id.*

287. *Id.* at 2729.

288. See *Goldwater v. Carter*, 444 U.S. 996 (1979); *Baker v. Carr*, 369 U.S. 186 (1962).

289. *Goldwater*, 444 U.S. at 997–98 (Powell, J., concurring).

judicial abstention.<sup>290</sup> In addition, a statement from the executive branch can play a significant role in a court's determination of whether the political-question doctrine bars a suit.<sup>291</sup>

Focusing on the other side of the transaction, the act of state doctrine also militates against judicial interference in foreign policy.<sup>292</sup> The act of state doctrine has the same "constitutional underpinnings" as the political-question doctrine, as it arises from the basic relationships between branches of government under the separation of powers.<sup>293</sup> It too is concerned with the judicial branch's competence "to make and implement particular kinds of decisions in the area of international relations."<sup>294</sup> The act of state doctrine generally requires a federal case involving the taking of property or another act of "governmental character" by a foreign state within its own territory not otherwise governed by international law.<sup>295</sup> Even if the act of state, validity, and situs requirements are met, the Supreme Court in *Banco Nacional de Cuba v. Sabbatino*<sup>296</sup> suggested that when applying this doctrine to acts other than expropriation, other factors must be considered, including: (1) how sharply a particular issue "touch[es] . . . on national nerves," (2) the "degree of codification or consensus concerning a particular area of international law," and (3) the "implications of an issue . . . for our foreign relations."<sup>297</sup>

The political-question doctrine played a significant role in the Supreme Court's decision in *HLP*. The State Department submitted an affidavit in the case, stating that its experience and analysis "suppor[ted] Congress's finding that all contributions to foreign terrorist organizations further their terrorism."<sup>298</sup> The Court ruled that an "evaluation of the facts by the Executive, like Congress's

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290. *Id.* at 996.

291. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004) (requiring courts to give "serious weight" to the executive branch's view when it files a statement opposing the litigation).

292. *See First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 785-90 (1972) (Brennan, J., dissenting) (stating that the validity of a foreign act of state in certain circumstances is a "political question" not cognizable in our courts).

293. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964).

294. *Id.*

295. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 443 (1987).

296. 376 U.S. 398 (1964).

297. *Id.* at 428.

298. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2727 (2010).

assessment, is entitled to deference” because the “litigation implicates sensitive and weighty interests of national security and foreign affairs.”<sup>299</sup> The Court recognized its own incompetence “when it comes to collecting evidence and drawing factual inferences in this area” and reaffirmed that “it is vital in this context ‘not to substitute . . . [the Court’s] own evaluation of evidence for a reasonable evaluation by the Legislative Branch.’”<sup>300</sup> The majority felt that Justice Breyer, in his dissent, “slight[ed] these real constraints in demanding hard proof—with ‘detail,’ ‘specific facts,’ and ‘specific evidence.’”<sup>301</sup> The majority recognized that “information can be difficult to obtain and the impact of certain conduct difficult to assess” when confronting “evolving threats” to “national security and foreign policy.”<sup>302</sup> Nevertheless, the Court did not go so far as to suggest that the political-question doctrine can excuse constitutional violations. In the end, the Court refused to abdicate its judicial role in interpreting the freedom of speech and association clauses, stating, “We do not defer to the Government’s reading of the First Amendment, even when such interests are at stake.”<sup>303</sup>

Likewise, in *Citizens United*, the Supreme Court vacillated between deferring to the political branches and demanding strict empirical data supporting a particular campaign finance rule. On the one hand, the Court was satisfied with its longstanding determination (sans empirical data) that contributions carry with them a substantial risk of corruption.<sup>304</sup> On the other hand, the Court did not feel that the government sufficiently demonstrated that independent expenditures posed as great a risk as contributions.<sup>305</sup> Thus, even after *Citizens United*, it is difficult to predict how deferential the Court would be to Congress’s determination that expanding Section 441e to foreign-controlled domestic corporations is both logically and historically necessary to prevent foreign influence in U.S. elections.

Currently, there is a dearth of information on the contributions

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299. *Id.*

300. *Id.* (citing *Rostker v. Goldberg*, 453 U.S. 57, 68 (1981)).

301. *Id.* at 2727 (quoting *id.* at 2735, 2739, 2743 (Breyer, J., dissenting)).

302. *Id.*

303. *Id.*

304. *Citizens United*, 130 S. Ct. at 883–84.

305. *Id.* at 883.

and independent expenditures of foreign-controlled corporations. More rigorous disclosure rules would help the government collect and present the courts with empirical evidence to support the proposed restrictions. In the interim, the strongest argument for preventing foreign influence in American politics is the historical one set forth in Part I *supra*. The counterargument is that Madison and the other Framers argued that larger countries can better prevent corruption than smaller ones.<sup>306</sup> While foreign corruption is still a serious problem in many lesser-developed or war-torn countries, so the argument would go, perhaps the United States as the world's only superpower is now immune from foreign influence. However, this argument is blunted by the concomitant rise of multinationals with aggregations of wealth unimaginable to the Framers. Therefore, on balance we still have a significant risk of exactly the kind of corrupting relationships that the Framers sought to prevent from destroying democracy. Faced with this reality, the Court would likely defer to Congress's determination that preventing foreign influence is a government interest of the highest order. However, the Court would still be free under the separation of powers doctrine to conduct a First Amendment analysis of any speech restrictions justified on that basis.

### *B. The Imperfect Right of a Sovereign Nation*

A second line of argument is based on the United States' "inherent sovereignty."<sup>307</sup> In the absence of textual guidance, courts

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306. See THE FEDERALIST NO. 10, *supra* note 42, at 81–84 (James Madison).

307. The concept of sovereignty defies simple definition. It is most often associated with territorial sovereignty or jurisdiction. As Joseph Story put it, "[N]o sovereignty can extend its process beyond its own territorial limits, to subject either persons or property to its judicial decisions." JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS, AND REMEDIES, AND ESPECIALLY IN REGARD TO MARRIAGES, DIVORCES, WILLS, SUCCESSIONS, AND JUDGMENTS 787 (2d ed. 1841); see also *Burnham v. Superior Court*, 495 U.S. 604, 619 (1990) ("[J]urisdiction based on physical presence alone constitutes due process," without regard to questions of "fairness" or "reasonableness."); *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877) ("[E]very State possesses exclusive jurisdiction and sovereignty over persons and property within its territory."). From this vantage point sovereignty is seen as the product of a nation's power to govern. JEAN BODIN, SIX BOOKS OF THE COMMONWEALTH 25 (M.J. Tooley trans., Basil Blackwell 1955) (1576) (defining sovereignty as "absolute and perpetual power vested in a commonwealth"). Others have suggested that sovereignty exists as a fundamental principle of the natural Law of Nations. EMMERICH DE Vattel, THE LAW OF NATIONS OR PRINCIPLES OF THE LAW OF NATURE APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS 2 (Joseph Chitty trans., The New Edition 1867) (1758) (basing the Law of Nations on the fundamental principle of "sovereign equality")

may review laws regulating foreign influence on the U.S. political process wholly on extra-constitutional grounds. In cases related to immigration, the courts have built a constitutional jurisprudence based on powers inherent in the United States' national and international sovereignty.<sup>308</sup> Notwithstanding the principle of enumerated powers, the Supreme Court found the power to exclude foreigners to be "an incident of sovereignty" incorporated into the federal power to conduct foreign affairs.<sup>309</sup> The federal government can refuse entry to aliens or deport them, making the issue of their political speech rights moot.<sup>310</sup> Because the source of this power antecedes the U.S. Constitution, the power is considered generally immune to constitutional restraints.<sup>311</sup> "[C]ourts have invoked sovereignty as an almost mythical force animating the plenary, unreviewable immigration power."<sup>312</sup>

Some courts have questioned the legitimacy of Congress's plenary authority to control immigration. However, Congress's power in this area is derived from the Framers' original

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among all nations irrespective of power differentials); *see also* *Schooner Exch. v. McFaddon*, 11 U.S. 116, 137 (1812) ("This perfect equality and absolute independence of sovereigns . . . has been stated to be the attribute of every nation."). This Article assumes Vattel's notion of inherent sovereignty best comports with the Framers' intent and the legal reasoning behind the Supreme Court jurisprudence discussed herein.

308. *See generally* Louis Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates*, 27 WM. & MARY L. REV. 11, 25 (1985) (exploring the Court's use of inherent powers in the *Chinese Exclusion Case*).

309. *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892). In the *Chinese Exclusion Case*, the Supreme Court held that Congress has plenary authority over immigration pursuant not only to the enumerated power to regulate commerce with foreign nations but also to inherent national and international sovereignty powers including the rights of the sovereign to control its territory and safeguard its security. 130 U.S. 581, 609 (1889). Therefore, immigration laws are not subject to constitutional restraint. Later the Supreme Court in *Mathews v. Diaz*, 426 U.S. 67 (1976), extended this plenary power doctrine to permit Congress to discriminate against aliens in the grant of affirmative government welfare benefits. *Id.* at 79–80.

310. Later cases have addressed the lack of constitutional protection for immigrants regarding admission, discrimination, or even indefinite internment. Henkin, *supra* note 308, at 28 & nn.106–07.

311. *Id.* at 26–27; Pringle, *supra* note 27, at 2077. For example, Congress was permitted to exclude or deport an alien for political activity that could not support a criminal conviction because it would not constitute deprivation of liberty without due process of law. *See, e.g.*, *Galvan v. Press*, 347 U.S. 522, 528 (1954); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952). *But see* Ibrahim J. Wani, *Truth, Strangers, and Fiction: The Illegitimate Uses of Legal Fiction in Immigration Law*, 11 CARDOZO L. REV. 51, 83 (1989) ("The Court [in the *Chinese Exclusion Case*] was undoubtedly caught up in the racist and nativist xenophobia of the era. . . . The fiction of sovereignty masked the Court's underlying bigotry by providing the decision with a seemingly objective disinfectant.").

312. Pringle, *supra* note 27, at 2077.

understanding of the Law of Nations. More specifically, there is considerable evidence the Framers relied heavily on Emmerich de Vattel's conception of the Law of Nations.<sup>313</sup> Under his theory, CIL was based on the fundamental principle of the sovereign equality of all nation-states.<sup>314</sup> This sovereignty principle necessarily implies a nation-state's right to control its territory and safeguard its security.<sup>315</sup> Although CIL principally governs the relationship between sovereign nations, it also deals with relations between an alien and a foreign state such as the United States.

In non-immigration cases, however, the Court has held that the extra-constitutional powers inherent in sovereignty are subject to constitutional limitations.<sup>316</sup> Initially, *Ross v. McIntyre*<sup>317</sup> held that the Constitution does not apply abroad.<sup>318</sup> After World War II, the Court reversed itself in *Reid v. Covert*<sup>319</sup> and held the Constitution still governed the extraterritorial actions of U.S. officials towards U.S. citizens.<sup>320</sup> Since *Reid*, aliens here and abroad have been entitled to constitutional protection against certain kinds of governmental action.<sup>321</sup> In the recent battles over the rights of detainees held at Guantanamo Bay, for example, the Supreme Court agreed that even when the United States acts outside its borders, the Constitution

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313. Vega, *supra* note 279, at 412–13.

314. *Id.* at 413.

315. Chae Chan Ping v. United States (Chinese Exclusion Case), 130 U.S. 581, 603–04 (1889).

316. Perez v. Brownell, 356 U.S. 44, 58 (1958) (“Broad as the power of the National Government to regulate foreign affairs must necessarily be, it is not without limitation. The restrictions confining Congress in the exercise of any of the powers expressly delegated to it in the Constitution apply with equal vigor when that body seeks to regulate our relations with other nations.”); United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936).

317. 140 U.S. 453 (1891).

318. *Id.* at 464, 479 (holding that the Constitution is for U.S. territory only and only applies to citizens and others within the United States).

319. 354 U.S. 1 (1957).

320. *Id.* at 12.

321. Plyler v. Doe, 457 U.S. 202, 211–13 (1982) (holding that the equal protection clause protects illegal aliens); Russian Volunteer Fleet v. United States, 282 U.S. 481, 489–91 (1931) (holding that the Fifth Amendment's just compensation clause entitles a foreign corporation to protection). *Contra* United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990) (holding that the Fourth Amendment did not apply to a search by American authorities of the Mexican residence of a Mexican citizen and resident who had no voluntary attachment to the United States); Greenham Women Against Cruise Missiles v. Reagan, 591 F. Supp. 1332, 1338–39 (S.D.N.Y. 1984), *aff'd*, 744 F.2d 34 (2d Cir. 1985) (refusing to consider noncitizens' Eighth and Ninth Amendment claims because they raised nonjusticiable political questions).

limits its powers.<sup>322</sup>

Thus, the issue is whether campaign finance laws banning foreign-controlled corporate spending are more like immigration control laws or more like the laws at issue in the non-immigration cases. If Section 441e is analogous to the immigration cases, then it is not subject to constitutional restraint; but if it is more akin to the non-immigration cases, it will be subject to constitutional restraint. The *HLP* Court does not discuss the sovereignty issue per se. It may be surmised, however, from its discussion of the political-question doctrine that if the Court was reluctant to abdicate its duty to interpret First Amendment rights in the face of a national security matter, it will be equally reluctant to defer to congressional efforts to protect the integrity of the U.S. political process even on the basis of sovereignty.<sup>323</sup>

On balance, it appears this plenary power over foreign relations must be weighed against the demands of the First Amendment for at least three reasons. First, alien constitutional rights ostensibly increase in direct proportion to an alien's contacts with the United States.<sup>324</sup> This sliding scale approach is implied by the manner in which existing campaign finance laws treat PRAs.<sup>325</sup> Although they cannot vote, PRAs can volunteer for campaign work, make donations, and independently spend money in support of or in opposition to a particular candidate or political issue.<sup>326</sup> In October

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322. *Boumediene v. Bush*, 553 U.S. 723, 770 (2008) (holding that enemy combatants were entitled to the privilege of habeas corpus). The Court did note that certain circumstances allowed for this exercise of jurisdiction; most notably the fact that the United States exercised "complete and total control" over Guantanamo Bay. *Id. Contra In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d 157, 167–72 (2008) (holding, as a matter of first impression, that the Fourth Amendment's warrant requirement does not govern searches conducted abroad by U.S. agents and such searches of U.S. citizens need only satisfy the Fourth Amendment's requirement of reasonableness).

323. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2727 (2010).

324. *Boumediene*, 553 U.S. at 793–95 (concluding that detention by the United States is a contact that merits habeas corpus and possibly other criminal procedure rights guaranteed by the Constitution); 120 CONG. REC. 8783 (1974) (statement of Sen. Bentsen) (indicating that PRAs enjoy the most extensive rights of any type of foreign national as they pay taxes and demonstrate an intention to live in the United States for an indefinite period of time). *Contra Matthews v. Diaz*, 426 U.S. 67, 79–80 (1976) (stating that simply entering the borders of the United States as an immigrant guarantees little in the way of constitutional rights and that Congress has broad discretion in this area).

325. *Brown*, *supra* note 107, at 503–04; Note, "Foreign" Campaign Contributions and the First Amendment, 110 HARV. L. REV. 1886, 1895–99 (1997); Pringle, *supra* note 27, at 2074–75.

326. 2 U.S.C. § 441e (2002) (stating that the definition of "foreign national" exempts PRAs from the prohibition); *FEC Foreign Nationals Brochure*, FED. ELECTION COMM'N (July 2003),



2010 a lawsuit was filed in federal court on behalf of two aliens lawfully residing and working in the United States who wished to contribute to U.S. candidates and make independent expenditures in U.S. campaigns.<sup>327</sup> One plaintiff was a Canadian with a TN work visa; the other plaintiff was admitted to the United States as a J1-status non-immigrant.<sup>328</sup> The complaint alleged that Section 441e and its regulations (which it referred to as the “Alien Gag Law”) as applied to aliens who lawfully reside and work in the United States violates the First Amendment.<sup>329</sup> The complaint also invoked the BCRA’s judicial-review provisions, which placed the case before a three-judge federal district court in Washington, D.C. and put it on a fast track for review by the U.S. Supreme Court.<sup>330</sup> The district court denied the plaintiffs’ application for a three-judge court holding that the FEC regulations’ constitutionality is not appropriately challenged in a three-judge court; however, it did request that the D.C. Circuit Court of Appeals appoint a three-judge court to review the plaintiffs’ constitutional challenge to BCRA § 303’s prohibition of contributions by foreign nationals, which is codified at 2 U.S.C. § 441e(a)(1).<sup>331</sup> The three-judge district court not only denied the plaintiffs’ motion for summary judgment but also granted the FEC’s motion to dismiss.<sup>332</sup> The court concluded the federal ban on campaign spending by foreign nationals is constitutional even under strict scrutiny because the statute is narrowly tailored to advance a compelling government interest “in limiting the participation of foreign citizens in activities of American democratic self-government, and in thereby preventing foreign influence over the

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[http://www.fec.gov/pages/brochures/foreign.shtml#Individuals\\_Green\\_Card](http://www.fec.gov/pages/brochures/foreign.shtml#Individuals_Green_Card).

327. Bluman v. FEC, No. 1:10-CV-01766 (RMV)(D.D.C.) (filed Oct. 19, 2010).

328. Complaint at ¶¶ 10, 15, Bluman v. FEC, No. 1:10-CV-01766 (RMV)(D.D.C.) (filed Oct. 19, 2010).

329. *Id.* ¶ 26.

330. *Id.* ¶ 6. A Supreme Court decision not to hear a direct appeal has precedential value; therefore, it makes it more likely that the Court will actually hear the case on appeal should it be appealed.

331. See Bluman v. FEC, 766 F. Supp. 2d 1, 3 (D.D.C. 2011) (citing *McConnell v. FEC*, 540 U.S. 93, 223 (2003)); Kenneth P. Doyle, *History of Limits on Foreign Campaign Money Traced by FEC in Response to New LawsUIT*, BNA MONEY & POL. REP., (Dec. 27, 2010) (on file with author).

332. See Bluman v. FEC, Civil No. 1:10-CV-01766 (D.D.C.) (Aug. 11, 2011), available at [https://ecf.dcd.uscourts.gov/cgi-bin/show\\_public\\_doc?2010cv1766-37](https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2010cv1766-37).

U.S. political process.”<sup>333</sup>

One could argue that American corporations owned by foreign parent companies but operating in the United States are analogous to PRAs and should be treated in kind. However, the 1974 Bentsen Amendment, which first exempted PRAs, appears to reflect Congress’s political judgment (read compromise) rather than any perceived constitutional mandate.<sup>334</sup> If so, Congress could change its mind. Thus, the argument by analogy to PRAs is not dispositive but does weigh in favor of conducting a First Amendment analysis.

Second, the American public has a right to receive information—even from noncitizens.<sup>335</sup> In *Citizens United*, Justice Kennedy was clearly concerned about the harm to “society as a whole, which is deprived of an uninhibited marketplace of ideas.”<sup>336</sup> He concluded that “[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 . . . .”<sup>337</sup> This obviously includes the right to information from foreigners who can provide a different perspective on public policy issues. However, giving foreign-controlled corporations an absolute right to spend money in U.S. political campaigns would effectively turn the right to self-government on its head.

The modern paradigm of the First Amendment has undeniably shifted from the individual speaker on the street corner to mass media predominated by large corporations.<sup>338</sup> This reality militates in favor of carefully protecting our national sovereignty from being trampled by foreign corporate concerns directly or indirectly. Moreover, in today’s digital age the voice of the individual has

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333. *Id.* at 10.

334. *See supra* text accompanying note 270.

335. *See* *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (“It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.”); *see also* Waters, *supra* note 107, at 805 (discussing the impact of indirect restraints on free speech). *See generally* Nadia L. Luhr, *Iran, Social Media, and U.S. Trade Sanctions: The First Amendment Implications of U.S. Foreign Policy*, 8 FIRST AMENDMENT L. REV. 500, 500 (2010) (giving examples of Twitter and Web 2.0 tools in use in Iran).

336. *Citizens United*, 130 S. Ct. at 896 (quoting *Virginia v. Hicks*, 539 U.S. 113, 119 (2003)).

337. *Id.* at 898; *accord* OWEN M. FISS, *THE IRONY OF FREE SPEECH* (1998); ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* (1948); CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993).

338. Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1409 (1986); Owen M. Fiss, *Silence on the Street Corner*, 26 SUFFOLK U. L. REV. 1 (1992).

begun to reemerge with blogs, wikis, and other low-cost methods of communication made possible by the Internet. Thus, the money of corporations owned or controlled by noncitizens is not necessary to preserve our form of self-government. Nevertheless, the First Amendment is still needed to determine the extent to which such spending can be constitutionally restricted to prevent foreign influence.

Alternatively, the right to receive information from foreign-controlled corporations also seems to follow from a major premise of *Citizens United*; namely, “the First Amendment stands against attempts to disfavor certain subjects or viewpoints.”<sup>339</sup> According to the majority, “restrictions distinguishing among different speakers, allowing speech by some but not others,”<sup>340</sup> are constitutionally prohibited because “[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content.”<sup>341</sup> However, Justice Stevens demonstrated that the majority opinion in this regard proved too much:

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 . . . . More pertinently, it would appear to afford the same protection to multinational corporations controlled by foreigners as to individual Americans: To do otherwise, after all, could “enhance the relative voice” of some (*i.e.*, humans) over others (*i.e.*, nonhumans).<sup>342</sup>

In Justice Stevens’s estimation, Justice Kennedy all but admitted that an absolute rule against restrictions based on speaker identity is “untenable” when he acknowledged that Congress might be allowed to take measures aimed at “preventing foreign individuals or associations from influencing our Nation’s political process.”<sup>343</sup> As Justice Stevens further explained, “Such measures have been a part of U.S. campaign finance law for many years. The notion that

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339. *Citizens United*, 130 S. Ct. at 898.

340. *Id.*

341. *Id.* at 899.

342. *Id.* at 947–48 (Stevens, J., dissenting in part) (quoting *id.* at 921 (majority opinion) (quoting *Buckley v. Valeo*, 424 U.S. 1, 49 (1976))).

343. *Id.* at 948 n.51.

Congress might lack the authority to distinguish foreigners from citizens in the regulation of electioneering would certainly have surprised the Framers . . . .<sup>344</sup>

Third, CIL must continue to evolve before the right to exclude foreign-controlled political speech can be recognized as “perfect,” to use Vattel’s term.<sup>345</sup> Under Vattel’s analytical framework, CIL consists of only perfect rights.<sup>346</sup> In the late eighteenth century, campaign-spending regulations were categorized as “imperfect” rights, leaving each nation free to decide the content of those rules. The Supreme Court has recognized, however, an evolving concept of CIL.<sup>347</sup> This means that occasionally the Court steps outside the known boundaries of conventional international law and expands our common understanding, thereby incorporating it into the Supreme Law of the Land.<sup>348</sup> But this generally requires a particular rule to be universally viewed as mandatory and widely practiced. Currently, there is no evidence of universal consensus on this point. According to the latest information available, only thirty-eight of 218 countries surveyed prohibit foreign corporate donations.<sup>349</sup> Lesser-developed countries and areas affected by war are the most susceptible to foreign influence.<sup>350</sup> However, few nations other than the United States expressly regulate independent expenditures. The lack of any mandate from CIL leaves the need for a full consideration of the

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344. *Id.*

345. Vega, *supra* note 279, at 390.

346. For Vattel, the Law of Nations actually consisted of two separate lines of authority: (1) the necessary law of a nation, which reflected the natural Law of Nations; and (2) the voluntary law of nations, which was a positivist construct of rights sufficiently “perfect” to derive the former. *Id.* at 413. The translation from one to the other is fraught with various ambiguities and anomalies that constitutional—and international—law scholars alike wrestle with still today. New natural-law theories offer an alternative way to recognize these perfect rights as fundamental goods. However, modern Supreme Court jurisprudence in both constitutional law and international law has expressly declined to employ this deontological newspeak.

347. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 749–51 (2004).

348. BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 4 (paperback ed. 1993). Professor Ackerman refers to these rare occasions as “transformative constitutional moments” in the Constitution. *Id.*

349. Joseph P. Covington & Iris E. Bennet, *Signs of Life in International Anti-Bribery Enforcement: Recent Enforcement of Anti-Bribery Laws Outside the U.S. and Issues to Consider for a Multi-Jurisdictional Defense Strategy*, JENNER & BLOCK LLP 1 (May 4, 2009), [http://www.jenner.com/files/tbl\\_s20Publications%5CRelatedDocumentsPDFs1252%5C2499%5Ccovington%20%20bennett%20pdf.pdf](http://www.jenner.com/files/tbl_s20Publications%5CRelatedDocumentsPDFs1252%5C2499%5Ccovington%20%20bennett%20pdf.pdf).

350. *Corruption Perceptions Index 2009*, TRANSPARENCY INT’L (Sept. 23, 2009), [http://www.transparency.org/policy\\_research/surveys\\_indices/cpi/2009/cpi\\_2009\\_table](http://www.transparency.org/policy_research/surveys_indices/cpi/2009/cpi_2009_table).

constitutionality of the speech suppression under the First Amendment.<sup>351</sup>

*C. Three Theories for Expanding Section 441e*

The foregoing discussion establishes two things: first, campaign spending by foreign-controlled or foreign-owned American corporations is likely to be constitutionally protected; and second, even assuming the First Amendment applies, the goal of preventing foreign influence could potentially justify restrictions on the financial participation of foreign-controlled domestic corporations in U.S. elections. The remaining question is one of line-drawing. It is easy to state that foreign influence in U.S. elections needs to be limited. The challenge is in determining where to draw the line.

If *Citizens United* is to be distinguished in the context of foreign-controlled corporations, then a clear, workable test must be found. Ambiguous criteria invite disparate treatment and create due process problems. Foreign-controlled corporations must be able to predict when their actions conform to the law. And courts cannot be expected to engage in case-by-case analysis in determining when foreign influence over U.S. elections should be limited. Therefore, I propose three possibilities: (1) lowering the standard of review from traditional strict scrutiny to intermediate scrutiny; (2) resurrecting the *Austin/McConnell* antidistortion rationale to justify extending Section 441e to foreign-owned or foreign-controlled domestic corporations; or (3) recognizing that preventing foreign influence is a compelling state interest and that extending Section 441e's ban on coordinated expenditures is necessary to achieve that goal.

These three possibilities are supported by the *HLP* decision. The *HLP* court did not address every potential First Amendment implication of the anti-terrorism law at issue. Instead, the Court concluded that the groups challenging the law failed to give enough details regarding the political speech at stake to create a case or controversy in a pre-enforcement action. Nevertheless, the decision's dictum shed new light on how to apply the First Amendment in the foreign context.

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351. As I hope to demonstrate in a future article, CIL best supports voluntary self-regulation by multinationals and other stakeholders working with the public sector in a transnational legal process.

### 1. Lower the Standard to Intermediate Scrutiny

The *HLP* Court grappled with the proper standard of scrutiny in the foreign context of that case. As discussed in Part III *supra*, if a content-based restriction on speech involves core First Amendment rights, it must pass strict scrutiny, which means it will almost never be upheld.<sup>352</sup> To date, the only case in the campaign finance law context to uphold a restriction under strict scrutiny is *Austin*, which *Citizens United* reversed.<sup>353</sup> If a restriction is content neutral, then the Court applies intermediate scrutiny. As the dissent points out, however, the *HLP* decision is less than clear on which standard it applied.<sup>354</sup> According to the majority, the proper test was whether the law is “necessary” to further a government interest of “the highest order.”<sup>355</sup> On the one hand, this sounds a lot like an inquiry under strict scrutiny: whether the statute is narrowly tailored to a compelling state interest.

On the other hand, the “necessary” language is broad enough to capture any activity that would, directly or indirectly, advance the state interest. In fact, the Court expressly reserved the question of whether a ban on purely independent advocacy speech would be constitutionally necessary to further the state interest.<sup>356</sup> Therefore, the *HLP* Court applied the intermediate level of scrutiny.<sup>357</sup> Under intermediate scrutiny a statute must further an important and substantial government interest (such as protecting national security) and restrict First Amendment freedom no more than is necessary.<sup>358</sup> The material-support statute at issue in *HLP* easily survives this

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352. A restriction is content based if it targets specific words, facts, ideas, subjects, or viewpoints. *E.g.*, *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115 (1989); *Boos v. Barry*, 485 U.S. 312, 329 (1988) (treating anti-harassment law as a content-based restriction on speech subject to strict scrutiny).

353. *Citizens United*, 130 S. Ct. at 913. *Contra* *Burson v. Freeman*, 504 U.S. 191, 211 (1992) (holding that a state can ban campaign materials within 100 feet of a polling place on election day). A plurality of the majority in *Burson* upheld the restriction under strict scrutiny; however, the deciding vote was cast by Justice Scalia, who did not apply strict scrutiny. *Id.* at 214–16.

354. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2734–35 (2010).

355. *Id.* at 2723.

356. *Id.* at 2724.

357. See Brief for the Respondents in Opposition at 18, *Citizens United*, 130 S. Ct. 876 (2009) (No. 09-89), 2009 WL 2599325 at \*18 (arguing that every court to have faced the issue has concluded that the material-support statute is subject to intermediate scrutiny, which it easily satisfies).

358. *Id.* at 4.

lower scrutiny because its restrictions were content neutral and directed at the particular forms of support the plaintiffs sought to provide to foreign terrorist groups.<sup>359</sup> This suggests that intermediate scrutiny applies to any speech restrictions falling within the “foreign relations” purview of the political branches. This would certainly include preventing undue foreign influence in U.S. elections.<sup>360</sup>

## 2. Invoke a Limited “Antidistortion” Rationale

Alternatively, an antidistortion rationale could justify extending the Section 441e ban to foreign-controlled domestic corporations. This approach would require salvaging the antidistortion rationale from the wreckage of *Austin* and *McConnell*, which *Citizens United* overturned. To do so, the holding in *Citizens United* must be limited to its facts, which involved a purely domestic source of potential distortion. Under this reading, courts are free to deploy the antidistortion rationale in cases involving a foreign influence. Among citizens, it might be unfair to characterize a volume of speech as distortion; however, when one of the speakers is foreign controlled, the opposite is true. Campaign spending by a foreign-controlled corporation is, by definition, a distortion of an exclusively American political process.

Limiting *Citizens United* to purely “domestic” corporations would also bring much needed coherence to the opinion.<sup>361</sup> The Court acknowledged that the right of association plays an important part in determining a corporation’s rights. At the same time, the Court insisted that corporate rights are independent of individual rights.<sup>362</sup> Both propositions make some sense in the case of a domestic corporation owned and controlled entirely by American citizens. In

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359. *Id.* at 5.

360. See *Bluman v. FEC*, Civil No. 1:10-CV-01766, at 8 (D.D.C.) (Aug. 11, 2011), available at [https://ecf.dcd.uscourts.gov/cgi-bin/show\\_public\\_doc?2010cv1766-37](https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2010cv1766-37) (noting the FEC position that § 441e(a) manifests a congressional judgment on a matter of foreign affairs and national security, and is thus subject to deferential rational basis review, but concluding the statute passes muster even under strict scrutiny). *But see* *Rothstein v. UBS AG*, 772 F. Supp.2d 511, 516 (S.D.N.Y. 2011) (concluding that the Supreme Court’s finding in *HLP* that foreign terrorist organizations (FTOs) “are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct is specific to FTOs” (citation omitted) (internal quotation marks omitted)).

361. The decision can be read as limited to domestic corporations but not limited to nonprofit domestic organizations since some funds used to make the movie were donations from for-profit corporations. *Citizens United*, 130 S. Ct. at 891.

362. *Id.* at 883–84.

that context, the corporation's political-speech rights flow from the rights of its underlying members as U.S. citizens, and in the aggregate, these new corporate rights have their own viability. However, if some or all of a corporation's shareholders do not have such rights, by virtue of their non-citizenship, it does not necessarily follow that the corporation should be afforded any separate and independent rights.<sup>363</sup> It is one thing to argue that "the people" protected by the First Amendment includes U.S. citizens, both individually and collectively, but it is entirely different to argue that the term was meant to include corporations comprising or controlled by aliens. On the contrary, the U.S. government has a cognizable interest in preventing foreign influence from distorting its political process that is sufficiently compelling to justify a restriction on foreign-controlled domestic corporations' financial participation in U.S. elections.

### 3. Categorize It as Coordinated Expenditures

Finally, dicta in *HLP* suggest the Section 441e ban can be constitutionally expanded to speech that is impermissibly coordinated with foreign principals. Congress, the FEC, and the Supreme Court have all assumed, to one degree or another, that political-speech rights do not extend to foreign participation in the political process. It stands to reason, therefore, that those foreign corporations should not be allowed to do indirectly what they cannot do directly. Suppose, for example, the Organization of the Petroleum Exporting Countries (OPEC) formed a wholly owned American subsidiary, Drill Baby Drill, Inc. ("DBD, Inc."), which then used its revenue to help elect the U.S. political candidates most likely to advance the interests of the foreign oil and gas industry. Should Congress have the constitutional authority to pass a statute limiting DBD, Inc.'s influence on U.S. elections? If so, how should the statute distinguish DBD, Inc. from other American corporations? The answer under FARA would depend on whether DBD, Inc. was a foreign agent.

The approach under the treason-by-propaganda cases would ask whether the defendant was an employee. Under *Citizens United* and

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363. Of course, modern corporations often have both foreign and domestic shareholders. How to resolve this difficulty is discussed later.



*HLP*, however, such political spending may be restricted to the extent that it is coordinated with a foreign entity, and the term “coordinated” can be broadly defined to include foreign ownership or control.

The independence of any expenditure by a foreign-owned or foreign-controlled domestic corporation is inherently compromised. The *HLP* opinion supports this conclusion by extending the concept of impermissible coordination to speech “controlled by” and even “directed at” foreign groups.<sup>364</sup> Speech that is independent of any foreign source, on the other hand, remains fully protected because the *HLP* Court presumed that if the speech is independent, it will not materially support a foreign group in any way. Conversely, speech is not protected when the speaker has knowledge of supporting or aiding certain foreign groups (the intent is not required) and the speaker is actually controlled by or coordinated with the foreign group.<sup>365</sup>

Although the particular foreign groups in the *HLP* case were terrorist organizations, the Court’s two-prong test would theoretically apply to any case triggering the general authority of Congress and the executive branch over foreign relations.<sup>366</sup> A foreign-controlled organization is not only controlled by a foreign principal but also knows its political efforts materially support the foreign principal. In many respects, the discussion in *HLP* is parallel to the classification of coordinated expenditures in *Citizens United*. In that case, the Court recognized that coordinated expenditures can be treated as the “functional equivalent” of direct contributions because they pose the same high risk of corruption. In this regard, the FEC recently issued a final regulation regarding coordinated communications that went into effect December 1, 2010.<sup>367</sup> The regulation applies the Court’s “functional equivalent” test to candidates, political parties, and those

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364. *Holder*, 130 S. Ct. at 2728–29. Although the language “directed at” is the most open-ended of the two statutory phrases, it has limited application in the context of U.S. elections; therefore this Article focuses mostly on the “controlled by” language.

365. This is analogous to the reasoning used in the treason-by-propaganda cases. *See supra* text accompanying notes 109–13. *But see Holder*, 130 S. Ct. at 2734–35 (Breyer, J., dissenting) (concluding that finding that independent speech “benefits” a foreign terrorist group is not enough to justify limits).

366. *See Holder*, 130 S. Ct. at 2710–11 (balancing the protection of free speech with the government’s interest in combating terrorism).

367. 11 C.F.R. § 109 (2010).

who coordinate with them.<sup>368</sup> Similarly, speech coordinated with a foreign entity poses the same risk of foreign influence as direct foreign speech.

Admittedly, there are practical and legal difficulties concerning how to define legal “control” by a foreign entity. The easiest cases are those in which a domestic corporation is the wholly owned subsidiary of a foreign parent and is acting as its agent.<sup>369</sup> The more difficult cases involve multinationals. The DISCLOSE Act would have drawn the line for what constitutes foreign control of a domestic corporation at 20 percent of the outstanding shares. Critics argue that line is arbitrary.<sup>370</sup> This criticism is somewhat supported by the Senate version of the bill, which adopted a 50 percent cutoff.<sup>371</sup> However, the Securities and Exchange Commission is on record stating that 20 percent is, in fact, the minimum level of ownership necessary for effective control of a corporation.<sup>372</sup> In addition, the same rule of thumb has been applied in other contexts, like the ban on foreign broadcast licenses.<sup>373</sup>

In the end, the DISCLOSE Act would not have prohibited independent expenditures or expression of any kind. Foreign-owned or foreign-controlled U.S. subsidiaries would still have been free to speak and write about any topic, even about American politics or policies. The statute, as proposed, only prohibited speech that was

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368. *Id.*

369. *See* 29 Op. Fed. Election Comm’n Dissent 1, 2–5 (1989) (arguing that treating subsidiaries and their parents as a singular entity is not a novel concept, as it is done with regard to all other corporate subsidiaries except those that are foreign-owned). The U.S. Supreme Court recently declined to address the question of when a parent company and its foreign subsidiary may be treated as a “unitary business” under a single enterprise theory because the respondent raised the issue for the first time in oral argument. *See* *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2857 (2011); United States Supreme Court Official Transcript at 27–28, *Goodyear Dunlop Tires Operations*, 131 S. Ct. 2846 (No. 10-76).

370. *See* 156 CONG. REC. H5524 (daily ed. July 13, 2010) (statement by Rep. John Carter) (“We have a Supreme Court opinion, a recent Supreme Court opinion, that protected certain First Amendment rights of free speech, and this Congress and this administration immediately brought to this floor and shoved through on a partisan vote a bill called the DISCLOSE Act, which gives special free speech rights to some and bars other groups from having the same rights, which is in the face of a Supreme Court opinion that’s taken place this summer.”).

371. *See* DISCLOSE Act, S. 3295, 111th Cong., § 101 (2010); *supra* text accompanying notes 109–11.

372. *See* *In the Matter of Request for Declaratory Ruling Concerning the Citizenship Requirements of Sections 310(b)(3) & (4) of the Communications Act of 1934, as amended*, 103 F.C.C. 2d 511, 515–16 (1985).

373. *See* Addis, *supra* note 27, at 150–56 (discussing the stated justification for the 20 percent rule in the United States as well as Australia, Canada, and France).

coordinated with or controlled by foreign principals. The threshold inquiry under the statute was not whether the speech would, in fact, corrupt the political process. In fact, the statute did not purport to stop foreign entities from gaining any unfair business advantage.<sup>374</sup> Rather, the statute narrowly focused on maintaining fidelity to the plain meaning of self-governance by only preventing foreign influence in U.S. elections. To that extent, its restrictions would likely have withstood First Amendment scrutiny under one or more of the approaches outlined *supra*.

#### V. CONCLUSION

The DISCLOSE Act failed to achieve cloture on July 27, 2010, and again on September 23, 2010; however, Democrats have vowed to continue the battle in the 112th Congress. While Republicans may not support the DISCLOSE Act in its entirety, there is considerable bipartisan support for the provisions relating to foreign nationals. In fact, there were over ten other campaign finance reform bills circulating in the 111th Congress containing similar language strengthening the ban on foreign influence in U.S. elections. Therefore, the Supreme Court will likely have the opportunity to resolve the First Amendment questions surrounding these reform efforts in one form or another.

The Court should permit Congress to freely restrict foreign corporations' financial participation in U.S. elections based on the extra-constitutional principles of sovereignty, national security, and foreign relations powers. Theoretically, the Court also has ample grounds to uphold similar restrictions on foreign-controlled or foreign-owned American corporations. Even though they are likely covered by the First Amendment, the speech of foreign-controlled domestic corporations is directly or indirectly controlled by or coordinated with foreign nationals. Therefore, the Court should apply a lower standard of scrutiny when analyzing the restriction. Even if strict scrutiny applies, the Court should apply an antidistortion rationale exclusive to cases involving foreign influence.

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374. There was a legislative proposal in the 110th Congress to give American companies a private cause of action against foreign companies that seek to obtain an unfair business advantage by offering or promising or giving a bribe or anything else of value to a U.S. government official or political candidate. Foreign Business Bribery Prohibition Act of 2008, H.R. 6188, 110th Cong. § 2(f) (2009).

Alternatively, the Court should classify the restricted political speech as impermissibly coordinated with foreign principals, as suggested by dicta in *HLP*. Either way Congress's efforts are narrowly tailored to achieve a compelling state interest—namely, to prevent foreign influence or distortion in U.S. elections.

