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Citizens United and Forced Speech: Why Protecting the Dissenting Shareholder Necessitates Disclosure of Corporate Political Expenditures After Citizens United v. FEC

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Citizens United and Forced Speech: Why Protecting the Dissenting Shareholder Necessitates Disclosure of Corporate Political Expenditures After *Citizens United v. FEC*

Sabina Bunt Thaler*

"Corporation, n.
An ingenious device for obtaining individual profit without individual responsibility.

—Ambrose Bierce, The Devil's Dictionary"[1]

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1. Tamara R. Piety, *Against Freedom of Commercial Expression*, 29 CARDOZO L. REV. 2583, 2604 (2008) (quoting AMBROSE BIERCE, THE DEVIL'S DICTIONARY 43 (Filiquarian Publishing 2007) (1911)).

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***Stephen Colbert**: Now what does it mean to individual donations? Like a corporation as a person . . . gets to give any amount of money, but I as a person can only give twenty-five hundred dollars?*

> ***Jeffrey Toobin**: Right, that is what is potentially the next legal challenge. Because if giving money is a form of speech, as the Court has held at various times, you can't prohibit a company from giving money and then presumably the next step would be you can't have limits on how much individuals could give either. That's the potential implication of this decision.*
>
> ***Colbert**: . . . Right now corporations will actually have more power as people than people, until people catch up with corporations?*
>
> ***Toobin**: That is exactly right, that would be the rule.*
>
> ***Colbert**: So that actually kind of confuses me, how corporations are more people than people. Could we um, could we settle that by ruling that people aren't people.*
>
> ***Toobin**: I do not think that that is going to be the way the Court rules—ruling that people aren't people.*
>
> ***Colbert**: Have you met Justice Scalia?*[2]

Introduction

Protesters rallied outside of Target Corporation's (Target) Minnesota corporate headquarters for weeks following the revelation that Target had given money to help Republican gubernatorial candidate, Tom Emmer, an outspoken opponent of gay marriage.[3] As one of the first major corporations to take advantage of the Supreme Court's recent decision in *Citizens United v. Federal Election Commission*,[4] that held unconstitutional

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2. *The Colbert Report:* Citizens United v. Federal Election Commission*: Jeffrey Toobin* (Comedy Central television broadcast Sept. 15, 2009), http://www.colbertnation.com /the-colbert-report-videos/249057/september-15-2009/citizens-united-v--federal-election-commission---jeffrey-toobin.

3. Martiga Lohn, *Liberal Groups Push to Exploit Target Backlash*, ASSOCIATED PRESS (Aug. 13, 2010, 9:32 AM EDT), *available at* http://finance.yahoo.com/news/Liberal-groups-push-to-apf-2321043209.html?x=0 (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

4. *See* Citizens United v. Federal Election Commission, 130 S. Ct. 876, 913 (2010) (overruling *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990), which held a Michigan statute restricting corporate spending in connection to state elections did not violate First Amendment, and parts of *McConnell v. FEC*, 540 U.S. 93 (2003), which upheld constitutionality of various restrictions on soft money contributions to state committees).

restrictions on corporate political expenditures, Target became a bull's-eye for gay rights groups and liberal political advocacy groups, alike.[5] As a result of Target's political expenditures, pop music sensation Lady Gaga dumped her endorsement deal with the company,[6] and the future of a planned San Francisco expansion, once met with enthusiasm, now hangs in the balance.[7] The uproar that followed Target's political spending motivated Target's CEO, Gregg Steinhafel, to issue a public apology and a promise that Target would more closely oversee its political spending.[8] Yet, just two months after Mr. Steinhafel's apology, documents filed with the Federal Election Commission (FEC) reveal that Target continued to fund anti-gay rights politicians.[9] Although the legacy of Target's political spending is not yet certain, the public outcry over its political advocacy illustrates the passionate disapproval corporate political spending can invoke in those who disagree with the speech.

With nearly one hundred million Americans investing in mutual funds, unfettered corporate political spending risks offending the speech rights of millions of Americans.[10] People define themselves in many ways, but fundamental to individuality is the choice of what to say and which cause to support.[11] Policies such as affirmative action, welfare, and a woman's right to choose turn on their public and congressional support—support that inevitably manifests itself in political expenditures.[12] These political

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5. Lohn, *supra* note 3.

6. Mary Papenfuss, *Gaga Dumps Target Deal in Gay Rights Flap*, NEWSER (Mar. 9, 2011, 2:00 AM CST), *available at* http://www.newser.com/story/113697/gaga-dumps-target-deal-in-gay-rghts-flap.html (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

7. Lohn, *supra* note 3.

8. Press Release, Target Brands, Inc., Civic Activity (Aug. 5, 2010), *available at* http://pressroom.target.com/pr/news/civic-activity.aspx (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

9. Abe Sauer, *The Anti-Gay Donations that Target Apologized for? They Never Stopped*, THE AWL, Dec. 21, 2010, *available at http://www.theawl.com/2010/12/the-anti-gay-donations-that-target-apologized-for-they-never-stopped* (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

10. *See* discussion *infra* Part IV.B.1.c (discussing prevalence of Americans who own stock in mutual funds).

11. *See* Citizens United v. Federal Election Commission, 130 S. Ct. 876, 913 (2010) (Stevens, J., concurring in part and dissenting in part) (noting "selection of public officials, [is] an area in which 'the interests of unwilling . . . corporate shareholders [in not being] forced to subsidize that speech are at their zenith" (alteration added) (internal citation omitted)).

12. *See* Buckley v. Valeo, 424 U.S. 1, 19 (invalidating some campaign finance reforms on the theory that money is itself a form of speech protected by the First

expenditures should reflect the support they are intended to convey. Or, at the very least, those funding the electioneering communication should be able to withdraw their financial support from political expenditures with which they disagree.

When corporations use general treasury money to finance electioneering communications, they use their shareholders' money to fund *their* corporate speech.[13] Corporate laws such as the business judgment rule allow corporations to make these business decisions without shareholder consent.[14] Yet, political expenditures are fundamentally different from general business decisions because political expenditures support causes intrinsic to self-expression.[15] An interesting body of law, termed the "Forced Speech Doctrine," holds that freedom of speech under the First Amendment to the U.S. Constitution[16] includes freedom from compulsory speech.[17] The two major Supreme Court cases in this boutique category of First Amendment jurisprudence are *Keller v. State Bar of California*,[18] and *Abood v. Detroit Board of Education*.[19] These cases held that dissenting attorneys and nonunion public school teachers, respectively, could not be required by law to contribute money to an organization that uses compulsory dues to make political expenditures that are unrelated to the organization's mission.[20] Such compulsory dues constitute a violation of the individuals' freedom of speech under the First Amendment to the U.S. Constitution.[21] As this Note will discuss, after *Citizens United*,

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Amendment).

13. *See* discussion *infra* Part III.C (discussing shareholders and forced speech).

14. *See* discussion *infra* Part IV.B.2 (explaining business judgment rule).

15. *See Buckley*, 424 U.S. at 16–17 (noting that spending money can operate as a form of personal expression).

16. *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech.").

17. *See* discussion *infra* Part III (discussing the forced speech doctrine).

18. *See* Keller v. State Bar of Cal., 496 U.S. 1, 13–15 (1990) (holding State Bar's use of compulsory dues to finance political and ideological activities with which members disagreed violated members' First Amendment right of free speech when such expenditures were not necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of legal services).

19. *See* Abood v. Detroit Bd. of Ed., 431 U.S. 209, 235–36 (1977) (holding Constitution requires that objecting nonunion employees not be required to pay dues to the union when the union uses those dues to further political and ideological speech with which they disagree provided such uses are not germane to the services the union provides).

20. *See supra* text accompanying notes 18–19 (describing Court's holdings in *Abood* and *Keller*).

21. *Keller*, 496 U.S. at 13–15; *Abood*, 431 U.S. at 235–36.

corporations may use their general treasuries to fund political causes that may, or may not be germane to the corporation's mission.[22] Because shareholders own corporations,[23] this Note first explores whether corporations force dissenting shareholders to speak when they avail themselves of the spending rights recognized in *Citizens United*.

Safeguarding freedom of expression requires protecting dissenting shareholders from being forced to support disagreeable causes. To provide such protection, it is paramount that corporations disclose how they are spending their shareholders' money.[24] This Note discusses various options for improving disclosure of corporate political expenditures.[25]

This Note concludes that without disclosure and disclaimer safeguards, the *Citizens United* decision allows corporations to compel shareholders to speak when corporations spend money from the corporate treasury on disagreeable electioneering communications.[26] First, in Part I, this Note discusses the impact of the Supreme Court's recent campaign finance decision holding unconstitutional prohibitions on corporate political expenditures.[27] Next, Part II briefly explores the history of campaign finance regulation and the Court's consideration of the legislation's constitutionality.[28] Then, discussing the forced speech doctrine, Part III analyzes the implications of the forced speech doctrine after *Citizens United*.[29] Transitioning to a proposed solution, Part IV rejects the efficacy of various aspects of current disclosure and disclaimer regulations in advising shareholders of corporate expenditures.[30] Finally, Part V recommends various improvements to the current disclosure and disclaimer

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22. *See* discussion *infra* Parts I, III (discussing corporate political spending after *Citizens United*).

23. *See* ROBERT W. HAMILTON & RICHARD A. BOOTH, BUSINESS BASICS FOR LAW STUDENTS 284 (Aspen Publishers, 4th ed. 2006) (defining publicly held businesses as "those in which a public market exists for ownership interests").

24. *Infra* Parts IV–V.

25. *Infra* Parts IV.B.1, V.

26. This Note uses the term "disagreeable electioneering communications" to indicate corporate electioneering communications supporting or opposing political causes with which the corporation's shareholder(s) disagree.

27. *See* discussion *infra* Part I (describing *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010)).

28. *See* discussion *infra* Part II (explaining history of campaign finance reform).

29. *See* discussion *infra* Part III (discussing the forced speech doctrine).

30. *See* discussion *infra* Part IV (analyzing corporate democracy and current disclosure and disclaimer legislation).

legislation that strike a balance between the First Amendment rights of corporations and shareholders alike.[31]

I. Citizens United v. Federal Election Commission

Motivated by concerns of corruption, unfair influence, and compelled shareholder expression, Congress had successfully restricted corporate electioneering for the past sixty-three years.[32] But, in January 2010, the Court, by a 5-to-4 vote, dismantled these campaign-financing safeguards, and in so doing, uprooted more than half a century of restrictions and two decades of law.[33] In *Citizens United v. FEC*, the Supreme Court held unconstitutional federal restrictions on independent political expenditures.[34]

A. Background Story of the Case

In the wake of the 2008 presidential election, a conservative organization called Citizens United produced *Hillary: The Movie* (*Hillary Movie*),[35] which functioned as a right-wing perspective on the life of, then-presidential hopeful—Secretary Hillary Rodham Clinton.[36] Although *Hillary Movie* almost certainly appealed to its key demographic, it never

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31. *See* discussion *infra* Part V (recommending improvements to current disclosure and disclaimer legislation).

32. *See* CIARA TORRES-SPELLISCY, BRENNAN CENTER FOR JUSTICE, CORPORATE CAMPAIGN SPENDING: GIVING SHAREHOLDERS A VOICE 7–8 (2010), http://www.brennancenter.org/page//publications/shareholdersvoice2_5_10.pdf (explaining corporate political spending banned for past sixty-three years).

33. *See* Citizens United v. FEC, 130 S. Ct. 876, 913 (2010) (overruling *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990), which held a Michigan statute restricting corporate spending in connection to state elections did not violate the First Amendment, and parts of *McConnell v. FEC*, 540 U.S. 93 (2003), which upheld the constitutionality of various restrictions on soft money contributions to state committees); *see also* TORRES-SPELLISCY, *supra* note 32, at 7–8 (discussing the effect of *Citizens United*).

34. *See Citizens United*, 130 S. Ct. at 913 (holding that a ban imposed on independent corporate political expenditures violated the First Amendment because the Government could not suppress political speech on the basis of the speaker's identity as business corporation).

35. HILLARY: THE MOVIE (Citizens United 2008), *available at* http://video.google.com/videoplay?docid=8464923602139974671# (last visited Oct. 7, 2010).

36. *See* Philip Rucker, *Citizens United Used 'Hillary: The Movie' to Take on McCain-Feingold*, WASH. POST, Jan. 22, 2010, *available at* http://www.washingtonpost.com/wpdyn/content/article/2010/01/21/AR2010012103582.html?sid=ST2010012104871 (on file with the Washington and Lee Journal of Civil Rights and Social Justice)

had the chance to become a blockbuster.[37] For, as many in Hollywood would probably attest: one bad review can bring even the surest hit to its knees. And for *Hillary Movie*, that critique came from a Washington panel of judges who concluded that this "scalding documentary . . . was not really a movie at all."[38] Determining that *Hillary Movie* was not so much of a documentary as it was a "90-minute campaign ad," the panel concluded the movie was "susceptible of no other interpretation than to inform the electorate that Senator Clinton is unfit for office, that the United States would be a dangerous place in a President Hillary Clinton world, and that viewers should vote against her."[39] This review was not just bad for viewership; it crippled the entire project. As a documentary, *Hillary Movie* would have been accorded the full breadth of First Amendment rights, but *Hillary Movie*'s designation as a campaign advertisement (or, "electioneering") catapulted it into conflict with restrictions on distribution and advertising under the Bipartisan Campaign Reform Act of 2002 (BCRA).[40] This Act limited how and when the movie could be disseminated and advertised.[41]

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37. *See id.* (observing *Hillary Movie* never became a blockbuster).

38. Robert Barnes, *'Hillary: The Movie' to Get Supreme Court Screening*, WASH. POST, Mar. 15, 2009, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/03/14/AR2009031401603_pf.html (describing *Hillary Movie*) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

39. *See* Citizens United v. FEC, 530 F. Supp. 2d 274, 279–80 (D.D.C. 2008) (internal quotation marks omitted) (finding *Hillary Movie* was the functional equivalent of express advocacy); *see also* Barnes, *supra* note 38 (describing Citizens United group's purpose in creating *Hillary Movie*).

40. *See* Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of 2 U.S.C.) (amending Federal Election Campaign Act of 1971 (FECA), Pub. L. No. 92-225, 86 Stat. 3 (1972)). BCRA amended FECA to prohibit soft money contributions to federal campaigns. BCRA § 101 (codified as amended at 2 U.S.C. § 441). Prior to BCRA, corporations, unions, and individuals were allowed to exceed the maximum permissible contribution by donating to "political parties for activities intended to influence state or local elections." McConnell v. Fed. Election Comm'n, 540 U.S. 93, 123 (2003). Furthermore, the FECA's disclosure and financing limitations applied only to express advocacy. *Id.* at 126. Thus, "[t]he political parties . . . could not use soft money to sponsor ads that used any magic words, and corporations and unions could not fund such ads out of their general treasures." *Id.* However, corporations could freely sponsor ads that did not "'expressly advocate the election or defeat of a clearly identified candidate'"—termed so-called issue ads. *Id.* (quoting Buckley v. Valeo, 424 U.S. 1, 80 (1976) (per curiam)). As such, not only could corporations fund issue ads with soft money, those ads "could be aired without disclosing the identity of, or any information about, their sponsors" because the FECA's disclosure provisions were also inapplicable to issue advocacy. *Id.* The combined effect of the soft money loophole and the distinction between issue and express advocacy resulted in unfettered corporate sponsorship for political advertisements. *Id.* at 127–28 ("Corporations and unions spent hundreds of millions of dollars of their general funds to pay for these ads, and those expenditures, like soft-money donations to the political parties, were unregulated

The BCRA applied to Citizens United despite the group's classification as a nonprofit because Citizens United partially financed the movie with corporate funds. Under BCRA:

> Citizens United could show [*Hillary Movie*] in theaters and sell it on DVDs, but promoting it through its planned advertising campaign was restricted. And the prohibitions on broadcast just before an election doomed the group's hope of paying $1.2 million to have the movie available on cable systems around the country via video-on-demand services.[42]

The freedom to show and sell *Hillary Movie* did not appease Citizens United, as the group viewed the Federal Election Commission's (FEC) restrictions on distributing the movie as a threat to Citizen United's freedom of speech.[43] Seizing the opportunity to take-on the BCRA, the organization's leader, David Bossie, sued—and thus was born *Citizens United v. FEC*.[44]

After a fairly predictable loss in the lower court,[45] Citizens United appealed the decision directly to the Supreme Court.[46] The Court agreed to hear the case, and in March 2009, Deputy Solicitor General Malcolm L. Stewart, for the Government, and Theodore Olson, along with Michael Boos and veteran First Amendment lawyer Floyd Abrams, for Citizens United, argued the case before the Court for the first time.[47] But, after

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under FECA."). Reacting to a Senate committee report concluding that corporations were evading the FECA's candidate contribution limits through issue advertising and soft money contributions, Congress enacted BCRA. *Id.* at 131–32. Congress designed BCRA to address these concerns:

> Title I regulates the use of soft money by political parties, office-holders, and candidates. Title II primarily prohibits corporations and labor unions from using general treasury funds for communications that are intended to, or have the effect of, influencing the outcome of federal elections.

Id. at 132.

41. *See* Barnes, *supra* note 38 (noting BCRA's broadcasting and advertising restrictions).

42. *Id.*

43. Rucker, *supra* note 36.

44. *Id.*

45. *See* Citizens United v. FEC, 530 F. Supp. 2d 274, 282 (D.D.C. 2008) (denying Citizens United's request for an injunction against the FEC's decision to enforce § 203 of the BCRA).

46. *See* Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-115, § 403(a)(3), 116 Stat. 81, 113–14 (granting Supreme Court authority to hear direct appeals in disputes arising under the BCRA).

47. *See* Transcript of Oral Argument at 886, Citizens United v. FEC, 130 S. Ct. 876, 913 (2010) (No. 08-205); *see also* Rucker, *supra* note 36 (noting timing of case and

Stewart responded affirmatively to a hypothetical posed by the Chief Justice that the Government could ban a "500-page book [if] at the end it says, 'And so vote for X.,'"[48] the Court asked for reargument on whether it should overrule two prominent cases upholding the regulations at issue in *Citizens United—McConnell v. FEC*,[49] and *Austin v. Michigan Chamber of Commerce*.[50]

Overrule these key First Amendment precedents the Court did.[51] In January 2010, Justice Kennedy announced the Court's decision overruling *Austin* and the part of *McConnell* that upheld BCRA § 203's[52] extension of § 441b's[53] restrictions on corporate independent expenditures.[54] Announcing the Court was returning to the principle that "the Government may not suppress political speech on the basis of the speaker's corporate

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attorneys arguing each side before the Court).

48. Transcript of Oral Argument, *supra* note 47.

49. *See* McConnell v. FEC, 540 U.S. 93, 206 (2003) (upholding § 203's regulation of independent corporate expenditures). Immediately after the BCRA was enacted, multiple plaintiffs challenged § 203 as an unconstitutional speech restriction because the prohibited "electioneering communications" extended beyond express advocacy. *See id.* at 205–06. Reasoning that the same justifications for regulating independent corporate expenditures constituting express advocacy apply to ads that are "the functional equivalent of express advocacy," the Court upheld § 203 as facially constitutional. *See id.* at 206. The *McConnell* Court found such regulation acceptable because these types of independent corporate expenditures could have the kind of "corrosive and distorting effect" on the electorate that *Austin* recognized as constituting a compelling governmental interest in countering those effects. *See id.* at 205. Of particular importance, although the Supreme Court held § 203 facially constitutional, it noted that future as-applied challenges may nonetheless succeed. *See id.*

50. *See* Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 669 (1990) (holding as constitutional a narrowly tailored Michigan law restricting corporate campaign contributions to state elections); *see also* Paul M. Smith et al., *Supreme Court Seems Poised to Invalidate a Key Campaign Finance Law*, 26 COMM. LAW. 27, 27 (2009), *available at* http://www.jenner.com/files/tbl_s20Publications%5CRelatedDocumentsPDFs1252%5C2574%5CCL%2026-3%20JULY%202009_SMITH-FALLOW-CARPENTER-BLOCK.PDF (discussing procedural history in *Citizens United*).

51. *See* Citizens United v. FEC, 130 S. Ct. 876, 913 (2010) (overruling *Austin* and parts of *McConnell*).

52. 2 U.S.C.A. § 203 (West 2010) (amending Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (codified at 2 U.S.C. §§ 431–442 (2010)). Section 203 of the BCRA prohibited corporations from using general treasury funds to fund electioneering communications. 2 U.S.C.A. § 441b(b)(2) (West 2010), *invalidated by* Citizens United v. Federal Election Commission, 130 S. Ct. 876 (2010).

53. 2 U.S.C.A. § 441b (West 2010), *invalidated by* Citizens United v. FEC, 130 S. Ct. 876 (2010).

54. *See* Citizens United v. FEC, 130 S. Ct. 876, 913 (2010) (overruling *Austin* and parts of *McConnell*).

identity," the *Citizens United* Court found that no sufficient governmental interest justifies limits on political expenditures of nonprofit or for-profit corporations.[55]

In what may be one of the most significant of the Roberts Court's decisions, the Justices had created a blockbuster out of a controversy over a minor movie produced by a nonprofit corporation with an annual budget of a mere twelve million dollars.[56] But, not all of the Justices were pleased with the Court's about-face. "Essentially," wrote Justice Stevens in his dissent, "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."[57] Finding deep flaws in the approach the Court took to reach its decision,[58] Justice Stevens criticized the Court's opinion as:

> [A] rejection of the common sense of the American people, who have recognized a need to prevent corporations from undermining self-government since the founding, and who have fought against the distinctive corrupting potential of corporate electioneering since the days of Theodore Roosevelt.[59]

B. Shareholders' Rights in Citizens United

The *Citizens United* Court treated the shareholder-protection interest almost as an afterthought.[60] Rejecting the Government's contention that corporate independent expenditures may be regulated "because of [the government's] interest in protecting dissenting shareholders from being compelled to fund corporate political speech," the majority reasoned that if this interest was sufficient, the Government might try to "restrict the media corporations' political speech."[61] Moreover, the Court found the statute

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55. *Id. But see* discussion *infra* Part IV (upholding disclosure and disclaimer requirements under the BCRA).

56. *Citizens United*, 130 S. Ct. at 886–87.

57. *Id.* (Stevens, J., concurring in part and dissenting in part).

58. *See id.* at 941–42 ("In the end, the Court's rejection of *Austin* and *McConnell* comes down to nothing more than its disagreement with their results."). Justice Stevens continued: "[T]he majority opinion is essentially an amalgamation of resuscitated dissents. The only relevant thing that has changed since *Austin* and *McConnell* is the composition of this Court." *Id.*

59. *Id.* at 979.

60. *See* discussion *infra* Part I.B (discussing minimal coverage of shareholder-protection interest by *Citizens United* majority).

61. Citizens United v. FEC, 130 S. Ct. 876, 911 (2010) (majority opinion).

"both underinclusive and overinclusive."[62] On the one hand, the statute was underinclusive because it only protected dissenting shareholders from corporate speech within one to two months before an election.[63] Furthermore, the statute only prohibited corporate spending on certain types of media, consequently leaving corporations free to sponsor electioneering via the Internet.[64] On the other hand, the majority criticized the statute as overinclusive because it applied to all corporations, even those with only a single shareholder.[65] Justice Stevens's dissent included a more satisfactory analysis of the interest in protecting shareholders, noting that:

> When corporations use general treasury funds to praise or attack a particular candidate for office, it is the shareholders, as the residual claimants, who are effectively footing the bill. Those shareholders who disagree with the corporation's electoral message may find their financial investments being used to undermine their political convictions.[66]

Characterizing as "utopian" the majority's view that procedures of corporate democracy will correct this interest, Justice Stevens noted the inadequacy of these procedures and reaffirmed *Austin*'s use of the shareholder protection interest to reinforce the antidistortion rationale.[67]

Ensuring a proper understanding of the risk to shareholders' freedom of speech after *Citizens United* requires a brief history of Congress's attempts to regulate money in politics. This history reveals that corporate money has played a prominent role in American elections since the founding of this country.[68] Furthermore, concern

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62. *Id.*

63. *See id.* ("[I]f Congress had been seeking to protect dissenting shareholders, it would not have banned corporate speech in only certain media within 30 or 60 days before an election.").

64. *See id.* at 913 ("Soon, however, it may be that Internet sources, such as blogs and social networking Web sites, will provide citizens with significant information about political candidates and issues.").

65. *Id.* at 911 ("[T]he statute is overinclusive because it covers all corporations, including nonprofit corporations and for-profit corporations with only single shareholders.").

66. *Id.* at 977.

67. *Id.* at 979 ("Recognizing the limits of the shareholder protection rationale, the *Austin* Court did not hold it out as an adequate and independent ground for sustaining the statute in question. Rather, the Court applied it to reinforce the antidistortion rationale . . . .").

68. *Infra* at Part II.

for protecting shareholders from compelled speech motivated campaign finance regulations from as early as 1907.[69] Understanding the successes and failures of former legislation helps inform future campaign finance regulations that are both protective of shareholder speech and constitutional.

II. Money in Politics: The History of Campaign Financing

Money and politics have intertwined since the founding of this country. Indeed, even back in 1757, with only 391 eligible voters, George Washington "spent £39 to buy 'treats' for voters, including 160 gallons of rum and other strong beverages, or more than a quart per eligible voter."[70] In the early days of America's elections, money spent on political campaigns went largely unregulated, often coming out of the candidate's own pocket.[71] But, with the evolution of the party system throughout the eighteenth and nineteenth centuries, fundraising for candidates grew increasingly more common.[72]

Much of the funding for the post-Civil War era campaigns came from the practice of assessments on officeholders.[73] This officeholder assessment practice consisted of awarding government jobs—and allowing officeholders to retain their government jobs—on the basis of whether the individual contributed a portion of her salary to the political party.[74] This assessment system was so popular that "by 1878 approximately 90 percent of the Republican Party congressional committees' income came from assessments on officeholders."[75] The Pendleton Act[76] brought the end of assessments as a source of campaign finance.[77] As a result, parties

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69. *See* discussion *infra* Part II (describing shareholder protection interest motivating Tillman Act).

70. BRADLEY A. SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM 18 (Princeton Univ. Press 2001).

71. *See id.* (discussing early American campaign finance).

72. *See id.* at 20 (noting steady growth of money in elections).

73. *Id.*

74. *See id.* (discussing that officeholders were usually expected to contribute two-percent of their salary to the party funds).

75. *Id.*

76. *See* Pendleton Civil Service Reform (Pendleton) Act, ch. 27, 22 Stat. 403 (1883).

77. SMITH, supra note 70, at 20. ("The passage of the Pendleton Act, and similar laws at the state level, led to a steady decline in assessments as a source of revenue.").

increasingly turned to wealthy individuals to replace this lost income.[78] The presidential campaign of 1888 "marked the full-scale development of a second new source of campaign cash: corporations."[79] Republicans aggressively solicited corporate contributions.[80] Their efforts resulted in business contributions comprising nearly half of the Republican national campaign funds.[81] This influx of corporate cash at the beginning of the twentieth century dramatically increased the cost of elections[82] and soon spurned the first campaign fundraising regulations.[83]

A. History of Campaign Finance Reform

The States' fear of corporate wealth in the political process dates back to at least 1897 when four states passed laws banning corporate contributions,[84] but the federal government did not become involved in banning corporate contributions until a 1905 New York investigation into the finances of the Equitable Life Insurance Company revealed the company had made large contributions to the Republican Party.[85] Public outcry over this revelation led one "judicial critic of corporate political

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78. *Id.* at 20–21.

79. *Id.* at 21.

80. *See id.* (discussing Republican letter-writing campaign soliciting corporate cash).

81. *See id.* (explaining result of corporate solicitation).

82. *See id.* at 21–22 (discussing candidate spending amounting to millions of dollars in year 2000 dollars).

83. *See id* at 23 (discussing beginning of campaign fundraising regulations); *see also* ANTHONY CORRADO ET AL., THE NEW CAMPAIGN FINANCE SOURCEBOOK 10 (Brookings Inst. Press 2005) ("Such lavish contributions from corporate sources alarmed progressive reformers and spurred a demand for campaign finance legislation at the national level.").

84. *See* Citizens United v. FEC, 130 S. Ct. 876, 900 (2010) (majority opinion) (citing SMITH, *supra* note 70, at 23, for the proposition that "[a]t least since the latter part of the 19th century the laws of some States and of the United States imposed a ban on corporate direct contributions to candidates"); *see also* CORRADO ET AL., *supra* note 83, at 10 ("By the late 1890s, four states had passed laws to prohibit corporate contributions.").

85. *See* SMITH, *supra* note 70, at 23–24 ("[C]orporate support for the GOP was well known before, the Equitable investigation took on the air of scandal."). In his 1905 annual message to Congress, President Roosevelt declared:

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

Citizens United v. FEC, 130 S. Ct. 876, 953 (2010) (Stevens, J., concurring in part and dissenting in part).

contributions [to] call[ ] such involvement a 'menace to the state.'"[86] Ultimately, Congress reacted to the public outcry by passing the Tillman Act.[87]

The Tillman Act banned political contributions by federally chartered banks and corporations.[88] "The bill's chief sponsor, segregationist Senator 'Pitchfork' Ben Tillman, argued, much as reform advocates argue today, that the American people had come to believe that congressional representatives had become the instrumentalities and agents of corporations."[89] Notably, one of the main concerns leading to the passage of the Tillman Act involved preventing corporations from using shareholders' money to support political candidates whom the shareholders opposed.[90]

"Although the Tillman Act may have reduced corporate participation in politics, it hardly served to eliminate it."[91] Among the reasons hampering the Tillman Act's effectiveness were the many loopholes through which corporations avoided regulation.[92] Despite—or, perhaps, because of—the ineffectiveness of the Tillman Act, Congress again attempted to regulate campaign finance in 1910 when it passed the Publicity Act.[93] The Publicity Act and the subsequent 1911 amendments required postelection disclosure in House and Senate races of contributors

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86. SMITH, *supra* note 70, at 24.

87. *See* Tillman Act of 1907, ch. 420, 34 Stat. 864 ("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."). "Congress has placed special limitations on campaign spending by corporations ever since the passage of the Tillman Act in 1907." *See* Citizens United v. FEC, 130 S. Ct. 876, 930 (2010) (Stevens, J., concurring in part and dissenting in part).

88. Tillman Act of 1907, ch. 420, 34 Stat. 864.

89. SMITH, *supra* note 70, at 24. The Tillman Act "was primarily driven by two pressing concerns: first, the enormous power corporations had come to wield in federal elections, with the accompanying threat of both actual corruption and a public perception of corruption; and second, a respect for the interest of shareholders and members in preventing the use of their money to support candidates they opposed." Citizens United v. FEC, 130 S. Ct. 876, 953 (2010) (Stevens, J., concurring in part and dissenting in part).

90. *See* Citizens United v. FEC, 130 S. Ct. 876, 953 (2010) (discussing concern for shareholders as a pressing concern motivating passage of the Tillman Act).

91. SMITH, *supra* note 70, at 24.

92. *See id.* at 24 (discussing how corporations were able to continue to participate in politics, despite the Tillman Act).

93. *See* Federal Corrupt Practices (Publicity) Act (FCPA) of 1925, 2 U.S.C. § 241, *amended by* Federal Election Campaign Act of 1971, Pub. L. No. 92-220, § 2, 85 Stat. 795, 795.

spending the equivalent of $1,667 in year 2000 dollars.[94] "Senator James Reed, who first proposed these spending limits, contended that they were necessary because only rich people could run for office, unless they were 'willing to accept contributions from those institutions which may be interested in the legislation.'"[95] In the aftermath of *Citizens United*, this Note argues that robust disclosure provides a meaningful option for shareholder protection.[96] However, the lesson of the Publicity Act and the attempts at legislating disclosure that followed is that the loopholes swallow the law. For the Publicity Act, the many legislative loopholes meant that the Publicity Act ultimately did little to curb the massive wealth that continued to engulf the campaigns.[97]

Congress's next foray into campaign finance regulations came in the wake of the Teapot Dome scandal.[98] Public outcry following the scandal led to Congress passing the Federal Corrupt Practices Act (FCPA),[99] which closed the nonelection-year loophole in the Publicity Act.[100] As with past congressional attempts at regulation, the FCPA was so riddled with loopholes that it was largely ineffective.[101] Indeed, during the forty-six years the Act was in force, the government did not prosecute a single violation under the FCPA.[102]

By the late 1930s, Republicans and conservative Democrats were growing concerned that Roosevelt was building a political power base through his New Deal programs.[103] Thus, in 1939, a coalition of conservative leaders passed the Hatch Act,[104] extending the ban on political

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94. *See* Buckley v. Valeo, 424 U.S. 1, 61 (1976) (per curiam) (discussing history of disclosure requirements).

95. SMITH, *supra* note 70, at 25.

96. *See* discussion *infra* Parts IV–V (concluding disclosure protects shareholders from forced speech).

97. *See* SMITH, *supra* note 70, at 25 (discussing why Publicity Act was ineffective in regulating campaign contributions).

98. *See* CORRADO ET AL., *supra* note 83, at 14–15 (noting scandal led Congress to pass the FCPA).

99. Federal Corrupt Practices Act (FCPA) of 1925, 2 U.S.C. § 241, *amended by* Federal Election Campaign Act of 1971, Pub L. 92-220, § 2, 85 Stat. 795, 795.

100. *See* SMITH, *supra* note 70, at 26 (discussing FCPA).

101. *See* CORRADO ET AL., *supra* note 83, at 15 ("Though the law imposed clear reporting requirements, it provided for none of the publicity or enforcement mechanisms needed to ensure meaningful disclosure.").

102. SMITH, *supra* note 70, at 27.

103. *Id.*

104. *See* Act to Prevent Pernicious Political Activities (Hatch Act) of 1939, ch. 410, 53 Stat. 1147.

expenditures in an attempt to apply the protections of the 1883 Pendleton Act[105] to the New Deal employees.[106] Again, however, corporations could circumvent these spending limits by funneling money through state and local committees.[107] Similar fears provoked the 1943 passage of the Smith-Connally Act,[108] which prohibited labor unions from contributing to campaigns during the ongoing world war.[109] As with past regulations, unions found ways to evade Smith-Connally's restrictions.[110] By establishing the first political action committees (collectively, PACs), unions could circumvent Smith-Connally's restrictions because PAC contributions are made with union members' money, rather than money from the union's general treasury.[111] Furthermore, through a strict interpretation of Smith-Connally, unions determined that the Act only applied to contributions to particular candidates, and not to contributions made independently of candidates.[112] Today, PACs remain an important and powerful vehicle for people to use to associate for the purposes of political spending.[113]

It took five more years for Congress to first "prohibit *independent* expenditures by corporations and labor unions."[114] The Taft-Hartley Act[115] was Congress's first attempt to limit political speech by political opponents.

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105. *See* Pendleton Civil Service Reform (Pendleton) Act, ch. 27, 22 Stat. 403 (1883).

106. CORRADO ET AL., *supra* note 83, at 16.

107. *See id.* (noting that the Hatch Act did not affect state and local government employees).

108. War Labor Disputes (Smith-Connally) Act, Pub. L. No. 78-89, 57 Stat. 163, 167 (1943) (amending § 313 of the Corrupt Practices Act of 1925).

109. *See* SMITH, *supra* note 70, at 28 ("In 1943, in the wake of a bitter strike by the United Mine Workers, Republicans capitalized on fears that unchecked union power might damage the war effort, to pass the Smith-Connally Act."); *see also* Brief of Amicus Campaign Finance Scholars in Support of Appellant, Citizens United, Citizens United v. FEC, 130 S. Ct. 876 (2010) (No. 08-205), 2009 WL 2365206 at *10 (noting Congress passed the Smith-Connally Act to "secure defense production against work stoppages").

110. *See* discussion *infra* (noting unions circumvented Smith-Connally's restrictions by establishing PACs).

111. SMITH, *supra* note 70, at 28.

112. *Id.*

113. *See* TORRES-SPELLISCY, *supra* note 32 (noting PACs raised $3.2 billion for all federal candidates during the 2008 U.S. federal election).

114. Citizens United v. FEC, 130 S. Ct. 876, 900 (2010) (emphasis added).

115. *See* Labor Management Relations (Taft-Hartley) Act of 1947, Pub. L. No. 80-101, § 304, 61 Stat. 136, 159 (codified at 2 U.S.C. § 251 (1946 ed., Supp. I)) (making ban on union contributions permanent and adding expenditure ban for both corporations and unions).

Original interpretations of the Taft-Hartley Act viewed it as preventing any political communication funded from union or corporate treasuries, "including, for example, an editorial endorsing a candidate in the union's house newspaper."[116] But, when the government indicted CIO News for publishing an editorial endorsing a Democratic candidate, labor unions quickly challenged the Act.[117] Ultimately, the Supreme Court ruled that Congress did not intend the Act to ban such internal communications.[118] Hence, the Supreme Court's decision merely narrowed the Act's reach without addressing its overall constitutionality. Although President Truman "warned that the expenditure ban was a 'dangerous intrusion on free speech,'" it took three more decades before the Court reached the constitutionality of restrictions on corporate and union expenditures.[119]

Throughout the twentieth century, money continued to play a large part in campaigns.[120] And through loopholes in congressional regulations, corporations, unions, and wealthy independent donors successfully evaded Congress's attempts at restricting campaign finance.[121] Thus, attempting to achieve more effective and heavy-handed regulations, in the early 1970s, Congress passed, and amended, the Federal Elections Campaign Act (FECA).[122] By retaining the Taft-Hartley restrictions on political funding from the general corporate treasury, Congress "expressed support for the

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116. SMITH, *supra* note 70, at 28 (discussing original interpretation of Taft-Hartley Act); *see also* Citizens United v. FEC, 130 S. Ct. 876, 953 (2010) (Stevens, J., concurring in part and dissenting in part) ("In that Act passed more than 60 years ago, Congress extended the prohibition on corporate support of candidates to cover not only direct contributions, but independent expenditures as well.").

117. *See* SMITH, *supra* note 70, at 28.

118. *See* United States v. Cong. of Indus. Org., 335 U.S. 106, 123–24 (1948) ("We are unwilling to say that Congress by its prohibition against corporations or labor organizations making an 'expenditure in connection with any election' of candidates for federal office intended to outlaw such a publication. We do not think § 313 reaches such a use of corporate or labor organization funds.").

119. Citizens United v. FEC, 130 S. Ct. 876, 900 (2010) (citing President Truman's warning after Congress overrode his veto of the Labor Management Relations Act of 1947).

120. *Infra* Part II.B.

121. *See Citizens United*, 130 S. Ct. at 953 (Stevens, J., concurring in part and dissenting in part) (noting that "[t]he bar on contributions 'was being so narrowly construed' that corporations were easily able to defeat the purposes of the [Taft-Hartley] Act by supporting candidates through other means" (quoting FEC v. Wis. Right to Life, 551 U.S. 449, 511 (2007) (Souter, J., dissenting))).

122. *See* Federal Election Campaign Act (FECA) of 1971, 2 U.S.C. § 441 (1972), *amended by* 18 U.S.C. § 608(e) (1970 ed., Supp. V) (increasing disclosure of contributions for federal campaigns, placing legal limits on campaign contributions, and creating the Federal Election Commission).

principle that corporate and union political speech financed with PAC funds, collected voluntarily from the organization's stockholders or members, receives greater protection than speech financed with general treasury funds."[123] Passed to replace the FCPA, the FECA "significantly tightened disclosure requirements" by putting in place penalties for failing to make proper disclosures, and by limiting the total media spending in Congressional races, and capping the percent of that spending that could be dedicated to radio and television advertising.[124] Notwithstanding these restrictions, § 441b(b) of the FECA codified the option for corporations and unions to create and use PACs for spending purposes that were otherwise forbidden to the corporation or union itself.[125]

Almost immediately after the 1974 amendments to the FECA, *Buckley v. Valeo*,[126] challenged the constitutionality of the Act's spending limits. In its 1976 decision, "the Supreme Court examined the four key features of the congressional reform effort: (1) disclosure requirements, (2) limits on campaign contributions, (3) limits on political expenditures, and (4) public financing of elections."[127] The *Buckley* Court upheld the FECA's disclosure provisions requiring political organizations or persons contributing to campaigns to reveal their identity.[128]

However, the real heart of the *Buckley* decision lies in the Court's distinction between political expenditures and contributions. Contributions are payments directed at a specific candidate or campaign.[129] In contrast, expenditures are payments spent to support a political cause.[130] While upholding limits on campaign contributions, the *Buckley* Court struck down limits on expenditures, for two reasons: (1) "contributions were potentially far more dangerous to the integrity of the political process than

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123. Citizens United v. FEC, 130 S. Ct. 876, 954 (2010).

124. *See* SMITH, *supra* note 70, at 31 (discussing FECA's disclosure provisions).

125. *See Citizens United*, 130 S. Ct. at 954 (discussing PAC provision in FECA).

126. *See* Buckley v. Valeo, 424 U.S. 1, 143 (1976) (per curiam) (concluding that certain limitations imposed by the FECA on campaign expenditures were an unconstitutional restriction on the freedom of expression).

127. RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 221–22 (Alfred A. Knopf, Inc. 1992).

128. *See Buckley*, 424 U.S. at 61 ("We affirm the determination on overbreadth and hold that § 434(e), if narrowly construed, also is within constitutional bounds.").

129. *See* SMOLLA, *supra* note 127, at 222 ("Contributions are payments made to a political candidate or campaign fund or spent in coordination with the candidate's campaign organization.").

130. *See id.* ("Expenditures, on the other hand, are sums spent directly by someone to foster a political cause.").

expenditures" and (2) "the Court regarded limits on contributions as significantly less intrusive incursions on free expression and association than limits on expenditures."[131] Thus, the Court's first constitutional endeavor into campaign finance restrictions recognized a "sufficiently important" governmental interest in preventing corruption and the appearance of corruption, with the caveat that restrictions that were not narrowly tailored to achieve this interest were unconstitutional.[132] Notably, the *Buckley* Court was silent on whether "corporate expenditures could be treated differently from individual expenditures."[133] Despite the *Buckley* Court's invalidation of the expenditure ban, which applied to corporations and unions, four months after the decision, Congress recodified § 610's corporate and union expenditure ban at 2 U.S.C. § 441b.[134] Section 441b[135] was the independent expenditure restriction challenged in *Citizens United v. FEC*.[136]

B. Constitutionality of Campaign Finance Restrictions Aimed at Corporations

Buckley did not address the constitutionality of § 610's separate ban on corporate and union expenditures.[137] Yet, even in the Court's early jurisprudence, the voluntariness of the support played an important role in resolving the cases.[138] Despite this brief concern for shareholders' rights

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131. *Id.*

132. *See* Citizens United v. FEC, 130 S. Ct. 876, 884 (majority opinion) (discussing the *Buckley* opinion).

133. *Id.* at 954 (Stevens, J., concurring in part and dissenting in part). Justice Stevens argues that the *Buckley* Court's silence on corporate expenditures "reinforced the understanding that corporate expenditures could be treated differently from individual expenditures." *Id.*

134. *Compare id.* at 883 (majority opinion) (concluding that *Buckley* invalidated the ban on corporate and union expenditures), *with id.* at 958 (Stevens, J., concurring in part and dissenting in part) ("It is implausible to think, as the majority suggests, that *Buckley* covertly invalidated FECA's separate corporate and union campaign expenditure restriction, § 610 . . . , even though that restriction had been on the books for decades before *Buckley* and would remain on the books, undisturbed, for decades after.").

135. 2 U.S.C. § 441b (1976).

136. *See Citizens United*, 130 S. Ct. at 913 (majority opinion) (overruling *Austin* and the part of *McConnell* that upheld BCRA § 203's extension of § 441b's restrictions on corporate independent expenditures).

137. *Id.*

138. *Compare* Pipefitters Local Union No. 562 v. United States, 407 U.S. 385, 409, 414–15 (1972) (determining the statutory bar on corporate and union spending does not

and expansive corporate influence, the Court did not specifically consider the constitutionality of the political spending rights of corporations until its decision in *First National Bank of Boston v. Bellotti*.[139]

Bellotti first considered the argument that the state may justify certain limitations on corporate speech because it has a legitimate and compelling interest in protecting corporate shareholders.[140] In *Bellotti*, a corporate bank, in conjunction with national banking associations and business corporations, challenged a Massachusetts statute that prohibited business associations and corporations from political spending intended to influence issue referenda not materially related to the business.[141] Further, the statute imposed a criminal penalty on violating corporations.[142] The Bank challenged the statute as a violation of its First Amendment rights.[143]

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apply to "the voluntary donations of employees," when maintained in a separate account, because "[t]he dominant [legislative] concern in requiring that contributions be voluntary was, after all, to protect the dissenting stockholder or union member"), *with* United States v. Int'l Union United Auto., Aircraft & Agric. Implement Workers of Am., 352 U.S. 567, 592 (1957) (remanding case to the district court and advising it to consider whether the broadcast in question was being "paid for out of the general dues of the union membership or [whether] the funds [could] be fairly said to have obtained on a voluntary basis"), *and* United States v. Cong. of Indus. Org., 335 U.S. 106, 123–24 (1948) (noting expenditure bar may not cover funds voluntarily contributed by union members or corporate stockholders for election purposes).

139. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 784 (1978) ("We thus find no support in the First or Fourteenth Amendment, or in the decisions of this Court, for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protections simply because its source is a corporation."). *But cf.* Citizens United v. FEC, 130 S. Ct. 876, 954 (2010) (Stevens, J., concurring in part and dissenting in part) (discussing that the opinions in both *Pipefitters* and *Automobile Workers* "expressed support for the principle that corporate and union political speech financed with PAC funds, collected voluntarily from the organization's stockholders or members, receives greater protection than speech financed with general treasury funds").

140. *See Bellotti*, 435 U.S. at 786 ("Especially where, as here, a prohibition is directed at speech itself, and the speech is intimately related to the process of governing, 'the State may prevail only upon showing a subordinating interest which is compelling' . . . ." (quoting Bates v. City of Little Rock, 361 U.S. 516, 524 (1960))).

141. *Id.* at 767–68. Specifically, the statute prohibited corporations from:

> [M]aking contributions or expenditures "for the purpose of . . . influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation." The statute further specifie[d] that "[n]o question submitted to voters solely concerning the taxation of the income, property or transactions of individuals shall be deemed materially to affect the property, business or assets of the corporation."

Id.

142. *Id*. at 768.

143. *Id.* at 770.

Rejecting the argument that the First Amendment does not protect corporate speech immaterial to its business or property, the *Bellotti* Court deemed the statute an unconstitutional violation of the First Amendment's freedom of expression.[144] After concluding the statute infringed on the corporation's freedom of expression, the Court subjected the statute to strict scrutiny analysis.[145] The State asserted a compelling governmental interest in protecting dissenting shareholders whose views differed from the views expressed by corporate management.[146] Dismissing the shareholder interest, the Court deemed the particular statute both too broad and too narrow to constitute a substantially relevant correlation between the governmental interest in protecting shareholders and its actual effect.[147] Finally, the *Bellotti* Court also failed to address the constitutionality of the State's ban on corporate independent expenditures supporting candidates.[148]

1. Federal Election Commission v. Massachusetts Citizens for Life[149]

FEC v. Massachusetts Citizens for Life (*MCFL*), first addressed corporate expenditures soliciting support for specific

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144. *See id*. at 777 ("If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech.").

145. *Id.* at 786–87.

146. *Id.* at 787.

147. *See id.* at 795 (finding that the portion of the statute is invalid because it "prohibit[ed] protected speech in a manner unjustified by a compelling state interest"). The shareholder argument received significantly more favorable analysis in Justice White's dissenting opinion. Comparing the effect of corporate political spending on shareholders to the effect of compelling union contributions that are subsequently used for political purposes, Justice White found identical Massachusetts's shareholder protection interest and the state interest upheld by the Court in *Abood*. *See id.* at 815–16 (White, J., dissenting) (noting the right against compelled speech is a right that has been previously protected by the Court under the First Amendment). That interest is "the right to adhere to one's own beliefs and to refuse to support the dissemination of the personal and political views of others, regardless of how large a majority they may compose." *Id.* He further noted that "First Amendment concerns of stockholders are directly implicated, [ ] when a corporation chooses to use its privileged status to finance ideological crusades which are unconnected with the corporate business or property and which some shareholders might not wish to support." *Id.*

148. *See* Citizens United v. FEC, 130 S. Ct. 876, 884 (2010) (stating that "a single *Bellotti* footnote purported to leave the question open" regarding independent expenditures, including those made by corporations).

149. *See* FEC v. Mass. Citizens for Life (*MCFL*), 479 U.S. 238, 251–53, 263 (1986) (holding, notwithstanding MCFL's violation of § 441b, the PAC requirement unconstitutionally burdens First Amendment rights of the small nonprofit).

candidates.[150] In this case, the defendant, Massachusetts Citizens for Life (Citizens for Life), was a nonprofit, nonstock corporation organized exclusively to advance anti-abortion efforts.[151] Notwithstanding Citizens for Life's small size and explicit nonprofit, prolife agenda, Citizens for Life's organization as a corporation subjected it to a federal statute requiring corporations making independent campaign expenditures to do so through PACs, rather than through the general corporate treasury.[152] Thus, when Citizens for Life began publishing a newsletter advising contributors and noncontributors of which politicians in the upcoming election were pro-choice, the FEC filed a civil complaint against Citizens for Life under § 441b.[153]

The Supreme Court first held that Citizens for Life's publication and distribution of the candidate advocacy violated § 441b because it constituted express advocacy.[154] However, the Court went on to hold that § 441b's speech prohibition was unconstitutional as applied to Citizens for Life because Citizens for Life was more akin to a voluntary political association than a business firm.[155] Therefore, the corporation should not have to undergo the extra burden of establishing a PAC.[156] In short, the compelling state interest in restricting the influence of political war chests funneled through the corporate form does not apply in this case because "[Citizens for Life] is not the type of 'traditional corporatio[n] organized for economic gain,' that has been the focus of regulation of corporate political activity."[157]

MCFL stands for the proposition that some types of corporations cannot be restricted from using their general treasury funds for independent expenditures.[158] However, the Court acknowledged that apart from this

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150. *See id.* at 241 (discussing the issue of whether a corporation can use its general corporate treasury to make an expenditure in connection with a federal election).

151. *See id.* at 241–42 (describing MCFL).

152. *See id*. at 253 (noting that because MCFL is incorporated, it must establish a separate fund if it wishes to engage in any independent spending). Moreover, such separate fund is considered a political committee and thus, MCFL must comply with additional statutory requirements. *Id*.

153. *Id.* at 242–45.

154. *Id.* at 251–53.

155. *See id*. at 259–60 (distinguishing MCFL from for-profit corporations).

156. *Id.* at 263 ("While the burden on MCFL's speech is not insurmountable, we cannot permit it to be imposed without a constitutionally adequate justification.").

157. *See id.* at 259–60 (distinguishing MCFL from profit-making corporations).

158. *See* Citizens United v. FEC, 130 S. Ct. 876, 955 (2010) (Stevens, J., concurring in part and dissenting in part) ("What the [*MCFL*] Court held by a 5-to-4 vote was that a

limited class of corporations, "[t]he Government has a legitimate interest in 'regulat[ing] the substantial aggregations of wealth amassed by the special advantages which go with the corporate form,'" because "[t]hose aggregations can distort the 'free trade in ideas' crucial to candidate elections, [ ] at the expense of members or shareholders who may disagree with the object of the expenditures."[159] Consequently, *MCFL* acknowledges that protecting dissenting shareholders supports governmental regulation of the general treasuries of corporations.[160] Further, when protecting shareholders from compelled political spending is not a concern—as it was not with Citizens for Life, the corporation's interest in unrestricted spending outweighs the government's interest in regulating spending.[161]

2. *Austin v. Michigan Chamber of Commerce*[162]

Although *MCFL* was a rather limited holding, the holding proved both good and bad for corporate political spending advocates.[163] On the one hand, Justice Brennan's opinion for the Court "seemed to embrace the validity of the leveling theory, at least as applied to corporate wealth."[164]

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limited class of corporations must be allowed to use their general treasury funds for independent expenditures . . . ."); *see also* FEC v. Mass. Citizens for Life (*MCFL*), 479 U.S. 238, 259 (1986) ("Groups such as MCFL, however, do not pose that danger of corruption. MCFL was formed to disseminate political ideas, not to amass capital.").

159. Citizens United v. FEC, 130 S. Ct. at 955 (quoting *MCFL*, 479 U.S. at 257–60).

160. *See id.* (noting *MCFL* recognized a legitimate governmental interest in regulating the great wealth amassed by the corporate form).

161. *See supra* note 158 and accompanying text.

162. *See* Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 655 (1990) ("Although we agree that expressive rights are implicated in this case, we hold that application of § 54(1) to the Chamber is constitutional because the provision is narrowly tailored to serve a compelling state interest.").

163. *See MCFL*, 479 U.S. at 263 (acknowledging the rationale behind the restriction of corporations' independent spending, but limiting the extension of that rationale). "We acknowledge the legitimacy of Congress' concern that organizations that amass great wealth in the economic marketplace not gain unfair advantage in the political marketplace." *Id.* However, "that justification does not extend uniformly to all corporations. Some corporations have features more akin to voluntary political associations than business firms, and therefore should not have to bear burdens on independent spending solely because of their incorporated status." *Id.*

164. *See* SMOLLA, *supra* note 127, at 227–28 (noting the *MCFL* Court stated that "'[d]irect corporate spending on political activity raises the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace'").

But, on the other hand, *MCFL* had also found too great a burden on free speech as applied to a nonprofit corporation like Citizens for Life, thus affirming the First Amendment rights of corporations.[165] Whatever the victory for so-called "corporate speech," it was short-lived, because less than five years later, the Supreme Court, per Justice Marshall, delivered a huge blow to corporate political spending rights in *Austin v. Michigan Chamber of Commerce*.[166]

In *Austin*, the Supreme Court upheld a state law prohibiting corporate expenditures supporting or opposing any candidate for state office, unless the expenditure was made through a segregated fund or PAC.[167] Like Citizens for Life, the Michigan Chamber of Commerce (Chamber) was a nonprofit corporation.[168] But, unlike Citizens for Life, three-quarters of the Chamber's 8,000 members were for-profit corporations.[169] Thus, the Chamber's business-friendly purpose, in conjunction with receiving annual funding through required membership dues, distinguished it from the small, pro-life, non-profit corporation in *MCFL*.[170]

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165. *See* FEC v. Mass. Citizens for Life (*MCFL*), 479 U.S. 238, 263 (1986) (stating that MCFL is not the type of corporation that merits this burden on free speech).

> [*MCFL*] does not pose such a threat at all. Voluntary political associations do not suddenly present the specter of corruption merely by assuming the corporate form. Given this fact, the rationale for restricting core political speech in this case is simply the desire for a bright-line rule. This hardly constitutes the *compelling* state interest necessary to justify any infringement on First Amendment freedom.

Id.

166. *See* Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 655 (1990) ("Although we agree that expressive rights are implicated in this case, we hold that application of § 54(1) to the Chamber is constitutional because the provision is narrowly tailored to serve a compelling state interest.").

167. *See id.* at 654–55 (explaining the state statute and upholding its constitutionality).

168. *Compare id.* at 656 (describing the Chamber as a "nonprofit Michigan corporation"), *with MCFL*, 479 U.S. at 241–42 (describing *MCFL* as a small nonprofit corporation).

169. *Austin*, 494 U.S. at 656.

170. *See id.* at 661–62 (distinguishing the nonprofit corporation in *MCFL* from the Chamber). The *Austin* Court pointed to three characteristics that were essential to its holding in *MCFL*:

> The first characteristic of Massachusetts Citizens for Life, Inc., that distinguished it from ordinary business corporations was that the organization "was formed for the express purpose of promoting political ideas, and cannot engage in business activities." . . . We described the second feature of MCFL as the absence of "shareholders or other persons affiliated so as to have a claim on its assets or earnings. This ensures that persons connected with the organization

Applying the *Buckley* test to determine whether Michigan's restrictions on corporate political expenditures may constitutionally be applied to the Chamber, the *Austin* Court queried the burden on the Chamber's speech and whether the statute was narrowly tailored.[171] As to the constitutional burden, the *Austin* Court concluded Michigan's PAC requirement "burdens the Chamber's exercise of expression because 'the corporation is *not* free to use its general funds for campaign advocacy purposes.'"[172] Thus, while not completely stifling corporate speech, the restriction sufficiently burdens the Chamber's First Amendment rights such that they must be "justified by a compelling state interest."[173] Next, the *Austin* Court found that the regulation aimed to limit political corruption by minimizing political spending that is uncorrelated to "the public's support for the corporation's political ideas."[174] Noting the corporate structure is unique in that state-conferred benefits allow corporations to amass large treasuries,[175] the *Austin* Court concluded that the unfair influence of corporate wealth similarly affects elections for political contributions *and* independent expenditures.[176] Thus, the *Austin* Court held that the State's interest in regulating corporate expenditures was a "sufficiently compelling rationale to support its restriction on independent expenditures by

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> will have no economic disincentive for disassociating with it if they disagree with its political activity." . . . The final characteristic upon which we relied in *MCFL* was the organization's independence from the influence of business corporations.

Id. at 661–64.

171. *See id*. at 657 (applying the *Buckley* test to the Michigan regulation).

172. *Id*. at 658 (quoting FEC v. Mass. Citizens for Life, 479 U.S. 238, 252 (1986)).

173. *Id*. at 658 ("Michigan's regulation aims at . . . corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."). *Id*. at 659–60.

174. *Id.* at 659–60.

175. *See id*. at 658–59 (noting that "[s]tate law grants corporations special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets—that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders' investments"). "These state-created advantages not only allow corporations to play a dominant role in the Nation's economy, but also permit them to use 'resources amassed in the economic marketplace' to obtain 'an unfair advantage in the political marketplace'" *Id.* at 659 (quoting *MCFL*, 479 U.S. at 257).

176. *See id.* at 660 ("Corporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions.").

corporations."[177] Finally, the Court found § 441b was narrowly tailored to achieve this interest in minimizing corruption because the BCRA allowed corporations to make political expenditures through a PAC.[178] Again focusing on the voluntariness of political expenditures made through PACs, the *Austin* Court hailed PACs as accurately reflecting contributors' support for the corporation's political views.[179]

3. McConnell v. Federal Election Commission[180]

The Court has reaffirmed *Austin*'s holding and rationale several times in the twenty years since the decision. Most importantly to the Court's recent decision in *Citizens United* was its affirmation of *Austin* in *McConnell v. FEC*. In *McConnell*, the Court upheld § 203 of the BCRA, the same provision challenged and subsequently overruled in *Citizens United*.[181] Section 203 was Congress's response to the corporations and unions that evaded the expenditure restrictions by advocating the election or defeat of political candidates without using "magic words." These magic words were the words that the *Buckley* Court had held distinguished contributions, which could be regulated, from expenditures, which could not be regulated.[182] By exploiting this loophole, corporations and unions were spending "hundreds of millions of dollars of their general treasury

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177. *Id.*

178. *Id*. at 660.

179. *See id.* at 660–61 ("Because persons contributing to such funds understand that their money will be used solely for political purposes, the speech generated accurately reflects contributors' support for the corporation's political views.").

180. McConnell v. FEC, 540 U.S. 93, 206 (2003) (upholding § 203 of the BCRA).

181. *Compare* Citizens United v. FEC, 130 S. Ct. 876, 913 (2010) (overruling "BCRA § 203's extension of § 441b's restrictions on corporate independent expenditures"), *with* McConnell v. FEC, 540 U.S. 93, 204–09 (2003) (plurality opinion), *overruled by Citizens United*, 130 S. Ct. at 913–14 (upholding § 203 of BCRA prohibiting corporations and unions from using their general treasury funds to finance electioneering communications). BCRA § 203 amends FECA § 316(b)(2) restricting corporations' and labor unions' spending on electioneering communications. *McConnell*, 540 U.S. at 190. "Thus, under BCRA, corporations and unions may not use their general treasury funds to finance electioneering communications, but they remain free to organize and administer segregated funds, or PACs, for that purpose." *Id*. at 204.

182. *See Citizens United*, 130 S. Ct. at 956 (Stevens, J., concurring in part and dissenting in part) (discussing how the *Buckley* Court narrowly interpreted the term "expenditures" "to avoid any problems of constitutional vagueness, holding it applicable only to 'communications that expressly advocate the election or defeat of a clearly identified candidate'" (citing Buckley v. Valeo, 424 U.S. 1, 80 (1976))).

funds for these ads."[183] Congress responded by passing § 203 to prohibit "corporations and unions from using general treasury funds for electioneering communications that 'refe[r] to a clearly identified candidate,' whether or not those communications use the magic words."[184] Unlike the *Citizens United* Court, the *McConnell* Court found this provision of the BCRA satisfied the compelling governmental interests in "preserving the integrity of the electoral process, preventing corruption, . . . 'sustaining the active, alert responsibility of the individual citizen in a democracy for the wise conduct of the government,' [and maintaining] the individual citizen's confidence in government."[185]

This history of campaign finance regulation and the Court's willingness to uphold many political spending restrictions renders the *Citizens United* Court's decision all the more dramatic.[186] Furthermore, given the many State interests the Court historically has held justify campaign-spending restrictions, the *Citizens United* Court's rejection of § 203 was particularly surprising.[187] Further, the precedents that the Court overruled rest, not only on principles of election regulation, but also on established doctrines in corporate law, securities law, and most importantly—the forced speech doctrine.[188]

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183. *Citizens United,* 130 S. Ct. at 957 (quoting *McConnell*, 540 U.S. at 127). "After *Buckley*, corporations and unions figured out how to circumvent the limits on express advocacy by using sham 'issue ads' that 'eschewed the use of magic words' but nonetheless 'advocate[d] the election or defeat of clearly identified federal candidates.'" *Id.* at 956–57 (quoting *McConnell*, 540 U.S. at 126).

184. *Id.* at 957 (quoting 2 U.S.C. § 434(f)(3)(A)(i)(I) (2010)).

185. *McConnell v. FEC*, 540 U.S. 93, 206–07 n.88 (2003) (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 788–89 (1978)).

186. *See, e.g.*, FEC v. Wisc. Right to Life (*WRTL*), 551 U.S. 449, 470 (2007) (holding government could regulate corporate communication under § 203 only if it was "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate"), *and McConnell*, 540 U.S. at 204–09 (upholding § 203 of BCRA prohibiting corporations and unions from using their general treasury funds to finance electioneering communications); *see also* FEC v. Nat'l Right to Work Comm. (*NRWC*), 459 U.S. 197, 209–10 (1982) (upholding congressional legislation barring nonprofit corporations from soliciting nonmembers for PAC funds).

187. *See, e.g.*, Citizens United v. FEC, 130 S. Ct. 876, 930 (2010) (Stevens, J., concurring in part and dissenting in part) (discussing historical precedent for corporate spending regulations).

188. *See* discussion *infra* Part III.

III. Forced Speech Doctrine

As discussed in Part II(B), the *Austin* Court distinguished the Chamber from Citizens for Life by noting the absence of shareholders.[189] The absence of shareholders was important to the Court because assuring other persons do not have a claim on the corporation's earnings avoids the forced speech problems associated with the economic disincentives involved in disassociating for dissenting shareholders.[190] This shareholder distinction was important to the *Austin* Court because it was concerned with forcing the Chamber's members to speak in violation of the First Amendment.[191] First Amendment jurisprudence embraces a small category of cases dealing with what is termed the "Forced Speech Doctrine."[192] The forced speech doctrine rests on the idea that the First Amendment protects those who wish to speak as well as those who wish to abstain from speaking.[193] And just as the Court has held that monetary contributions constitute protected speech under the First Amendment,[194] the forced speech doctrine holds that the First Amendment protects individuals from being compelled to speak through their involuntary contribution of funds.[195] Several cases deal with

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189. *See* Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 663 (1990) (noting one feature the Court had described of MCFL was the "absence of 'shareholders or other persons affiliated so as to have a claim on its assets or earnings'"). The *Austin* Court went on to compare the Chamber's members to shareholders stating that "[a]lthough the Chamber . . . lacks shareholders, many of its members may be similarly reluctant to withdraw as members even if they disagree with the Chamber's political expression, because they wish to benefit from the Chamber's nonpolitical programs and to establish contacts with the other members of the business community." *Id.*

190. *See id.* at 663 ("This ensures that persons connected with the organization will have no economic disincentive for disassociating with it if they disagree with its political activity" (quoting FEC v. Mass. Citizens for Life (*MCFL*), 479 U.S. 238, 264 (1986)).

191. *See id.* at 663–65 (discussing disincentives and potential forced speech implications for Chamber members who disagree with the corporation's political speech).

192. *See* VICTOR BRUDNEY, *Compelled Speech*, *in* ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 475, 475 (Leonard W. Levy & Kenneth L. Karst eds., MacMillan Reference USA 2d ed. 2000) ("The First Amendment mandates that 'Congress shall make no law . . . abridging the freedom of speech' implies a stricture against compelling or coercing persons to engage in speech they do not wish to make—either because they disagree with the speech or because they wish to remain silent.").

193. *See id*. at 475 ("Substantially the same considerations that drive the prohibition against abridgement of Freedom of Speech—whether derived from the notion of the speaker's autonomy or from the listener's entitlement or the societal value of undistorted public discourse—drive the strictures against coercion of speech.").

194. *See* Buckley v. Valeo, 424 U.S. 1, 22–23 (1976) (per curiam) (reasoning that limiting the freedom to contribute "implicate[s] fundamental First Amendment interests").

195. *See* BRUDNEY, *supra* note 192, at 475 ("Protected speech may also consist of the

compelled expression,[196] but, for the purposes of this Note, the category of cases dealing with compelled subsidization of private expression is the most pertinent, because these cases relate to the compelled speech arguably affecting shareholders after *Citizens United*.[197]

A. Abood v. Detroit Board of Education[198]

The Supreme Court first examined compelled ideological and political speech by private actors in a 1977 case—*Abood v. Detroit Board of Education*.[199] In *Abood*, nonunion public school teachers challenged an agreement between the state and unions requiring the teachers, as a condition of their employment, to pay a service fee.[200] The objecting teachers alleged that the union's use of their fees to engage in political speech violated their freedom of association guaranteed by the First and Fourteenth Amendments.[201] Relying on two previous decisions regarding collective-bargaining agreements, the *Abood* Court found a valid exercise of the agency-shop agreement to the extent that the union used the service charge to finance union expenditures "for the purposes of collective bargaining, contract administration, and grievance adjustment."[202]

Consequently, although the agency-shop agreement inevitably impacted the employees' First and Fourteenth Amendment rights, in the context of union spending promoting union causes, the compelled dues were permissible.[203] However, the *Abood* Court drew a line between

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contribution of funds or furnishing of facilities to be used by the recipients, inter alia, for expressive conduct (i.e., the contribution may be assimilated to speech of the contributor).").

196. *See* Howard M. Wasserman, *Compelled Expression and the Public Forum Doctrine*, 77 TUL. L. REV. 163, 169 (2002) (discussing four categories of compelled expression).

197. *See* discussion *infra* Part III.C (discussing forced speech cases).

198. *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235–36 (1977) (holding Constitution requires that nonunion employees are not required to pay dues to union to further disagreeable political and ideological speech).

199. *See id.*

200. *See id*. at 212–13 (describing the nonunion teachers' complaint that they opposed collective bargaining in the public sector and that the Union is engaged in activities of which they do not approve).

201. *Id*. at 213.

202. *Id.* at 225–26.

203. *See* Wasserman, *supra* note 196, at 174–75 ("As long as the union used the fees to promote those causes for which it was formed and for which it brought members together, an individual payer could not withdraw financial support merely because she disagreed with the

contributing funds for political purposes germane to the union's duties as a collective bargaining representative, and contributions not germane to such representation.[204] For those political and ideological causes that were not germane to the union's duties, the *Abood* Court held that the State could not require an individual payor to have her funds used to advance these ideas.[205] The *Abood* Court's solution in such cases of objection "would be restitution to the objecting employee of a fraction of her union dues, equal to the fraction of total union expenditures that were made for the impermissible objectionable political purposes."[206] Consequently, *Abood* stands for the proposition that mandatory dues used to fund political and ideological causes unrelated to the organization's duties constitute forced speech in violation of the First Amendment.

B. Keller v. State Bar of California[207]

The Court extended the principles established in *Abood* to the mandatory dues paid by attorneys to a state bar.[208] In *Keller v. State Bar of California*, the Supreme Court held that the State Bar of California (Bar) could constitutionally use mandatory membership dues to fund activities germane to the state's goals of regulating the legal profession and of improving the quality of legal services.[209] However, the Bar could not use mandatory dues to fund ideological activities not germane to the Bar's goals.[210]

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group's contract strategy."). "This was true even if all the union's activities could be regarded, in some sense, as political." *Id*. at 175.

204. *See id.* at 175 (discussing distinction between germane and non-germane political expenditures).

205. *See id.* (discussing unconstitutionality of compelling payment for disagreeable causes); *see also* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235–36 (1977) ("[T]he Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment.").

206. Wasserman, *supra* note 196, at 175.

207. *See* Keller v. State Bar of Cal., 496 U.S. 1, 2 (1990) (holding State Bar's use of compulsory dues to finance political and ideological activities with which members disagreed violated their First Amendment right of free speech when such expenditures were "not necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of legal services").

208. *See id*.

209. *Id.* at 13–15.

210. *Id*.

The forced speech doctrine established in *Abood/Keller* holds that the First Amendment protects dissenting individuals from (1) compulsory payments (2) used to support political or ideological causes (3) not germane to the organization's mission. Part III(C) of this Note argues that the forced speech doctrine should have been an important consideration for the Court in *Citizens United*.

C. Shareholders and Forced Speech

The protections against forced speech established in *Abood*—and later in *Keller*—have not been extended to shareholders.[211] Yet, dissenting shareholders are in many ways similarly situated to the dissenting union and bar members.[212] Similar to the union and bar members, shareholders are contributing their money to a cause from which they expect to realize some benefit.[213] Consequently, shareholders are purchasing a stake in a corporation.[214] Although shareholders typically benefit monetarily from this stake, some shareholders may genuinely want to support the corporation.[215] Corporations then use shareholders' money to run the business. Therefore, when corporations spend money on political or ideological electioneering, they are—just like unions and bar associations—spending their contributors' money. Part IV(A) argues that to the extent a dissenting shareholder faces federal or state penalties for selling her stock in a corporation financing disagreeable political or ideological electioneering, the forced speech doctrine should protect the dissenting shareholder from these financial penalties. The Court

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211. *See* Wasserman, *supra* note 196, at 176–77 (noting arguments have been made to extend protections of free speech to dissenting shareholders, but that the argument "has never attained a majority of the Court").

212. *See id*. at 176 (stating that "corporate expressive expenditures using invested moneys of shareholders who object to the corporation's message" is a "superficially similar situation" with that of the dissenting nonunion teachers in *Abood*).

213. *See* HAMILTON & BOOTH, *supra* note 23, at 278–79 (describing role of the shareholder in the corporation).

214. *See* BLACK'S LAW DICTIONARY 1500 (9th ed. 2009) (defining "shareholder" as "[o]ne who owns or holds a share or shares in a company, esp. a corporation").

215. "Social Funds" is an example of a website devoted to providing shareholders with information about socially responsible investing options. *See* SOCIAL FUNDS, http://www.socialfunds.com/ (last visited Oct. 28, 2010) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

has addressed this argument several times;[216] but, "[t]he compelled-shareholder argument has never attained a majority of the Court."[217]

IV. Proposal for Remedying Dissenting Shareholders Forced Speech Concerns After Citizens United

A. State Action: Laying the Groundwork for Extending the Speech Protections to Dissenting Shareholders

The first step in establishing a violation of the forced speech doctrine requires the dissenting shareholder to prove that her payments were compulsory. Moreover, the compulsion must result from some form of state action.[218] At first blush, the compulsion dissenting shareholders face seems to lack the state action necessary to bring corporate political spending within the protections of the First Amendment. For example, in *Abood*, state law required individuals to pay money to the union.[219] Similarly, in *Keller*, attorneys were only allowed to practice law in California if they joined, and paid dues to the Bar.[220] In contrast, shareholders are generally not governmentally compelled to *invest* in the corporations.[221] Nevertheless, this Part argues that the tax consequences

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216. *See, e.g.*, FEC v. Nat'l Right to Work Comm. (*NRWC*), 459 U.S. 197, 207–08 (1982) (recognizing a governmental interest in "protect[ing] the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed").

217. Wasserman, *supra* note 196, at 177.

218. *See* Hudgens v. Nat'l Labor Relations Bd., 424 U.S. 507, 513 (1976) ("It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgement by government, federal or state.").

219. *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 212–14 (1977) (describing mandatory union dues).

220. Keller v. State Bar of Cal., 496 U.S. 1, 4 (1990).

221. *But see What Is the PST Retirement Program?*, SAVINGS PLUS PROGRAM https://www.nrsservicecenter.com/iApp/ret/content/employee.do?Site=SPPFORU&Role=EE&currentTopNode=PST%20Program (last visited Oct. 28, 2010) (describing mandatory retirement system) (on file with the Washington and Lee Journal of Civil Rights and Social Justice). This mandatory retirement program for California state employees invests in a diversified portfolio of investments, including "guaranteed investment contracts (GICs) issued by major, high quality insurance and financial companies, and U.S. Treasury or agency securities and other high quality fixed income assets." SHORT TERM INVESTMENT FUND—PST 1 (Dwight Asset Management Company 2009), *available at* https://www.nrsservicecenter.com/content/media/retail/pdfs/SPPFORU/PST_Profile.pdf. Thus, by requiring California public employees to invest in a retirement savings plan that invests in corporations, California's retirement scheme satisfies the state action doctrine.

involved in prematurely *selling* certain types of investment accounts constitutes a governmentally created financial burden on the dissenting shareholder who wishes to sell the offending shares. In some instances, the financial burden is so great that notwithstanding the injury to her speech, no reasonable shareholder would sell her shares. Thus, this Note argues that when governmentally created penalties on premature divestment unreasonably restrict a dissenting shareholder's ability to divest, the penalties serve as a de facto mandate that the shareholder maintain ownership of her shares, even when such ownership offends her freedom of speech.

Critics of extending the forced speech doctrine to protect dissenting shareholders argue that shareholders are not compelled to retain the stock, or as Justice Stevens explains, the argument goes that, "If and when shareholders learn that a corporation has been spending general treasury money on objectionable electioneering, they can divest."[222] This argument is also referred to as "the Wall Street Rule,"[223] but as this Part will explain, for certain types of investments, the Wall Street rule cannot eradicate forced speech concerns. The Wall Street rule fails to effectively remedy forced speech because dissenting shareholders would rarely accept the significant financial penalties assessed for premature divestment.[224]

Retirement accounts,[225] particularly defined contribution (DC) plans,[226] and defined benefit (DB) plans[227] present these concerns.

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222. Citizens United v. FEC, 130 S. Ct. 876, 978 (2010) (Stevens, J., concurring in part and dissenting in part).

223. *See* Jean Helwege et al., *Voting with Their Feet or Activism? Institutional Investors' Impact on CEO Turnover*, 68 J. FIN. ECON. 3, 4 (discussing the Wall Street rule). The Wall Street rule reflects the theory that shareholders "implicitly praise or criticize management, by buying or selling [stock], but seldom get involved more directly, even to the extent of a phone call." *Id.*

224. *See* discussion *infra* (outlining various early divestment penalties).

225. *See* J. MARTIN BURKE & MICHAEL K. FRIEL, UNDERSTANDING FEDERAL INCOME TAXATION 91 (LexisNexis, 3d ed. 2008) (defining individual retirement accounts). "As an encouragement to savings and investment, principally for retirement purposes, Congress has authorized tax-favored devices commonly known as 'IRAs' (individual retirement accounts or annuities) to which taxpayers may make annual contributions." *Id.* As a major tax incentive, IRAs are not subject to taxes until they are distributed. *Id.*

226. *See* Jennifer S. Taub, *Able but Not Willing: The Failure of Mutual Fund Advisors to Advocate for Shareholders' Rights*, 34 J. CORP. L. 843, 851 (2009) (defining a defined contribution (DC) plan). It is a retirement channel through which a participating employee "is considered a 'plan participant' and merely directs the plan to make investments of his or her pre-tax wages in accordance with his or her instructions." *Id.* Furthermore, "[i]n this structure, the plan participant is the investor who takes the economic risk, but he or she is not the legal owner of the mutual fund or the underlying portfolio companies." *Id.*

Employers offering their employees retirement benefits favor "qualified plans"[228] for their tremendous tax advantages.[229] Although employees are generally not required to take advantage of this sizeable financial benefit,[230] the financial incentives of such a plan often compel the employee to participate.[231] Retirement benefits structured as 401(k) plans penalize investors who prematurely sell the fund.[232] Early divestment results in an additional ten percent tax penalty for distributing the benefit before reaching the age of fifty-nine and a half.[233] This tax penalty is in addition to regular income taxes.[234] Money-Zine provides a useful example for how this penalty works:

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227. *See id.* (defining defined benefit (DB) plans as retirement plans promising an employee a set amount calculated according to established variables).

228. *See* HAMILTON & BOOTH, *supra* note 23, at 80–82 (noting qualified plans are those meeting requirements of the federal Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code (IRC)).

229. *See id.* ("A [qualified] plan provides for a much greater degree of tax deferral than a plan financed with after-tax dollars, because no tax is imposed on either the contributions or the buildup until the employee retires (unless the funds are withdrawn before retirement)."); *see also* I.R.C. § 401 (2010) (defining "Qualified pension, profit-sharing, and stock bonus plans" as "[a] trust created or organized in the United States and forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries").

230. *See* INV. CO. INST., 2009 INVESTMENT COMPANY FACT BOOK 96 (49th ed. 2009), *available at* http://www.ici.org/pdf/2009_factbook.pdf ("On an asset-weighted basis, the average total expense ratio incurred on 401(k) participants' holdings of stock mutual funds through their 401(k) plans was 0.74 percent in 2007, compared with an average total expense ratio of 0.85 percent for stock mutual funds industrywide."). Investors benefit from investing their money in 401(k) stock mutual funds over stock mutual funds that are not designated as 401(k)s. *Id.*

231. *See id.* at 86. ("Eighty-two million, or 70 percent of, U.S. households report that they had employer-sponsored retirement plans, IRAs, or both in May 2008 . . . ."). "Sixty-one percent of U.S. households reported that they had assets in DC plan accounts, were receiving or expecting to receive benefits from DB plans, or both. Forty-one percent of households reported having assets in IRAs. Thirty-two percent of households had both IRAs and employer-sponsored retirement plans." *Id.*

232. *See id.* at 90 ("At the end of 2008, employer-sponsored DC plans—which include 401(k) plans, 403(b) plans, 457 plans, Keoghs, and other DC plans—held an estimated $3.5 trillion in assets . . . [and] [w]ith $2.4 trillion in assets at year-end 2008, 401(k) plans held the largest share of employer-sponsored DC plan assets."). Similar to 401(k) plans, 403(b) and 457 plans "held another $712 billion in assets. The remaining $455 billion in DC plan assets were held by other DC plans without 401(k) features." *Id.*

233. *Publication 575*, IRS, http://www.irs.gov/publications/p575/ar02.html#en_US_publink1000226952 (last viewed on Oct. 20, 2010) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

234. *See* 401(k) Plans: Life Advice, (Metlife, Inc. 2009), *available at* https://eforms.metlife.com/wcm8/cmsclient/eForms_PROD_Deployment2/15400/15268.pdf

> Let's say you've saved $200,000 in your 401k plan and you have the rollover payment sent directly to yourself. That means you will get a check for $160,000 from that institution—not the full amount of $200,000. Under the 401k rollover rules, you now have 60 days to deposit the full amount—$200,000—into another 401k plan, qualifying plan, or IRA to avoid tax penalties. In this example you need to come up with the $40,000 withheld and deposit this money into your new retirement plan in order to match 100% of the amount withdrawn. If you have considerable funds in an existing 401k plan, multiply that number by 20%. This is how much money you need to supplement to avoid tax penalties if you take possession of the rollover money.[235]

Avoiding speech compelled by the underlying corporations in an employee's retirement portfolio by prematurely cashing-out the plan subjects investors to severe financial penalties if they do not have the money to compensate for the loss and an alternative retirement plan lined up.[236] If the employee intends to work for the same employer, and that employer only offers one retirement plan, selling the 401(k) means the employee will lose twenty percent of her savings.[237] Investors should not be required to sacrifice twenty percent of their retirement account to avoid financing disagreeable speech. Such penalties on speech are patently unfair.[238]

401(k) penalties on early divestment may present traditional forced speech issues because the tax penalties are government regulations that satisfy the state action necessary to invoke First Amendment protections. The early divestment penalties impact the First Amendment rights of the seventy percent of American households (eighty-two million Americans) owning retirement plans.[239] Forcing investors to divest, or accept compelled political expression, affects the vast majority of American families because—at least in the case of 401(k)'s—it puts a twenty percent penalty on what invested Americans refuse to say. After *Citizens United*, striking a balance between the corporate and shareholder First Amendment

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(discussing 401(k) plans in general).

235. *401k Rollover*, MONEY-ZINE, http://www.money-zine.com/Financial - Planning/Retirement/401k-Rollover/ (last visited Oct. 20, 2010) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

236. *See* discussion *infra* (illustrating an example of the penalty for investors who sell early).

237. *Id.*

238. *See* INV. CO. INST., *supra* note 230, at 94 (illustrating the reluctance of 401(k) participants to borrow from their plans).

239. *Id.* at 86.

rights may require the government to waive tax penalties for shareholders who choose premature divestment as a means of distancing themselves from disagreeable corporate speech.[240]

B. Legislation Balancing Corporate Speech Rights with Shareholder Speech Rights

For those instances when dissenting shareholders do not face tax consequences for premature divestment, this subpart argues that Congress should import First Amendment principles to federal election regulation to enhance the disclaimer and disclosure provisions already in place. Because the government has an interest in protecting shareholders from corporations usurping the shareholders' speech, the government may pass legislation that seeks to balance the First Amendment interests of corporations and shareholders. This sort of balancing argument was employed by the Court to validate the burden of must-carry regulations on the free speech rights of cable television system operators and programmers in *Turner Broadcasting System, Inc. v. Federal Communications Commission*.[241]

In *Turner*, cable television operators and programmers brought actions against the Federal Communications Commission (FCC) challenging the constitutionality of the FCC's must-carry provisions,[242] which required cable television systems to carry local broadcast stations.[243] The cable companies argued that these regulations unconstitutionally burdened their First Amendment rights.[244] After determining that the must-carry regulation was a content-neutral regulation, the *Turner* Court applied

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240. Of course, the dissenting shareholder would also have to prove that the disagreeable speech was not germane to the mission of the corporation, a burden that in all but the most egregious cases will probably prove insurmountable. *See, e.g.*, Keller v. State Bar of Cal., 496 U.S. 1, 2 (1990) (holding State Bar's use of compulsory dues to finance political and ideological activities with which members disagreed violated their First Amendment right of free speech when such expenditures were "not necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of legal services").

241. *See* Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180, 185 (1997) (plurality opinion) (concluding that "the must-carry provisions are consistent with the First Amendment").

242. Cable Television Consumer Protection and Competition Act of 1992 (Cable Act), Pub. L. No. 102-385, 106 Stat. 1460.

243. *Turner*, 520 U.S. at 185–87.

244. *Id.*

intermediate scrutiny.[245] The Court reaffirmed three important government interests: "(1) preserving the benefits of free, over-the air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming."[246] Assessing Congress's determination that many broadcast stations would be refused carriage on cable systems absent the must-carry requirement, the Court found that the must-carry provision effectively and directly served government's interests and did not burden substantially more speech than was necessary to further these substantial goals.[247] Thus the Court upheld the regulation as a valid exercise of police power.[248]

Congress could use the *Turner* Court's balancing analysis to enact more comprehensive legislation that regulates corporate political speech in the interest of protecting corporate shareholders' First Amendment rights. Notably, the *Turner* Court categorized the must-carry regulations as content-neutral.[249] In *Citizens United*, however, the Court categorized § 441b's prohibition on corporate independent expenditures as a content-based restriction, consequently subjecting it to strict scrutiny.[250] Thus, to satisfy strict scrutiny analysis, Congress must narrowly tailor legislation aimed at balancing the First Amendment rights of shareholders and corporations. Furthermore, the Court must elevate the shareholder protection interest recognized in *MCFL* from a legitimate governmental interest to a compelling governmental interest.[251]

Despite *MCFL*'s holding that the government has a legitimate interest in protecting dissenting shareholders,[252] the *Citizens United* majority

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245. *See id.* at 189 ("A content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.").

246. *Id.* at 189–90.

247. *Id.* at 192–225.

248. *Id.* at 224–25.

249. *Id.* at 189–90.

250. Citizens United v. FEC, 130 S. Ct. 876, 882 (2010) ("Laws burdening such [political] speech are subject to strict scrutiny.").

251. FEC v. Mass. Citizens for Life (*MCFL*), 479 U.S. 238, 257–60 (1986) ("The Government has a legitimate interest in 'regulat[ing] the substantial aggregations of wealth amassed by the special advantages which go with the corporate form,'" because "[t]hose aggregations can distort the 'free trade in ideas' crucial to candidate elections, [ ] at the expense of members or shareholders who may disagree with the object of the expenditures.").

252. *Id.*

dismissed the shareholder protection interest, relying on the notion that "abuses of shareholder money," such as compelled speech concerns, "can be corrected 'through the procedures of corporate democracy,' and . . . through Internet-based disclosures."[253] While this may be true, this Note argues that Congress should enhance the current disclosure and disclaimer provisions because the established disclosure and disclaimer requirements and corporate democracy procedures cannot effectively protect dissenting shareholders from compelled speech.[254]

1. Current Disclosure Requirements and Corporate Democracy Procedures Do Not Provide Effective Disclosure

In addressing the benefits of disclosure for protecting shareholders, the *Citizens United* Court recommended Internet-based disclosures, noting such disclosures "can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters."[255] Disclosure is important because if shareholders are unaware of the political expenditures of the corporations in which they hold stock, they cannot be expected to independently cure the forced speech by voluntarily withdrawing their financial support. Thus, at the very least, legislation aimed at protecting dissenting shareholders from forced speech must assure that shareholders are able to discover corporate political spending.[256] As discussed in the next subpart, the current channels available do not sufficiently disclose corporate political spending to interested shareholders.

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253. *Citizens United*, 130 S. Ct. at 978 (Stevens, J., concurring in part and dissenting in part) (citations omitted).

254. *See* discussion *infra* Parts IV–V (discussing ineffectiveness of current corporate democracy procedures and disclosure requirement in curing compelled speech concerns of dissenting shareholders).

255. *Citizens United*, 130 S. Ct. at 916 (majority opinion).

256. As discussed in Part IV(A), critics of applying the forced speech doctrine to shareholders advocate the Wall Street rule as a sufficient cure for disagreeable corporate speech, but if shareholders are not made aware of the offensive spending, they cannot take advantage of the Wall Street rule to cure compelled expression.

a. BCRA-Mandated Disclosure Requirements

Despite the heated disagreement between the majority, concurring, and dissenting opinions in *Citizens United*, eight Justices supported upholding the BCRA's disclosure, disclaimer, and reporting requirements.[257] Assuming corporations disclose political spending *and* investors know how to discover this information,[258] some evidence supports the assertion that the Internet could be an effective tool for discovering corporate political spending.[259] However, as they are implemented today, the BCRA disclosure provisions do not provide adequate notice to shareholders about corporate political expenditures.

Citizens United upheld BCRA's disclaimer and disclosure provisions as applied to ads for *Hillary Movie*, and for *Hillary Movie*, itself.[260] These disclosure requirements are codified at 2 U.S.C. § 441d, and require that certain types of electioneering broadcasts disclose the name of the person or organization sponsoring the advertisement.[261] Section 441d further

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257. *See generally* Citizens United v. FEC, 130 S. Ct. 876, 931 (2010) (Stevens, J., concurring in part and dissenting in part) ("Although I concur in the Court's decision to sustain BCRA's disclosure provisions and join Part IV of its opinion, I *emphatically dissent* from its principal holding." (emphasis added)).

258. *See infra* Part IV.B.1.b and accompanying text (discussing the difficulties investors face in finding information on the FEC website); *see also infra* Part IV.B.1.c and accompanying text (discussing further difficulties shareholders face when they have the burden to discover political contributions). These discussions show that these are two very big assumptions.

259. *See* INV. CO. INST., *supra* note 230, at 81 ("In 2008, 91 percent of U.S. households owning mutual funds had Internet access."); *see also id.* at 82 ("In 2008, 82 percent of shareholders with Internet access went online for financial purposes, most often to obtain investment information or check their bank or investment accounts . . . .").

260. *Citizens United*, 130 S. Ct. at 885 (majority opinion).

261. *See* 2 U.S.C. § 441d(a)(3) (2010) (outlining disclosure requirements). Specifically, § 441 provides:

> [W]henever any person makes a disbursement for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate, or solicits any contributions through any broadcasting station, newspaper, magazine, outdoor advertising facility, mailing, or any other type of general public political advertising or makes a disbursement for an electioneering communication (as defined in § 434(f)(3) of this title), such communication . . . if not authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state the name and permanent street address, telephone number, or World Wide Web address of the person who paid for the communication and state that the communication is not authorized by any candidate or candidate's committee.

Id.

requires that such communications that are "transmitted through radio or television . . . include, . . . in a clearly spoken manner, the following audio statement: '_____ is responsible for the content of this advertising.' (with the blank to be filled in with the name of the political committee or other person paying for the communication and the name of any connected organization of the payor)."[262] Additionally, under § 201, any person who spends more than $10,000 on electioneering communications within a calendar year must file a disclosure statement with the FEC.[263] That statement must identify the person making the expenditure, the amount of the expenditure, the election to which the communication was directed, and the names of certain contributors.[264] The *Citizens United* Court upheld these disclosure provisions, concluding that the public interest "in knowing who is speaking about a candidate shortly before an election" justifies disclosure of who (or, which corporation) is spending money on electioneering communications.[265]

b. For-Profit Corporations that Fund Nonprofit Corporations Should also Be Disclosed and Reported to the FEC

An important consideration for the purposes of this Note is whether § 434(f)(3) requires disclosure of corporate political expenditures that are not directly spent on electioneering, but rather are given to another business, such as a nonprofit, to support that business's electioneering activities. For example, Citizens United, a now-infamous nonprofit, acquires some of its funding from for-profit corporations.[266] If a for-profit corporation that contributes to Citizens United, "Corp X," makes a significant financial donation to Citizens United for the purpose of advocating for a specific political cause, is Citizens United required to disclose the identity of Corp X? Maybe. Section 434(f)(2)(F) requires that the organization sponsoring the electioneering communication disclose to the FEC "the names and addresses of all contributors who contributed an aggregate amount of $1000 or more to the person making the

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262. 2 U.S.C. § 441d(d)(2) (2010).

263. 2 U.S.C. § 434(f)(1) (2010).

264. 2 U.S.C. § 434(f)(2); *see* Citizens United v. FEC, 130 S. Ct. at 885 (explaining disclosure requirements).

265. *Citizens United*, 130 S. Ct. at 915.

266. *See id.* at 887 (describing Citizens United).

disbursement."[267] Thus, in the hypothetical, § 434 appears to require Citizens United to disclose to the FEC any amounts over $1,000 that Corp X contributed to Citizens United's electioneering efforts.[268] The FEC then makes that information publicly available through the FEC website.[269] What is not as clear is whether § 434 requires the nonprofit to report the parent company associated with the for-profit expenditure. In other words, if Corp X is a subsidiary of Corp XYZ, but the political expenditure purports to come from Corp X, which name does Citizens United report to the FEC? As discussed above, from the inception of campaign finance reform, legislative loopholes have plagued Congress's efforts to regulate corporate political spending.[270] Congress should amend § 434 to require disclosure of the parent company for all corporations directly or indirectly engaged in electioneering communications. If Congress implements this change, § 434 will provide one measure for an especially prudent shareholder to discover the political spending of a specific corporation.

Even with the information available on the FEC website, navigating the website is an arduous and time-consuming process.[271] At the time of writing, the FEC website does not provide an updated and searchable list of contributing corporations.[272] The FEC website probably lacks this information because previously it was not required to list such information.[273] Yet, at the time of writing, more than a year has passed since the Supreme Court's decision in *Citizens United*, and during that year a national election took place in which Americans elected representatives for one-third of the Senate and the entire House of Representatives.[274]

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267. 2 U.S.C. § 434(f)(2)(F).

268. *See id.*

269. *See* 2 U.S.C. § 434(i)(A) (noting that the FEC makes disclosure information available on the FEC website).

270. *See* discussion *supra* at Part I.B and accompanying text.

271. *See* TORRES-SPELLISCY, *supra* note 32, at 11 (noting difficulty of tracking contributions).

272. *Disclosure Data Catalog*, FEDERAL ELECTION COMMISSION, http://www.fec.gov/data/ (last visited Feb. 6, 2010) (on file with the Washington and Lee Journal of Civil Rights and Social Justice). *But see* TORRES-SPELLISCY, *supra* note 32, at 11 (noting difficulty in navigating FEC disclosure information for PACs).

273. Prior to *Citizens United*, § 203's ban on corporate political expenditures prevented corporations from engaging in the electioneering that § 434 requires political spenders disclose to the FEC for publication on the FEC's website. *See* Citizens United v. FEC, 130 S. Ct. 876, 913 (2010) (overruling "BCRA § 203's extension of § 441b's restrictions on corporate independent expenditures"); 2 U.S.C. § 434(i)(A) (noting that the FEC makes disclosure information available on the FEC website).

274. *Elections*, UNITED STATES SENATE, http://www.senate.gov/reference/reference_

News reports and voluntary disclosures by various corporations establish that corporations were funding electioneering communications through political expenditures in the 2010 elections.[275] Thus, this Part provides recommendations for how the FEC should structure its website to provide the disclosure hailed by the *Citizens United* majority.

Given the complexity of listing parent corporations and subsidiary corporations, in addition to their corresponding contributions, the only way to assure this information is easily accessible involves allowing users to search by corporation.[276] The public should be able to perform a Google-like search by corporate name that returns links to all political expenditures by that corporation for the past several elections. The website should provide advanced search options to help the public restrict searches by district in which the electioneering communication aired, and even the candidate the electioneering communication supported or opposed.

The current design of the website does allow users to input corporate names in an "Individual Search" database,[277] but the results are unwieldy and disorganized. The "Individual Search" results lump corporations and people together, such that a search for "Target" reveals the electioneering expenditures of businesses such as "Target Corporation, " "Target Stores, " and "Targeted Creative" on the same page as the electioneering expenditures of individuals, such as "Marci Target" and "Stephen

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index_subjects/Elections_Campaigns_vrd.htm (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

275. *See, e.g.*, John Gibeaut, *A Cautionary Tale of Corporate Political Spending Emerges in Minnesota*, ABA J. (Oct. 22, 2010, 2:48 PM CST), http://www.abajournal.com/news/article/a_cautionary_tale_target_corporate_political_spending_emerges_in_minnesota/ (discussing Target's decision to give money to the political campaign of a candidate who offended many gay rights activists) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

276. *See* discussion *infra* (noting problems with website already in place). It is probably not realistic to expect interested shareholders to navigate the confusion of the FEC website. And even if navigating the site is not unreasonable, it cannot be realistic to expect shareholders to search for this information if it is never revealed to them that the company they are interested in is making these political expenditures. Because, while § 434 requires disclosure of Corp X to the FEC, § 441d does not require that Corp X be included in the disclaimer listing sponsoring corporations of the television or radio broadcast. 2 U.S.C. § 441d(d)(2). As a result, unless Corp X is directly sponsoring the political advertisement, the shareholder would have to check the FEC website, on her own, without really knowing what she is looking for. And, of course, this again assumes that the website is reasonably accessible.

277. *Transaction Query by Individual Contributor*, FEDERAL ELECTION COMMISSION, http://www.fec.gov/finance/disclosure/norindsea.shtml (last visited Mar. 7, 2011) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

Targett."[278] Certainly, a more efficient search would provide a corporate database that is separate from the individual database. Additionally, the search results reveal that one corporate entity may be listed under several different names.[279] For example, the website lists "Target Corporation" three different times with three separate area codes, though two of the zip codes only differ as to their last digit.[280] The website also returned search results for two separate entries of "Target Stores," yet both entries are listed as being located at the same zip code.[281] If some of these separate entries are actually referring to the same company, the website should condense the list such that users do not have to ponder which listing relates to which company.

Another way the FEC could clarify the search results is to provide the New York Stock Exchange ticker symbol, and perhaps even a link to the parent company's webpage. Finally, users should be able to "follow the money." For example, as discussed at the beginning of this Note, in 2010, Target Corporation gave "$100,000 in cash and another $50,000 in services to MN Forward, a committee organized by the state Chamber of Commerce," which MN Forward then spent "on advertising supporting Republican candidate Tom Emmer."[282] As the website is currently designed, a user can search by corporation or candidate, but not both. In other words, to determine whether Target gave money to Tom Emmer, a user would have to search under "Target," select one of the many hyperlinks for committees receiving Target's political expenditures, then hope that the recipient committee's page lists candidates the committee supported or opposed. If Tom Emmer was not listed, the user would need to repeat the process for every recipient committee until she found Emmer. A simple Boolean search allowing users to search with connecting terms, such as "Target AND Emmer," to trace whether corporate expenditures financed specific candidates would dramatically improve the efficiency of the FEC website.

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278. *See id.* (search "Target") (last visited Mar. 7, 2011) (returning search results for "Target").

279. *Id.*

280. *Id.*

281. *Id.*

282. Gibeaut, *supra* note 275.

c. Given the Breadth and Diversity of the Average American's Portfolio, Putting the Burden of Discovering Political Contributions on Corporate Shareholders Is Unrealistic and Unfair

Even if shareholders are able to locate relevant information about a corporation on the FEC website, effective disclosure assumes the shareholder knows that the corporation is among the hundreds of securities within her portfolio. For this reason, the "transparency" relied on by the *Citizens United* majority is effectively opaque.[283] Because most Americans invest through mutual funds and pension plans, it is exceedingly difficult for the general public to "monitor and to alter particular holdings."[284] The majority's claim that Internet-based disclosures serve the shareholder protection interest[285] is flawed in that it presupposes shareholders know, or could know, in which corporations they hold stock.[286]

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283. *See* Citizens United v. FEC, 130 S. Ct. 876, 916 (2010) (majority opinion) (relying on transparency in advocating disclosure as a proper remedy for protecting shareholders from compelled speech). As the majority noted:

> Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits, and citizens can see whether elected officials are "'in the pocket' of so-called moneyed interests." The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.

Id. (citations omitted).

284. *Id.* at 978 (Stevens, J., concurring in part and dissenting in part); *see also* Alicia Davis Evans, *A Requiem for the Retail Investor?*, 95 VA. L. REV. 1105, 1105 (2009) ("The American retail investor is dying."). Noting the diminishing number of retail investors, Evans discusses investor characteristics over the past sixty years: "In 1950, retail investors owned over 90% of the stock of U.S corporations. Today, retail investors own less than 30% and represent a very small percentage of U.S. trading volume. . . . There is no question that U.S. securities markets are now dominated by institutional investors." *Id.* Institutional investors are those corporations or other entities that invest "in securities of other corporations." *Id.* at 441. Investment companies are themselves entities that issue shares. Investors may purchase these shares and thereby obtain instant diversification, because the shares that an investment company issues in effect constitute investment in the portfolio owned by the investment company. *Id.* "A mutual fund is one type of investment company, but there are many others." *Id.* Approximately 90 million American investors own mutual funds. *See* Taub, *supra* note 226, at 847–48 (discussing characteristics of American investors).

285. *See* Citizens United v. FEC, 130 S. Ct. 876, 916 (2010) (majority opinion) ("Shareholder objections raised through the procedures of corporate democracy . . . can be more effective today because modern technology makes disclosure rapid and informative.").

286. *See id.* at 978 (Stevens, J., concurring in part and dissenting in part) ("If the corporation in question operates a PAC, an investor who sees the company's ads may not know whether they are being funded through the PAC or through the general treasury.").

Appreciating the difficulty entailed in monitoring mutual funds requires understanding that mutual funds are constantly buying and selling different companies.[287] Thus, the securities comprising the fund when the investor first purchases her shares will not necessarily be the same securities she will own in six months or a year.[288] Of course, an investor can make herself aware of the companies comprising the fund by reviewing a report listing the fund's holdings,[289] but discovering the companies in which the mutual fund invests involves costs—both in time and in money.[290] And, as a practical matter, the average investor may not be able to shoulder the burden and costs associated with constantly monitoring the hundreds of securities in her mutual fund.[291]

As Justice Stevens appropriately points out, the argument that a shareholder need only divest herself of the offending security to be free of compelled expression[292] only partially solves the injury to the shareholders' expressive rights.[293] For, as Justice Stevens's dissent in *Citizens United* observes, assuming shareholders reliably learn of the corporate spending:

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287. *See* HAMILTON & BOOTH, *supra* note 23, at 521 (discussing that most mutual funds are actively managed); *see also Mutual Funds*, FINRA, http://www.finra.org/Investors/SmartInvesting/ChoosingInvestments/MutualFunds/ (last visited Mar. 4, 2010) (noting the dynamic nature of mutual funds) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

288. *See* HAMILTON & BOOTH, *supra* note 23, at ("Most mutual funds are actively managed. That means the fund manager shifts investments aggressively in order to maximize the return to investors."). For investors who do not want the costs associated with the active management of most mutual funds, index funds are a viable option. Index funds structure their portfolios with securities "that . . . closely mimics the mix of stocks in one or more broad market indexes." *Id.* Nevertheless, even index funds involve some trading. *See id.* at 526 (noting index funds *minimize* trading).

289. *See* Securities Exchange (Exchange) Act of 1934, ch. 404, sec. 1, 13(f)(1), 48 Stat. 881 (codified as amended at 15 U.S.C.S. § 78a, § 78m(f) (2010)) (requiring institutional investment managers to periodically disclose acquired securities).

290. *See* discussion *infra* (discussing dynamic nature of mutual fund portfolios).

291. *See id.* (stating that it is difficult for investors to monitor portfolios because they invest through mutual funds and pension plans).

292. *See* Transcript of Re-argument at 57–59, Citizens United v FEC, 130 S. Ct. 876 (2010) (No. 08-205) (suggesting dissenting shareholders could just sell objectionable stock). During re-argument in *Citizens United*, Justice Roberts asked Sol. Gen. Elena Kagan, "can't [shareholders] sell their shares or object in the corporate context" if the objecting shareholder does not like the corporate political spending. *Id.*

293. *See Citizens United*, 130 S. Ct. at 978 (Stevens, J., concurring in part and dissenting in part) (stating that even if "shareholders learn that a corporation has been spending general treasury money on objectionable electioneering . . . this solution is only partial").

> The injury to the shareholders' expressive rights has already occurred; they might have preferred to keep that corporation's stock in their portfolio for any number of economic reasons; and they may incur a capital gains tax or other penalty from selling their shares, changing their pension plan, or the like.[294]

But more specifically, mutual funds are comprised of hundreds of securities, so even if an investor discovers a security in her fund that is making disagreeable political expenditures, the investor cannot sell the single offending security.[295] Rather, if an investor is unhappy with the business practices of one company in the fund, she must sell the entire fund.[296] Requiring a dissenting investor to choose between selling her entire mutual fund because of the disagreeable political spending of one security, or being compelled to speak is patently unfair. Indeed, Americans' investing practices demonstrate that investing households owning IRAs "tend to preserve their IRA assets as long as possible."[297] Further, given the prevalence of mutual funds in American households, it is not surprising that "[s]tudies show that a majority of individual investors make no trades at all during a given year."[298]

Considering the significant difficulties most shareholders face in determining in which corporations they own stock, disclosure and disclaimer improvements may not directly impact most investors' decision-

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294. *Id.*

295. *See* Taub, *supra* note 226, at 106–07 (discussing the structure and distribution of mutual funds). "A mutual fund that holds corporate stocks is considered to be the shareholder of that corporation. The person (or institution) who invests money in the mutual fund is considered to be the shareholder of the mutual fund." *Id.* Consequently, the decisions regarding in which corporations to invest fall to the board of directors of the fund ("fund directors"). *See* INV. CO. INST., A GUIDE TO UNDERSTANDING MUTUAL FUNDS 28 (2007), *available at* http://www.ici.org/pdf/bro_understanding_mfs_p.pdf (noting fund directs must execute business affairs of the mutual fund "in the best interests of fund shareholders"). Additionally, the board of directors hires an investment adviser to manage the fund. Taub, *supra* note 226, at 107–08. Although the advisor owes fiduciary duties to the fund, "[i]n reality . . . the Adviser runs the show." *Id.* Consequently, the adviser makes the investment decisions for the fund. *Id.* Furthermore, the business judgment rule protects the adviser's decisions. *See* discussion *infra* Part II.B.2, notes 335–37 (discussing the business judgment rule). Therefore, when fund shareholders are dissatisfied with the fund's investment decisions, their only real defense is to follow the Wall Street Rule and divest. Taub, *supra* note 226, at 878.

296. *See* Taub, *supra* note 226, at 878 (discussing the Wall Street Rule and how investors can sell their shares if they do not approve of management's actions).

297. INV. CO. INST., *supra* note 230, at 99.

298. Citizens United v. FEC, 130 S. Ct. 876, 978 (2010) (Stevens, J., concurring in part and dissenting in part).

making. Still, disclosure and disclaimer improvements may place public pressure on corporations to avoid political expenditures that their shareholders and their patrons find disagreeable.[299] Even if the corporation does not initially cave to this public pressure,[300] larger shareholders with a direct stake in the corporation may introduce proxy initiatives recommending political spending limits.[301] Although the validity of such proxy initiatives remains unclear,[302] the public and media attention drawn by such initiatives could place added pressure on corporations to rein-in their political spending.[303] Finally, prudent corporations heeding the lessons of Target's political activity, discussed above, may well decide the risk to their reputation is not worth the anticipated gain from a political expenditure.

2. *Current Corporate Democracy Procedures Do Not Adequately Protect Dissenting Shareholders*

The *Citizens United* majority concluded that "[t]here is [ ] little evidence of abuse that cannot be corrected by shareholders 'through the procedures of corporate democracy.'"[304] Although the Court does not

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299. *See, e.g.*, Press Release, Target Brands, Inc., Civic Activity (Aug. 5, 2010), *available at* http://pressroom.target.com/pr/news/civic-activity.aspx (apologizing for Target's political expenditure to organization supporting an anti-gay rights politician) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

300. *See, e.g.*, Abe Sauer, *The Anti-Gay Donations that Target Apologized for? They Never Stopped*, THE AWL, Dec. 21, 2010, *available at http://www.theawl.com/2010/12/the-anti-gay-donations-that-target-apologized-for-they-never-stopped* ("According to documents filed with the FEC in October 2010, Target continued donating to a bevy of anti-gay politicians even after [CEO] Steinhafel apologized and committed to reforming the review process for future political donations. These donations even included some of the same anti-gay politicians the company had already been criticized for supporting.") (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

301. *See* Lucian A. Bebchuk & Robert J. Jackson Jr., Commentary, *Corporate Political Speech: Who Decides?*, 125 Harv. L. Rev. 83, 87–88 (2010) (discussing proxy options).

302. *See id.* ("Whether shareholders may use the federal proxy rules to put forward proposals recommending changes to the amount or targets of political spending is unclear, but such proposals, if included in the proxy and adopted by the shareholders, would in any event be nonbinding.").

303. *See* Jeff Cossette, *Investors Target Political Spending*, INVESTOR RELATIONS MAG., Feb. 4, 2011, *available at* http://www.insideinvestorrelations.com/articles/18037/investors-target-political-spending/ (noting "[m]ore than 45 companies could face proxy initiatives on disclosing and accounting for their political donations this year") (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

304. Citizens United v. FEC, 130 S. Ct. 876, 911 (2010) (majority opinion) (citing First

elaborate on what it means by procedures of "corporate democracy," Justice Stevens interprets the majority to mean "the rights of shareholders to vote and to bring derivative suits for breach of fiduciary duty."[305] Every state already has statutory and decisional laws that create rights for individual shareholders to sue corporate boards for making "wasteful expenditures."[306] Alleging wasteful spending is a claim that the directors irrationally squandered the corporation's assets in a way that did not advance the corporation's interests.[307] Yet, Professor Lawrence H. Tribe, a constitutionally renowned legal scholar, dismisses the checking effect of waste claims, arguing that:

> [S]hareholder democracy is largely illusory in a world where there are countless obstacles to vigilant oversight of corporate management by the widely dispersed "owners" of the underlying enterprise, especially when most of those owners have only the most attenuated link to their stock holdings, a link made all the more tenuous by the fact, noted in the Stevens dissent in *Citizens United*, that "[m]ost American households that own stock do so through intermediaries such as mutual funds and pension plans, . . . which makes it more difficult both to monitor and to alter particular holdings."[308]

The onerous standard for successfully pleading corporate waste buttresses the ineffectiveness of the largely illusory corporate democracy.[309]

The director's duty to exercise informed business judgment derives from the duty of care.[310] In Delaware, the business judgment rule presumes

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Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 794 (1978)).

305. *Id.* at 978 (Stevens, J., concurring in part and dissenting in part).

306. *See* Posting of Lawrence H. Tribe & Carl Loeb, *What Should Congress Do About Citizens United?*, SCOTUSblog (Jan. 24, 2010, 10:30 PM) http://www.scotusblog.com/2010/01/what-should-congress-do-about-citizens-united/ (Jan. 24, 2010) (discussing the current state of state laws regarding expenditures) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

307. *See In re* Walt Disney Co. Derivative Litigation, 906 A.2d 27, 73–74 (Del. Supr. 2006) (defining a claim for corporate waste); *see also* Tribe *supra* note 306 (discussing the waste claim).

308. Tribe, *supra* note 306.

309. *See In re Walt Disney Co.*, 906 A.2d at 73–74 (discussing the standard for successfully pleading corporate waste). "To recover on a claim of corporate waste, the plaintiffs must shoulder the burden of proving that the exchange was 'so one sided that no business person of ordinary, sound judgment could conclude that the corporation has received adequate consideration.' A claim of waste will arise only in the rare, 'unconscionable case where directors irrationally squander or give away corporate assets.'" *Id.*

310. *See* Smith v. Van Gorkom, 488 A.2d 858, 872–73 (Del. 1985) (describing the business judgment rule).

that in making business decisions, directors "were informed, acted in good faith and honestly believed that the decision was in the best interests of the corporation."[311] This principle serves dual purposes: (1) recognizing courts do not have the expertise, nor is it their role to second guess corporate decision making; and (2) guarding against concern that if directors fear personal liability they will be less likely to take business risks that produce gain.[312] Given these director-friendly standards, a claim for waste, premised on a corporation's political spending, is so unlikely to succeed, that claiming such legislation empowers shareholders boarders on disingenuous.[313]

C. Recommendations Following Citizens United

Some critics of the uproar over *Citizens United* argue that the case will have little effect on corporate spending because corporations will police themselves.[314] For example, Richard Epstein, a noted legal scholar at the University of Chicago Law School, suggested in a recent issue of FORBES that "'corporate realities and market constraints' will prevent any adverse outcomes if corporate general treasury funds are unleashed for political spending."[315] But, as Brenda Wright, the director of the Democracy Program, notes, America's history of campaign finance does not offer much support for this notion.[316] For example, Wright points to the FEC's soft-money exemption, which allows unlimited donations to political parties by corporations, unions, and individuals.[317] In 1984, these "soft-money

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311. *Id.*

312. *Id.*

313. *See* Citizens United v. FEC, 130 S. Ct. 876, 978 (2010) (Stevens, J., concurring in part and dissenting in part) (observing that "many corporate lawyers will tell you that 'these rights are so limited as to be almost nonexistent,' given the internal authority wielded by boards and managers and the expansive protections afforded by the business judgment rule").

314. *See* Brenda Wright, *Examining High Court's Consideration of Campaign Finance Regulation*, AM. CONSTITUTION SOCIETY, Sept. 8, 2009, http://www.acslaw.org/node/14062 (last visited Oct. 20, 2010) (discussing impact of *Citizens United*) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

315. *Id.*

316. *See id.* (stating that American history in general provides little support for the notion); *see also* discussion *infra* (noting the exponential increase of parties' election spending from 1984 to 2000).

317. *See* Wright, *supra* note 314 (discussing the impact of soft money on campaign finance).

donations accounted for only five percent ($21.6 million) of the two major parties' total expenditures, but in 2000—just four presidential election cycles later—they accounted for forty-two percent of the parties' spending ($498 million)."[318]

These soft money funds are neither subject to BCRA's disclosure requirements, nor subject to its source and amount limitations.[319] Yet, as Justice Stevens points out in his dissent in *Citizens United*, corporations and unions will have a dramatically enhanced role in political parties and choosing electoral candidates because the soft money contributions that BCRA bars political parties from soliciting or spending will remain prohibited.[320] "Going forward, corporations and unions will be free to spend as much general treasury money as they wish on ads that support or attack specific candidates, whereas national parties will not be able to spend a dime of soft money on ads of any kind."[321] If history conveys anything about the future, corporate political expenditures will likely have a huge impact on the treasuries of political parties.[322] As the Solicitor General's supplemental brief in *Citizens United* explains, if during the 2007–08 elections the Fortune 100 companies spent just one percent of their profits on electoral advocacy, "such spending would have more than doubled the federally-reported disbursements of all American political parties and PACs combined."[323]

In stark contrast with those calling *Citizens United* the *Dred Scott* decision of the present generation,[324] some commentators argue that state elections demonstrate that the effect of the case may not be so drastic.[325]

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318. *Id.*

319. *See* Citizens United v. FEC, 130 S. Ct. 876, 940 (2010) (Stevens, J., concurring in part and dissenting in part) (describing soft money funds under 2 U.S.C. § 441i).

320. *See id.* ("Political parties are barred under BCRA from soliciting or spending 'soft money,' funds that are not subject to the statute's disclosure requirements or its source and amount limitations.").

321. *Id.*

322. *See* Wright, *supra* note 314 (discussing the impact of corporate political expenditures).

323. Supplemental Brief for the Appellee at 17, *Citizens United v. FEC*, 130 S. Ct. 876 (2010) (No. 08-205); *see also* Wright, *supra* note 314 (discussing the impact of corporate political expenditures).

324. *See* Keith Olbermann, Special Comment, Jan. 21, 2010, *available at* http://www.youtube.com/watch?v=AMTJ--JWJqM&NR=1 (last visited Oct. 20, 2010) (referencing *Dred Scott v. Sandford*, 19 How. 393, 407 (1857) (finding that people of African descent who were held as slaves are not protected by the Constitution and cannot become United States citizens)).

325. *See* discussion *infra* notes (stating that commentators look at corporate spending to

This argument is premised on the fact that corporate spending on state elections does not appear to have overwhelmed elections in the more than two dozen states allowing unlimited corporate spending.[326] Proponents of this argument reason that corporations spend conservatively on elections because they want to avoid alienating large sectors of their customers and clients.[327] Notably, if this reasoning truly underlies the reluctance of corporations to engage in political spending, effective disclosure is necessary for the potential market reaction to continue imposing a check on corporate spending.[328] Likewise, because the Court's decision to hold § 441b unconstitutional only affects corporate political expenditures within the thirty-day period before an election, critics of the *Citizens United* panic argue the decision will not make much difference in election spending.[329] This critique, however, assumes engaging in political speech is equally enticing, notwithstanding the proximity of the speech to the election it is offered to influence.

1. Congress Should Build on Disclosure and Disclaimer Provisions

Article I, § 8 of the U.S. Constitution grants Congress the power to regulate interstate commerce.[330] Pursuant to this power, some authorities argue Congress should craft legislation protecting people from having their money used by corporations for political spending.[331] Federal legislation in this area is particularly important because after the Supreme Court's

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show that *Citizens United* has not had a drastic effect).

326. Tribe, *supra* note 306.

327. *See id.* ("[B]usiness corporations are necessarily risk-adverse and hesitate to alienate large sectors of their customer and client base by pouring large sums of money."); *but see* Gibeaut, *supra* note 275 (discussing Target's decision to give money to the political campaign of a candidate who offended many gay rights activists).

328. *See id.* (noting reasoning for conservative corporate spending presumes open and visible spending).

329. *See* Citizens United v. FEC 130 S. Ct. 876, 929 (2010) (Stevens, J., concurring in part and dissenting in part) (noting that Citizens United "could have used those assets to televise and promote *Hillary: The Movie* wherever and whenever it wanted to[;] . . . [i]t also could have spent unrestricted sums to broadcast *Hillary* at any time other than the 30 days before the last primary election").

330. U.S. CONST. art. I, § 8, cl. 3.

331. *See* Tribe, *supra* note 306 (stating Congress should use its authority under the Commerce Clause to protect shareholders' investments from being deployed to candidates contrary to the shareholders' beliefs and wishes).

holding in *U.S. Term Limits v. Thornton*,[332] questions remain about whether *states* have the constitutional authority to regulate corporate activity in connection with the election of *federal* officials. In *Thornton*, the Supreme Court held that "states may not interfere with the uniquely federal relationship between citizens and their federal representatives."[333] Indeed, Professor Tribe argues that "Congress may legitimately act under the Commerce Clause to enhance the efficacy of each shareholder's ability to ensure that his or her investment is not deployed to advance or obstruct the election of particular candidates to federal (or, indeed, state) office contrary both to that shareholder's own wishes and, more importantly in this context, to the corporation's business interests."[334]

Tribe argues this federal legislation should build on the disclosure and disclaimer requirements upheld in *Citizens United*. Moreover, this federal legislation could serve as a model for states to follow.[335] Tribe suggests bolstering these disclosure and disclaimer requirements by enlarging the sponsoring corporation's identifying statement, and including certification from the corporate sponsor's CEO about how much the corporation spent on the electioneering.[336] Finally, Tribe's proposal requires the CEO to certify during the disclaimer that the general treasury expenditure "significantly advances the corporation's business interests."[337] Beefing up these requirements, Tribe argues, would undercut the influence of the corporate funded electioneering by lifting the "veil of public-spiritedness."[338] As this Note has argued, bolstering disclosure and disclaimer requirements is certainly an important step in limiting the forced speech concerns following *Citizens United*, but Professor Tribe's solution fails to account for electioneering communications *indirectly* funded by corporations. Corporations making expenditures to political committees would not be ousted by this recommendation, and consequently more

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332. *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 783 (1995) (finding that individual states cannot adopt their own qualifications for congressional service).

333. *Id.*

334. Tribe, *supra* note 306.

335. *See id.* ("Whatever individual states might do to beef up their shareholder protections with respect to corporate spending in state or federal candidate elections, federal legislation could usefully set both a nationwide floor of protection and a model for states to follow and build upon.").

336. *Id.*

337. *Id.*

338. *Id.*

corporations may elect to shield their expenditures in this way to avoid the disclosure statement.

Professor Tribe also proposes buttressing the congressional disclosure requirements by creating a federal cause of action for corporate waste.[339] This federal legislation would serve to deter improper political expenditures by imposing individual liability on the corporate officers making the spending decisions for the general treasury.[340] In conjunction with this new cause of action, Tribe advocates replacing the business judgment rule, which, as discussed above, makes waste cases notoriously difficult to win.[341] He advocates replacing this principle with "a rule less deferential to management and more focused on the existence of a convincing justification for using general treasury funds."[342] Although these are interesting suggestions, the concerns underlying the business judgment rule, discussed above, counsel against adopting Professor Tribe's proposal. Legislatures would probably be unwilling to return to the panic that ensued following the Delaware Supreme Court's decision in *Smith v. Van Gorkom*.[343] *Van Gorkom* held directors of a publicly held corporation personally liable for breach of their fiduciary duty to stockholders.[344] The decision unleashed a panic in the business world prompting states to adopt

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339. *See id.* (stating congressional disclosure requirements would fall within the commerce power of Congress).

340. *See id.* (stating legislation could provide a greater incentive for suit, as well as provide better deterrence).

341. *See id.* (stating business judgment rule makes cases difficult to bring under state law and should be replaced).

342. *Id.*; *see also* Bradley A. Smith, Citizens United*, Shareholder Rights, and Free Speech: Restoring the Primacy of Politics to the First Amendment, Part II*, SCOTUSBLOG (Feb. 2, 2010, 2:01 PM), http://www.scotusblog.com/2010/02/citizens-united-shareholder-rights-and-free-speech-restoring-the-primacy-of-politics-to-the-first-amendment-2/ (suggesting critics of *Citizens United* should be attacking the business judgment rule instead of campaign finance law) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

343. *See* Smith v. Van Gorkom, 488 A.2d 858, 893 (Del. 1985) (holding directors personally liable for breach of fiduciary duty owed to shareholders and finding reversible error in the Trial Court's application of the business judgment rule in favor of the directors); *see also* WILLIAM A. KLEIN ET AL., BUSINESS ASSOCIATIONS: CASES AND MATERIALS ON AGENCY, PARTNERSHIPS, AND CORPORATIONS 328 (Foundation Press, 7th ed. 2009) (discussing the legislature's reaction to *Van Gorkom* Court's decision imposing personal liability on corporate directors notwithstanding business judgment presumption).

344. *See Van Gorkom*, 488 A.2d at 893 (holding directors personally liable for breach of fiduciary duty owed to shareholders and finding reversible error in trial court's application of business judgment rule favoring directors).

legislation shielding managers from personal liability.[345] The same apprehension that personal liability might inhibit a corporation's ability to retain the best directors would probably overwhelm any attempt to amend the business judgment rule.[346]

2. *Proposal to Amend the U.S. Constitution*

More drastic proposals for curing shareholders' forced speech concerns involve amending the U.S. Constitution. Indeed, members of Congress have proposed just that.[347] Maryland state senator Jamie Raskin argues amending the Constitution is the only way to contain the damage done by *Citizens United*.[348] Specifically, Congresswoman Donna Edwards (D-MD) said she plans to introduce a constitutional amendment "so that we, the people, can take back our elections and our democracy."[349] In addition to the congressional response, a grassroots movement is underway to change the U.S. Constitution.[350] Less than two weeks after the Supreme Court's decision in *Citizens United*, a petition to amend the U.S. Constitution had garnered more than 58,000 signatories.[351] This petition is just one of the many reform efforts gaining momentum after *Citizens United*.[352] Of course, amending the Constitution is a difficult process, and in this heavily partisan political climate, relying on a method that requires the approval of two-thirds of Congress and three-quarters of all the states is

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345. *See* KLEIN, *supra* note 343 ("The decision in Smith v. Van Gorkom caused considerable consternation and anxiety among corporate directors. To relieve the anxiety, many states adopted provisions designed to afford directors protection from liability.").

346. *See* discussion *supra* Part IV.C and accompanying text (discussing business judgment rule).

347. *See* H.R.J. Res. 74, 111th Cong. (2010) (proposing to amend U.S. Constitution to permit "Congress and the States to regulate the expenditure of funds by corporations engaging in political speech").

348. *Bill Moyers Journal: We the People, Inc.* (PBS television broadcast Feb. 5, 2010), *available at* http://www.pbs.org/moyers/journal/02052010/transcript1.html (transcript on file with the Washington and Lee Journal of Civil Rights and Social Justice).

349. *Id.*

350. *See* MOVE TO AMEND, http://movetoamend.org/ (last visited Feb. 7, 2010) (establishing a petition for constitutional amendment) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

351. *Id.*; *see also Bill Moyers Journal*, *supra* note 348 ("More than 55 thousand people have signed [MovetoAmend.org's] petition calling for a constitutional amendment.").

352. *Bill Moyers Journal*, *supra* note 348 ("Another reform effort at FreeSpeechforPeople.org has more than 35 thousand signatures.").

not the most realistic method of addressing concerns following *Citizens United*.[353]

3. Proposal to Amend Corporate Charters

At the founding of this country, corporations were much less prevalent than they are today.[354] Although Justice Scalia and Justice Stevens disagree about just how prevalent they were, a fair reading of their opinions concludes that only a couple hundred corporations existed in the early years of the nation.[355] The elaborate process required to charter corporations was partly responsible for their historic scarcity.[356] Unlike corporate charters today, these early charters "specified the corporation's powers and purposes and 'authoritatively fixed the scope and content of corporate organization,' including 'the internal structure of the corporation.'"[357] States granted charters to corporations of this time for the express purpose of serving the "social function of the state."[358] Consequently, the legislature closely scrutinized corporations to ensure they acted consistent with the public welfare.[359] Furthermore, historically corporations had very limited rights because they were considered "mere creature[s] of law, [ ] possess[ing] only those properties which the charter of [their] creation confer[ed] upon [them]."[360]

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353. *See* U.S. CONST. art. V (requiring approval of two thirds of both Houses and three-fourths of the states to amend U.S. Constitution).

354. *See* discussion *infra* (discussing the history of corporations).

355. *Compare* Citizens United v. FEC, 130 S. Ct. 876, 925 (2010) (Scalia, J., concurring) (noting that during the 18th century "[t]here were approximately 335 charters issued to business corporations in the United States"), *with id.* at 949 n.53 (Stevens, J., concurring in part and dissenting in part) ("Scholars have found that only a handful of business corporations were issued charters during the colonial period, and only a few hundred during all of the 18th century.").

356. *See* discussion *infra* (discussing historic corporation formation). Originally, creating corporations required petitioning the legislature for a special legislative charter. *See Citizens United*, 130 S. Ct. at 949 (Stevens, J., concurring in part and dissenting in part) ("Those few corporations that existed at the founding were authorized by grant of a special legislative charter.").

357. *Citizens United*, 130 S. Ct. at 949 (Stevens, J., concurring in part and dissenting in part).

358. *See id.* (stating that corporations were legally privileged and therefore closely scrutinized).

359. *Id.*

360. Trustees of Dartmouth College v. Woodward, 4 Wheat. 518, 636 (1819) (Marshall, C.J.).

Not until the 1800s did general incorporation statutes emerge, which resembled modern corporate creation.[361] Because corporations are creatures of state law, conceivably the states can return their charters to a status resembling those utilized during the founding of the nation.[362] In so doing, states could effectively limit the rights of corporations to only those enumerated in their charters.[363] Thus, if the amended charter did not provide for political spending rights, corporations could not avail themselves of the protections of the First Amendment.[364] It stretches the imagination, however, to seriously entertain the idea that a business-friendly state such as Delaware would be willing to make such a drastic change.[365] Moreover, if even one state refused to follow suit, the rechartering would fail to achieve its purpose because most corporations would simply move to the state with the least restrictions.[366] For these reasons, redefining corporate charters is an unrealistic option for protecting shareholders' speech rights.

V. Conclusion

Chief Justice Roberts's conclusory assertion that dissenting shareholders can avoid compelled speech by following the Wall Street rule is no answer.[367] The financial penalties resulting from the sale of certain investments impose serious limitations on the prudent investor's ability to divest.[368] Further, the Wall Street rule relies on the false premise that shareholders could or would discover the offending corporate political

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361. *See* Citizens United v. FEC, 130 S. Ct. 876, 949 (2010) (Stevens, J., concurring in part and dissenting in part) (discussing history of general incorporation statutes).

362. *See id.* at 925 (Scalia, J., concurring) ("[I]n 1791 (as now) corporations could pursue only the objectives set forth in their charters.").

363. *See id.* at 949 (Stevens, J., concurring in part and dissenting in part) (stating that corporations were granted charters from the legislature, which outlined the corporation's powers and purpose).

364. *See id.* at 925–26 (Scalia, J., concurring) (stating that there is no exclusion for corporations under the First Amendment and that corporations could historically pursue only those goals set out in their charters).

365. *See* ROBERT A. RAGAZZO & DOUGLAS K. MOLL, CLOSELY HELD BUSINESS ORGANIZATIONS 277–78 (2006) (noting Delaware's "liberal corporate statute" attracts corporate managers).

366. *See id.* (discussing the selection process of a state of incorporation).

367. *See* discussion *supra* Part IV (discussing why the Wall Street Rule is not a cure for compelled free speech).

368. *See* discussion *supra* Parts IV.A, IV.B.1.c (discussing specific penalties for certain divestments).

expenditures.[369] As this Note has discussed, the structure of shareholders' portfolios creates an insurmountable hurdle to discovering corporate political spending.[370] Moreover, to the extent that shareholders are able to discover corporate political expenditures, the business judgment rule impedes the ability of the dissenting shareholder to cure the forced speech through corporate democracy.[371] Consequently, effective protection for shareholders' First Amendment rights requires building on the disclosure and disclaimer provisions already in place.

Effective legislation should mandate robust disclosure requirements for corporations that directly *and* indirectly make political expenditures for electioneering communications. These disclosure requirements should extend beyond the thirty and sixty days required by § 434.[372] Corporate political spending is no less damaging to investing shareholders' First Amendment rights at sixty-one days than at twenty-nine days prior to an election. If a corporation makes a political expenditure a year before the expenditure is used to fund an electioneering communication, the amended disclosure requirements should clarify that the corporation must disclose this expenditure. These expanded disclosure requirements should apply to *both* for-profit and nonprofit corporations. Applying disclosure requirements to nonprofit corporations assures for-profit corporations do not shield their political spending by funneling it through nonprofits. Furthermore, distinguishing between for-profit and nonprofit corporations presents practical difficulties because for-profit corporations could effectively bypass disclosure requirements by disguising electioneering spending as charitable giving. If for-profit corporations give money to nonprofit corporations for use in electioneering, the disclosure legislation should require the nonprofit to disclose its contributors, including the parent corporations of the contributing corporations. Putting the burden on nonprofit corporations to disclose parent corporations will encourage nonprofit corporations to demand upfront that contributing for-profit corporations provide them with this information.

Above all, effective disclosure demands ease of access. Achieving accessibility centers largely on improving the FEC website.[373] First,

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369. *See* discussion *supra* Part IV.B.1.c (discussing the difficulty in monitoring and altering holdings).

370. *See id.* (outlining the difficulties of shareholder's portfolios).

371. *See* discussion *supra* Parts IV–V (discussing the obstacles present in disclosure and corporate democracy).

372. 2 U.S.C. § 434 (2007).

373. *See* discussion *supra* Part IV.B (discussing navigability problems with FEC

disclosure should be instantaneous. After each political expenditure, corporations should be able to electronically submit a political spending report to the FEC. The FEC, in turn, should make these reports available on its website within 48 hours of receipt. Rapid reporting and availability assures shareholders may timely react to disagreeable spending. At writing, the FEC website does contain a realtime-updated list of independent disclosures professing to update within twenty-four hours of filing, but that list is not easily searchable and lacks the user-friendly capabilities necessary to qualify as an effective research tool.[374] In addition to minimizing the time lapse between spending and reporting, the FEC should significantly improve website navigability. Curious investors should be able to search by inputting a corporation's name. If the corporation queried has made direct political expenditures, the search should return hotlinks to details about that political spending and perhaps even reproductions of the electioneering communication. If the corporation donated money to a nonprofit that participates in electioneering, that information should be similarly available by hotlinks. To further improve navigability, clear labeling should buttress the proposed hotlinks. The FEC website should be intuitive, but to aid inexperienced researchers, the FEC should produce and distribute a "how to," YouTube-style video.

Admittedly, because most shareholders are rationally apathetic, they are less likely to take advantage of this service. Furthermore, mutual fund investors who do not know in which securities their fund invests will still face informational hurdles not cured by these disclosure and disclaimer proposals. To address some of these concerns, improvements should also be made to the disclaimer process.

Section 434 limits the disclaimer requirement to a thirty- to sixty-day timeframe. Congress should consider expanding this timeframe to account for the early start of many campaigns.[375] Likewise, in addition to the disclaimer provisions of § 434, electioneering financed by corporations should include a disclaimer that other corporations may have contributed to

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website).

374. *See Independent Expenditures*, FED. ELECTION COMM'N, http://www.fec.gov/data/IndependentExpenditure.do?format=html (last visited Mar. 9, 2011) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

375. *See, e.g.*, Michelle Austein, *U.S. Presidential Election Campaigns off to an Early Start*, AM., Jan. 19, 2007, *available at* http://www.america.gov/st/washfile-english/2007/January/20070119115804hMnietsuA0.5833704.html ("The 2008 U.S. presidential election campaign season is off to an extraordinarily early start, according to the head of a leading public opinion polling organization.") (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

funding the advertisement. This disclaimer could read along the lines of: "In addition to [name of corporation directly funding the electioneering], other corporations may have contributed directly or indirectly to this political message. For more information about which corporations financed this message, please visit [FEC Website] and search '[name of corporation directly funding the advertisement].'" This type of message strikes a balance between informing the public of corporate sponsorship and protecting corporations from the burden of specifically naming all contributing corporations. Additionally, Congress should expand § 434's disclosure and disclaimer provisions to cover Internet electioneering. As more and more Americans shift their television-watching to the Internet,[376] disclosure and disclaimer provisions that do not include regulating Internet electioneering communications are probably too narrow to achieve Congress's mission of "provid[ing] shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters."[377]

Lastly, as discussed above, existing corporate democracy procedures do not provide dissenting shareholders with an effective procedure to encourage corporations to make agreeable decisions regarding electioneering expenditures. Moreover, a shareholder cannot directly bring a forced speech claim against a corporation because the corporation is not a government actor. Consequently, dissenting shareholders who are not in a position to sell their stock, or who do not know they own stock in the particular corporation, will probably have to rely on public outcry to influence corporate electioneering expenditures. The lesson of Target,[378] discussed at the beginning of this Note, is that effective disclosure and disclaimer legislation aids the public in discovering, through media exposure, corporate political expenditures. In this way, the First Amendment guarantee of a free press, aided by the disclosure and disclaimer improvements suggested in this Note, protects the First Amendment rights of corporations and shareholders alike.

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376. *See* AARON SMITH, PEW INTERNET & AM. LIFE PROJECT, THE INTERNET'S ROLE IN CAMPAIGN 2008, 46–47 (2009) (noting that "the online political news consumer audience has grown from 18% of all adults in 2000 to 44% of all adults today").

377. Citizens United v. FEC, 130 S. Ct. 876, 916 (2010) (5-4 decision).

378. *Lady Gaga Ends Target Partnership, Reportedly over LGBT Stance*, THE HUFFINGTON POST (Mar. 8, 2011, 10:29 PM), http://www.huffingtonpost.com/2011/03/08/lady-gaga-ends-target-lgbt_n_833209.html (noting pop sensation Lady Gaga terminated a deal with Target allegedly as a result of Target's political spending in support of anti-gay rights politicians).