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First Amendment and "Foreign-Controlled" U.S. Corporations: Why Congress Ought to Affirm Domestic Subsidiaries' Corporate Political-Speech Rights

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First Amendment and "Foreign-Controlled" U.S. Corporations: Why Congress Ought to Affirm Domestic Subsidiaries' Corporate Political-Speech Rights

ABSTRACT

Political spending in the modern-day, prolonged election cycle continues to exceed historic proportions. With money equated to speech, whether the First Amendment entitles certain contributors to engage in this political activity remains an open question. Unlike France and Israel, which prohibit corporate contributions, and Canada and the United Kingdom, which turn to public funding for campaign finance, the United States has pushed candidates to rely on political party contributions, personal wealth, and the generosity of individuals, political action committees, and corporations. Concerns about corporate and foreign influence on politics have been especially salient during this lengthy economic downturn, as shown by the prominence of the nationwide Occupy Wall Street protests. Those who trumpet restrictions on so-called "foreign" corporate political influence are concerned with infringements on U.S. sovereign independence and citizens' political self-determination. This Note responds to the uproar against corporate and foreign influence in the wake of Citizens United v. Federal Election Commission, *arguing the debate in Congress and, thus, the law, ought to distinguish between domestic subsidiaries of foreign corporations and foreign corporations themselves. Under the current legal regime, no distinction between U.S. corporations and domestic subsidiaries exists; despite proposed legislation to the contrary, it should remain this way.*

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I. INTRODUCTION

"High Court Allows Foreign Campaign Finance"[1] and other deceptive headlines contributed to popular misunderstanding[2] of the *Citizens United v. Federal Election Commission* ruling.[3] Somehow, journalists, law professors, think tanks,[4] members of Congress,[5] and even the President[6] confused the majority opinion.[7] In the opinion's

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1. Elison Elliott, *High Court Allows Foreign Campaign Finance*, FOREIGN POL'Y BLOGS (Jan. 31, 2010), http://foreignpolicyblogs.com/2010/01/31/high-court-allows-foreign-campaign-finance.

2. Scholars may equate misunderstanding with political jockeying. Though this Note does not address whether *Citizens United* benefits one political party more than another, this concern undoubtedly underlies the vehemence of proponents and opponents alike. Constitutional-law scholar and former federal judge Michael McConnell contends:

> *Citizens United* is likely to benefit Democrats more than Republicans. Corporations rarely make independent expenditures during candidate elections in their own name, because the ads offend customers, workers and shareholders. And direct corporate contributions to candidates tend to be split more or less evenly between the two parties, largely neutralizing their effect. But unions have no compunctions against running campaign ads, and almost all of their money goes to Democrats.

Michael W. McConnell, *Citizens United and the Wisconsin Vote*, WALL ST. J., June 11, 2012, at A11.

3. While foreign influence certainly has penetrated the electoral system, widespread influence does not occur, and *Citizens United* left the law regarding foreign nationals undisturbed. *See infra* Part II.B.2.

4. *See* Richard C. Leone, *Duty Free,* BLOG CENTURY (Jan. 18, 2012), http://botc.tcf.org/2012/01/duty-free.html (explaining that "domestic subsidiaries of foreign corporations can spend" unlimited amounts of money on U.S. political campaigns).

5. U.S. Senator Max Baucus criticized and misrepresented the *Citizens United* decision as permitting foreign corporations to contribute limitlessly in U.S. elections. In describing the motivations behind his proposed constitutional amendment on campaign finance, Baucus said, "Democracy means people have the power to elect a government that represents them—not big business or foreign corporations." Charles S. Johnson, *Tester, Baucus Support Amending U.S. Constitution To Regulate Campaign Spending*, MISSOULIAN (Jan. 25, 2012, 6:00 AM), http://missoulian.com/news/local/tester-baucus-support-amending-u-s-constitution-to-regulate-campaign/article_958cbd2e-470e-11e1-a62a-001871e3ce6c.html#ixzz1kd9NPMe4.

6. Barack Obama, President, State of the Union Address (Jan. 27, 2010), *available at* http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address. Obama "warned that foreign interests would be able to 'spend without limits'—a criticism that earned a rebuff from Justice Samuel Alito, who mouthed 'not true,' while listening to Obama's address." Michael Beckel, *CPAC Panel: 'Celebrate' Citizens United Ruling*, NJTODAY.NET (Feb. 13, 2012), http://njtoday.net/2012/02/13/cpac-panel-celebrate-citizens-united-ruling/#ixzz1mllSRpZ0.

wake, legislators have stoked fear of foreign corporate influence and have made U.S. corporations with foreign links the target of legislative proposals. The *Citizens United* Court, however, was not tasked with addressing—and indeed did not address—foreign political influence. At issue was the Bipartisan Campaign Reform Act of 2002 (BCRA) prohibition on corporate sponsorship of electioneering communications,[8] and the 5–4 decision held that corporations and unions may make unlimited independent expenditures from their general treasury funds on political advertisements.[9] After *Citizens United*, the ban on direct contributions by corporations in 2 U.S.C. § 441b remains valid.[10] Ever since the Court's ruling (and especially in the lead-up to the 2012 elections), opponents have called for a reversal. In fact, more than two-thirds of the public opposes the Court's holding.[11]

Last term, the Supreme Court Justices seized an opportunity to revisit their precedent after the Montana Supreme Court ignored *Citizens United* and upheld a state law regulating corporate political spending.[12] Reversing the Montana Supreme Court, the Supreme Court found the "holding of *Citizens United* applie[d] to the Montana state law."[13] Neither of these cases, however, asked the Court to reach a decision on whether the "[g]overnment has a compelling

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7. Despite sensationalist headlines and President Obama's rebuke of the Supreme Court during his 2010 State of the Union Address, the *Citizens United* Court did not "open the floodgates" to foreign involvement in campaign finance.

8. Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1, 7 (2012); *see also* Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, 116 Stat. 81, 91 (2002) (codified at 2 U.S.C. § 441b(b)(2) (2006)).

9. Joshua A. Douglas, *The Procedure of Election Law in Federal Courts*, 2011 UTAH L. REV. 433, 442; *see also* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 911–13 (2010) (holding that the federal government cannot restrict corporate political speech in the form of independent expenditures). Though *Citizens United* addressed federal laws censoring corporate political expenditures, the decision also "rendered unconstitutional state and local laws prohibiting corporate independent expenditures." Matt A. Vega, *The First Amendment Lost in Translation: Preventing Foreign Influence in U.S. Elections After* Citizens United v. FEC, 44 LOY. L.A. L. REV. 951, 986, n.214 (2011).

10. *Citizens United*, 130 S. Ct. at 909; *see also* 2 U.S.C. § 441b(a) (2006).

11. Associated Press, *Most Oppose Unlimited Corporate Campaign Spending*, EXAMINER (July 17, 2012), http://washingtonexaminer.com/most-oppose-unlimited-corporate-campaign-spending/article/feed/2012822#.UDeWIaD7Wuk.

12. Some legal scholars feared the Chief Justice John G. Roberts Jr.-led court would issue a summary reversal, which essentially rules on the merits of the case without full briefing or oral argument *and* gives no indication of the opinion's authorship. *See* Adam Liptak, *Mystery of Citizens United Sequel Is Format, Not Ending*, N.Y. TIMES (June 11, 2012), http://www.nytimes.com/2012/06/12/us/in-citizens-united-ii-how-justices-rule-may-be-an-issue-itself.html. Ultimately, the Supreme Court did issue an unsigned, per curiam opinion, overturning the Montana state law in a 5–4 decision.

13. Am. Tradition P'ship, Inc. v. Bullock, 132 S. Ct. 2490, 2491 (2012).

interest in preventing foreign individuals or associations from influencing our Nation's political process."[14]

During oral arguments, counsel for Citizens United suggested that the constitutionality of limiting donations from foreign-controlled corporations would depend on whether the government "established a compelling governmental interest and a narrowly tailored remedy to that interest."[15] Justice Stevens's dissent in *Citizens United* suggests the majority's rationale would "appear to afford the same protection to multinational corporations controlled by foreigners as to individual Americans."[16] This Note explores and answers the constitutional and policy question of whether the law ought to view domestic subsidiaries differently from other corporations in the campaign-finance context.[17] The answer is a resounding *no*.[18]

American society's political discourse demonstrates a fixation on the role of corporate money and foreign influence.[19] Couple those pervasive concerns with frustrations with the "inside the Beltway" political culture and special-interests lobbyists—largely due to corruption concerns[20]—and the frenzy following *Citizens United* becomes self-explanatory. Political speech protectionism, among other concerns, motivates opponents to *Citizens United* who aim to distance domestic subsidiaries of foreign corporations from the political process.[21] But these multinational enterprises that do business and

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14. *Citizens United*, 130 S. Ct. at 911. The conclusions reached in *Citizens United* "are not binding on the very different question of whether the government has a compelling state interest in preventing foreign influence or distortion vis-à-vis the financial participation of foreign-controlled or foreign-owned domestic corporations in U.S. elections." Vega, *supra* note 9, at 951.

15. Transcript of Oral Argument at 5, Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010) (No. 08-205), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-205[Reargued].pdf.

16. *Citizens United*, 130 S. Ct. at 947–48.

17. Anthony Johnstone refers to the line between domestic and foreign political speakers as a "puzzle" in the First Amendment doctrine of campaign-finance law. Anthony Johnstone, *A Madisonian Case for Disclosure*, 19 GEO. MASON L. REV. 413, 456 (2012).

18. *See id.* at 439 (arguing that "the rationale, if not the holding, of *Citizens United* calls into question the justification for remaining limits, including foreign campaign spending restrictions and even contribution limits").

19. Illegal political contributions rose to 4 percent in 2011, based on the views of private-sector U.S. workers. ETHICS RES. CTR, 2011 NATIONAL BUSINESS ETHICS SURVEY 24 (2012), *available at* www.Ethics.org/nbes/files/FinalNBES-web.pdf.

20. Transparency International, the global coalition against corruption, studies the laws governing campaign finance, recognizing "opportunities for purchasing influence in government are not confined to the electoral process." *Corporate Funding and Buying of Influence*, TRANSPARENCY INT'L, http://archive.transparency.org/global_priorities/corruption_politics/corporate_funding (last visited Dec. 9, 2012).

21. Opponents have raised several approaches that may permit the financial participation of "foreign-controlled and foreign-owned domestic corporations to be restricted, even banned" under the First Amendment: (1) lowering the standard of

incorporate in the United States should have access to the political process commensurate to their status as contributing "American" stakeholders in the U.S. economy. Moving away from politically charged sentiments, there is no de jure problem with restricting the activities of foreign individuals. In fact, the law has spoken on voting restrictions to minimize foreign manipulation of the political process, with citizenship and residence requirements laid out in the Constitution,[22] export controls concerning non-U.S. persons,[23] and citizenship requirements for jury service.[24]

Though citizens and elected officials express fear over foreign influence in governance and politics, the law nonetheless allows for it in some instances. Most blatantly, U.S. participation in international organizations such as the North Atlantic Treaty Organization (NATO) and the United Nations allows foreign nations to direct policy to some extent. Moreover, corporate law permits foreign shareholders in U.S. corporations. Finally, foreign-owned press, like the *Economist*[25] and the *Wall Street Journal*,[26] may editorialize, print, and distribute foreign political opinions to Americans. Foreign-owned news outlets like the Fox News Channel[27] may also broadcast political speech.

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judicial review to intermediate scrutiny, (2) applying an "antidistortion" rationale, or (3) narrowly tailoring legislation to cover speech impermissibly "coordinated" with foreign principals." Vega, *supra* note 9, at 959.

22. *See* U.S. CONST. art. I, § 2, cl. 2 (requiring representatives to meet age and residency requirements limiting who may run for office and, therefore, for whom one may vote); *id.* art. II, § 1, cl. 5 (creating residency and age requirements for presidential candidates that have the same effect).

23. *See* International Traffic in Arms Regulations, 22 C.F.R §§ 120–130 (2012) [hereinafter ITAR]; Export Administration Regulations, 15 C.F.R. §§ 730–774 (2012). A non-U.S. person is defined as "any foreign corporation . . . or group that is not [currently] incorporated or organized to do business in the U.S." ITAR, *supra*, § 120.16.

24. *See* Perkins v. Smith, 370 F. Supp. 134, 138 (D. Md. 1974) (holding that jury service may be limited to citizens of a community).

25. The Economist Group, which has individual and institutional European shareholders, owns the *Economist*. *See Results and Governance: Ownership*, ECONOMIST GROUP, http://www.economistgroup.com/results_and_governance/ownership.html (last visited Dec. 9, 2012).

26. In 2007, Rupert Murdoch's News Corporation acquired Dow Jones & Company, publishers of the *Wall Street Journal*. By early 2012, voting stock held by foreign investors rose above the 25 percent limit set by the Communications Act of 1934. News Corporation, in turn, suspended those voting rights of select non-American shareholders. *News Corp To Act on U.S. Ownership Breach: WSJ*, REUTERS (Apr. 18, 2012), http://www.reuters.com/article/2012/04/18/us-newscorp-foreignownership-idUSBRE83H0AG20120418.

27. News Corporation, a global media company, also owns the Fox News Channel. *Fox News Channel*, NEWS CORPORATION, http://www.newscorp.com/management/foxnewschannel.html (last visited Feb. 26, 2013).

Given that political speech activates the "fullest and most urgent application" of the First Amendment,[28] this Note addresses the Supreme Court's opinion and its implications for corporate actors, specifically domestic subsidiaries of foreign corporations. Other studies address broader corporate influence on electoral politics in the United States and abroad,[29] including the impact on corporate contributions post-*Citizens United*.[30] Restricting itself to the question of foreign-linked U.S. corporations, this Note argues that American subsidiaries of foreign corporations and foreign-controlled U.S. corporations[31] should share the same rights to political speech as "American" corporations.

Legal reasons for rejecting congressional attempts to ostracize domestic subsidiaries and ensuring equal treatment stem from the Supreme Court's jurisprudence on free speech, treaty obligations, presidential primacy over Congress in an area arguably of foreign policy, and the fact that other areas of the U.S. legal system treat domestic subsidiaries the same as other U.S. corporations. From a policy perspective, the demands of the regulatory state imposed on all corporations, the taxes paid by domestic subsidiaries, the sizeable number of U.S. citizens who work for domestic subsidiaries, and an interest in attracting foreign investment all counsel in favor of equal treatment. Discriminating against domestic subsidiaries of foreign corporations would only add to the "bizarre and incongruous regulations" surrounding political finance.[32] This Note considers each of these justifications.

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28. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 898 (2010) (quoting Eu v. S.F. Cnty. Democratic Cent. Comm., 489 U.S. 214, 223 (1989)).

29. The United Kingdom places no limits on the amount corporations may donate. And in Brazil, corporations donate nearly all of the money spent; of President Dilma Rouseff's donations, almost 98 percent came from corporations. Nick Thompson, *International Campaign Finance: How Do Countries Compare?*, CNN (Jan. 24, 2012), http://articles.cnn.com/2012-01-24/world/world_global-campaign-finance_1_party-spending-public-funding-political-parties?_s=PM:WORLD.

30. *Cf. Shutting Up Business: Now Unions Are Turning to Shareholder Proposals To Limit Political Speech*, WALL ST. J. (Dec. 29, 2011), http://online.wsj.com/article/SB10001424052970204224604577030260580411048.html ("As it is, 57 of the S&P 500 companies already either don't spend on politics or disclose their political spending on their websites.").

31. U.S.-headquartered companies that are "highly subsidized by a profitable overseas subsidiary . . . could be beholden to foreign interests as a matter of pragmatism to an even greater degree than a U.S. subsidiary might be as a matter of corporate structure." ORG. FOR INT'L INV., WRITTEN STATEMENT FOR THE SENATE RULES COMMITTEE HEARING ON: CORPORATE AMERICA V. THE VOTER: EXAMINING THE SUPREME COURT'S DECISION TO ALLOW UNLIMITED CORPORATE SPENDING IN ELECTIONS 3 (2010), *available at* http://www.ofii.org/docs/OFII_Statement_for_Senate_Rules_Cmte.pdf.

32. Nathan Persily, *The Law of American Party Finance*, *in* PARTY FUNDING AND CAMPAIGN FINANCE IN INTERNATIONAL PERSPECTIVE 213, 219 (Keith D. Ewing & Samuel Issacharoff, eds. 2006).

Part II of this Note explores the theories of campaign finance and current laws and regulations. Part III traces the Supreme Court's corporate political-speech jurisprudence from *Buckley v. Valeo* to *Citizens United*, placing special emphasis on the Supreme Court's rationales, which may provide guidance as to how the Court would consider restrictions on domestic subsidiaries. Part IV presents detailed arguments for treating subsidiaries and foreign-controlled U.S. corporations the same as other U.S. corporations. Finally, Part V considers legislative and corporate responses to *Citizens United*.[33]

II. BACKGROUND

Whether campaign-finance law characterizes—or should characterize—domestic subsidiaries of foreign corporations as foreign was not at issue in *Citizens United*. The Supreme Court's holding, however, did strike down restrictions on corporations' independent political expenditures,[34] finding no constitutional distinction between an individual and a corporation under the First Amendment.[35] The Supreme Court faces the same controversy over whether a corporation constitutes a "person" under the law in the pending *Kiobel* case, which involves the liability of corporations for human rights violations.[36] Election law also has yet to settle "on a single, coherent conception of the corporation—what it is, what values it serves, and what role it should play in politics."[37] Some scholars have argued for a narrower view of corporate personhood, viewing it "as only the recognition of a corporation's ability to hold rights in order to protect" the individuals behind it.[38] This Note, however, accepts the

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33. Larry E. Ribstein, *The First Amendment and Corporate Governance*, 27 GA. ST. U. L. REV. 1019, 1021 (2011) ("*Citizens United* shifted the debate over corporate speech from corporations' power to distort political debate to the corporate governance processes that authorize this speech.").

34. Corporate plaintiffs in Montana challenged whether state legislation may ban corporate independent expenditures. After the Montana Supreme Court found *Citizens United* did not prohibit the state's ban, the U.S. Supreme Court reversed and held that *Citizens United* applied to Montana state law. *See* Am. Tradition P'ship v. Bullock, 132 S. Ct. 2490 (2012)

35. *See* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 900 (2010) (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 783 (1978)) ("The identity of the speaker is not decisive in determining whether speech is protected. Corporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster.").

36. The Supreme Court is expected to issue a decision in 2013 on whether a corporation may be liable under the Alien Tort Statute. Kiobel v. Royal Dutch Petroleum Co., 132 S. Ct. 472 (2011), *granting cert. to* 621 F.3d 111 (2010).

37. Adam Winkler, *The Corporation in Election Law*, 32 LOY. L.A. L. REV. 1243, 1243 (1999).

38. Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629. Public and legislative debate historically did not equate corporations with

basic premise of *Citizens United*, which rejected a distinction between corporate and individuals' speech.[39]

A. *Campaign-Finance Options*

In the Tillman Act of 1907, Congress banned direct corporate contributions to federal candidates and national party committees. Only in 1947 did Congress extend the ban to labor unions via the Taft–Hartley Act.[40] In 1979, after tightening regulations in response to Watergate, the post-*Buckley* Federal Election Campaign Act (FECA) amendments created the "soft-money" loophole, allowing corporations, unions, and the wealthy to give unlimited sums to the national party committees for "party-building" activities.[41] Currently, the corporate decision to engage in political speech remains subject to "the same rules as ordinary business decisions, which give directors and executives virtually plenary authority."[42]

Understanding the basic campaign-finance-law landscape is requisite to an analysis of whether domestic subsidiaries of foreign corporations should face any political-speech restrictions and, if so, in what forms. Campaign finance can come from private and public sources. These sources include individuals, the candidates' political party entities, political action committees (PACs), and the candidates themselves.

There are two "central doctrinal distinctions in the Court's campaign-finance law—between contributions and expenditures and between express advocacy and issue advocacy."[43] The fuzzy

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individuals in the field of election law, instead emphasizing internal distinctions within the corporate form. Adam Winkler, *"Other People's Money": Corporations, Agency Costs, and Campaign Finance Law*, 92 GEO. L.J. 873, 938 (2004) ("The result was that the corporation was *denied* rights of political participation otherwise enjoyed by natural individuals.").

39. *Citizens United*, 130 S. Ct. at 900 ("The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'"). Even after the *Bellotti* Court's "speech is speech" approach, the "corporate form mattered" and was an adequate justification for special regulation. *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 117 (2003); Fed. Election Comm'n v. Beaumont, 539 U.S. 146, 153–55 (2003); Fed. Election Comm'n v. Nat'l Right To Work Comm., 459 U.S. 197, 207–11 (1982); Richard Briffault, *On Dejudicializing American Campaign Finance Law*, 27 GA. ST. U. L. REV. 887, 893 (2011).

40. Labor Management Relations Act, ch. 120, §§ 304, 313, 61 Stat. 136, 159 (1947).

41. *A Century of U.S. Campagin Finance Law*, NAT'L PUB. RADIO, http://www.npr.org/templates/story/story.php?storyId=121293380 (last visited Dec. 9, 2012).

42. Lucian A. Bebchuk & Robert J. Jackson, *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83, 83 (2011).

43. Briffault, *supra* note 39, at 889.

categories[44] of "expenditures" and "contributions" have "become less-than-ideal proxies for whether strict scrutiny or intermediate scrutiny applies."[45] In *McConnell v. Federal Election Commission*, for example, the Supreme Court evaluated contribution limits under the less rigorous "closely drawn" scrutiny.[46] Burdens on political speech in the form at issue in this Note remain subject to the strict scrutiny standard, so Congress must remain cognizant of this when weighing its regulatory options.[47] To pass the strict scrutiny test, the Government must prove that the restriction "furthers a compelling interest and is narrowly tailored to achieve that interest."[48] *Citizens United* deemed restrictions on corporations' independent expenditures unconstitutional without disturbing the federal ban on direct contributions to candidates and parties.[49] Thus, regulation of domestic subsidiaries' corporate political speech in the form of independent expenditures remains subject to the strict scrutiny approach.

Independent expenditure refers to expenditure "expressly advocating the election or defeat of a clearly identified candidate" but not in conjunction with the candidate or his campaign.[50] Direct contributions, on the other hand, involve donations directly to a candidate's campaign for use as it sees fit.[51] Beyond campaign spending from the corporate treasury on independent expenditures,

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44. The Court has recognized that expenditures coordinated with a candidate's campaign present the same dangers of corruption and the appearance of corruption as contributions and, accordingly, has held they may be regulated like contributions. However, the Court has rejected the idea that independent expenditures that aid a candidate and are just as likely to cause a candidate to feel obligated to the spender as to the donor of a comparable amount of money to the candidate's campaign can be limited.

Id. at 900.

45. Vega, *supra* note 9, at 989.

46. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 141 (2003).

47. *See* Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (noting that under the Warren Court, scrutiny that "was 'strict' in theory and fatal in fact" proliferated after the early 1960s). "Strict in theory, but fatal in fact" refers to the unlikelihood of laws passing constitutional muster under the strict scrutiny standard; however, empirical studies have successfully challenged this notion. *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 794–95 (2006).

48. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 898 (2010) (quoting Fed. Election Comm'n v. Wisconsin Right to Life, Inc., 551 U.S. 449, 464 (2007)).

49. *See id.* at 913.

50. 11 C.F.R. § 100.16(a) (2011).

51. Some countries, such as India, face a substantial "under the table corporate contributions" problem, with upwards of $2 billion in so-called "black money" spent to influence the Uttar Pradesh state elections alone. Thompson, *supra* note 29.

corporations retain other avenues to engage in political speech, including contributing to PACs, spending money on direct lobbying efforts, and "utilizing corporate funds to encourage employees [and shareholders] to support or oppose a particular candidate or issue."[52]

The term *PAC* refers to two distinct types of political committees registered with the Federal Election Commission (FEC): separate segregated funds (SSFs)[53] and nonconnected committees.[54] Corporations, labor unions, membership organizations, and trade associations employ SSFs as a conduit for soliciting contributions exclusively from "individuals associated with" their organizations.[55] Corporate entities cannot make direct contributions to federal SSFs.[56] Nonconnected committees, on the other hand, are unconnected to "the aforementioned entities and are free to solicit contributions from the general public."[57] Independent expenditure-only committees, more commonly known as super PACs, have particular force as domestic corporations and unions[58] may make unlimited and, under certain circumstances, anonymous donations to them. Further, corporations may cover the administrative and operating expenses of the PACs.[59] Individuals may donate up to $5,000 to a particular PAC annually.[60]

B. *Domestic Subsidiaries and Foreign-Controlled Corporations Under the Law*

Though corporate independent expenditures from foreign-linked corporations remain minimal compared to overall PAC spending, globalization promises to increase the presence of such corporations and their political spending in the United States. Consequently, Congress ought to define the framework of permissible influence. The legislative proposals brought forward in the wake of *Citizens United*

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52. Anne Tucker, *Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in Citizens United*, 61 CASE W. RES. L. REV. 497, 507 (2010).

53. "A separate segregated fund (SSF), often referred to as a PAC, is primarily a bookkeeping arrangement used by corporations and other organizations to further their political ends." Daniel Scott Savarin, *Curtailing Foreign Financial Participation in Domestic Elections: A Proposal To Reform the Federal Election Campaign Act*, 28 VA. J. INT'L L. 787, 797 (1987).

54. *SSFs and Non-Connected PACs*, FED. ELECTION COMMISSION, http://www.fec.gov/pages/brochures/ssfvnonconnected.shtml (last visited Oct. 18, 2012).

55. *Quick Answers to PAC Questions*, FED. ELECTION COMMISSION, http://www.fec.gov/ans/answers_pac.shtml (last visited Oct. 18, 2012) (noting that 2 U.S.C § 441b prevents nonprofit and profit corporations from making direct contributions to political campaigns).

56. *SSFs and Non-Connected PACs*, *supra* note 54.

57. *Quick Answers to PAC Questions*, *supra* note 55.

58. While unions also benefit from *Citizens United*, this Note does not provide descriptive and normative treatments of them.

59. *SSFs and Non-Connected PACs*, *supra* note 54

60. 2 U.S.C. § 441a(a)(2)(C) (2006).

do not treat domestic subsidiaries of foreign corporations equal to thoroughbred domestic corporations. This subpart begins to address arguments for permitting foreign-linked political speech.

1. Domestic Subsidiaries and Their Influence

Interestingly, SOE Software, the corporation that supplies the election software that records, counts, and reports votes in hundreds of jurisdictions nationwide, is a domestic subsidiary of a Spanish corporation.[61] Though a subsidiary of a foreign corporation, SOE Software maintains its headquarters in Tampa, Florida.[62]

The global economy has removed the ease with which one may determine whether a corporation is foreign. Besides considering a corporation's place of incorporation—a mere legal formality—one may clarify the "foreign" nature of a corporation by examining the composition of a corporation's workforce, the division of ownership, the make-up of its board of directors, the location of its headquarters, and the countries in which it holds the highest market share. None of these elements alone is dispositive of when foreign interests play a meaningful role. For example, General Electric, an iconic American corporation incorporated in New York, has its headquarters in Connecticut but more employees overseas than in the United States.[63]

The following chart lists some major U.S. companies with foreign parent corporations and shows whether or not they have company-sponsored PACs, as opposed to industry PACs that they may choose to support.[64] Each of these entities has a SSF—not a super PAC.

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61. Michelle Malkin, *Voter Fraud Facts and Fiction*, FLA. TIMES-UNION (May 9, 2012), http://m.jacksonville.com/opinion/blog/406107/carol-boonve/2012-05-09/new-syndicated-columns.

62. *About SOE Software*, SOE SOFTWARE, http://www.soesoftware.com/company/company.aspx (last visited Oct. 18, 2012).

63. CURRENT REPORT PURSUANT TO SECTION 13 OR 15(D) OF THE SECURITIES EXCHANGE ACT OF 1934: GENERAL ELECTRIC COMPANY (Oct. 1, 2012); Ken Chan, *Should Foreigners Face Limits on Political Speech?*, JUSTIA.COM LAW TECH. & LEGAL MARKETING BLOG (Apr. 12, 2012), http://onward.justia.com/ 2011/04/21/should-foreigners-face-limits-on-political-speech/.

64. *About Bridgestone Americas, Inc.*, BRIDGESTONE, http://www.bridgestone-firestone.com/about_bg_index.asp (last visited Oct. 17, 2012); *Foreign-Connected PACs*, OPENSECRETS.ORG, http://www.opensecrets.org/pacs/foreign.php (last visited Oct. 17, 2012); *Membership List*, ORG. INT'L INVESTMENT, http://www.ofii.org/mission/membership-list.html (last visited Oct. 17, 2012). Employee information was obtained from Bloomberg Law. *See* BLOOMBERG LAW, http://about.bloomberglaw.com/ (last visited Dec. 9, 2012).

Figure 1—PACs and Major U.S. companies with Foreign Parents

U.S. Company	Employees	Company PAC	Foreign Parent Corporation (Country of Incorporation)
Allianz Life Insurance Co. of North America	2,800	Yes	Allianz SE (Germany)
Bridgestone Americas, Inc.	43,000*	Yes	Bridgestone Corp. (Japan)
DHL Express USA, Inc.	400	Yes	Deutsche Post AG (Germany)
Electrolux North America, Inc.	7,914	No	Electrolux AB (Sweden)
Lafarge North America Inc.	16,400	Yes	Lafarge SA (France)
L'Oreal USA, Inc.	9,800	No	L'Oreal SA (France)
McCain Foods USA, Inc.	4,300	No	McCain Foods Ltd. (Canada)
Miller Brewing Co.	6,000	Yes	SABMiller PLC (United Kingdom)
Nestle Purina PetCare Co.	6,749	Yes	Nestlé SA (Switzerland)
Volkswagen Group of America	3,000	Yes	Volkswagen AG (German)

* The Company's web site listed over 43,000 in the "Americas."

Domestic subsidiaries' contributions comprise only a sliver of the magnitude of money spent on electoral politics.[65] In the 2007–2008 presidential election cycle, there was record spending of nearly $1.2 billion by PACs.[66] But PACs of companies more than 50 percent foreign-owned contributed only $16.8 million to federal candidates, which amounted to less than 1 percent of 2007–2008 PAC contributions.[67] In the 2010 federal election cycle, U.S. subsidiaries of foreign companies donated about $15.5 million through "foreign-

65. *Cf.* Iain McMenamin, *If Money Talks, What Does It Say?: Varieties of Capitalism and Business Financing of Parties*, 64 WORLD POL. 1, 4–5 (2012) ("When compared to the potential value of benefits, business spends very little on political contributions.").

66. Alan Fram, *Number of Political Action Committees Hits Record*, HUFFINGTON POST (Mar. 14, 2009, 10:35 AM), http://www.huffingtonpost.com/2009/03/14/number-of-political-actio_n_174933.html.

67. Erin Williams, *Foreign Subsidiaries Get Political, Evan Bayh for 'Fair Elections' and More in Capital Eye Opener*, OPENSECRETS.ORG (Mar. 9, 2010, 12:00 PM), http://www.opensecrets.org/news/2010/03/foreign-subsidiaries-get-polit.html.

controlled PACs."[68] Based on FEC data released in October 2012, foreign-connected PACs had raised nearly $13 million in the current election cycle.[69]

U.S. subsidiaries of foreign corporations employ 5.3 million people, pay $26.6 billion in U.S. corporate tax payments—not to mention state and local income and property taxes—and invest in their domestic infrastructure, operations, and research and development.[70] The Organization for International Investment, a business association for U.S. subsidiaries, professes awareness of "no meaningful controversy or even a credible allegation about actual foreign influence being brought to bear on American elections via a domestic subsidiary of a company acting within the parameters" of the FEC regulations.[71] Despite this industry statement, Congress continues to explore regulating domestic subsidiaries.[72]

2. Framework of Permissible Foreign Influence

American fear of foreign influence dates to the constitutional era when it was at the forefront of the Framers' discourse.[73] From the Constitution to modern legislative enactments, the United States has a history of prohibiting foreign influence in its politics.[74] Restrictions on extraterritorial electioneering stem from four sources: the

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68. Vega, *supra* note 9, at 956 (citing *Foreign-Connected*, *supra* note 64 (select "2010")).

69. *Foreign-Connected PACs*, *supra* note 64; *see also* Steve Rennie, *Canadian-Owned Firms Are Funding U.S. Election Campaigns*, GLOBE & MAIL (Feb. 18, 2012, 8:27 AM), http://www.theglobeandmail.com/news/world/canadian-owned-firms-are-funding-us-election-campaigns/article2343098/?utm_medium=Feeds%3A%20RSS%2F Atom&utm_source=World&utm_content=2343098 (noting that U.S. subsidiaries of Canadian companies' PACs donated $163,500 to candidates in U.S. Congressional elections through February 2012).

70. *Insourcing Facts*, ORG. INT'L INVESTMENT, http://www.ofii.org/resources/insourcing-facts.html (last visited Dec. 9, 2012)

71. Letter from Org. for Int'l Inv. to Fed. Election Comm'n (Oct. 22, 2010), *available at* www.ofii.org/docs/OFII_FEC_Letter%20to%20FEC102210.pdf.

72. It is far more likely that foreign individuals will contribute to elections in the United States than a foreign corporation will, making regulations for these parties less controversial.

73. Foreign corruption was of paramount concern during the Federal Convention of 1787. Vega, *supra* note 9, at 960 (citing Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 347 (2009)). Hamilton expressly argued the republic form of government too easily provided an opening for "foreign corruption." THE FEDERALIST NO. 66, at 435 (Alexander Hamilton).

74. Zephyr Teachout, *Extraterritorial Electioneering and the Globalization of American Elections*, 27 BERKELEY J. INT'L L. 162, 169 (2009). This fear reflects an underlying concern with foreign interests affecting actual U.S. policy, which supposedly diminishes the voter's right to self-determination. *See* Savarin, *supra* note 53, at 789 (1987) ("Foreign contributors, by influencing the outcome of domestic elections are able to alter both the composition and agenda of the U.S. political leadership.").

Constitution,[75] the Foreign Agents Registration Act (FARA), the Federal Communications Commission (FCC), and the FEC.[76]

First, the Constitution prohibits foreign office holding and foreign gifts to public officers.[77] Next, FARA, enacted in 1938, originally required employees of foreign nations or organizations to register with the Secretary of State for permission to distribute propaganda within the United States.[78] Congress later amended FARA to prohibit any "agent of a foreign principal" from knowingly offering to or actually contributing to electoral or political activities in the United States.[79] Though *agent* was not clearly defined, FARA's definition of *foreign principal* included foreign business entities.[80] Notably, businesses organized under U.S. laws, and with their principal place of business in the United States, were not subject to these prohibitions.[81]

The FCC prohibits foreign ownership of media.[82] Section 310 of the Communications Act establishes guidelines for when a foreign national is eligible to apply for a broadcast license.[83] The FCC issued a Notice of Proposed Rulemaking (NPRM) in fall 2011 and has considered "how to simplify the application of the foreign ownership restrictions that appear in the Communications Act."[84]

The FEC was established thanks to a 1974 amendment to FECA.[85] In 1976, Congress granted the FEC authority to implement and enforce the Bentsen Amendment, discussed in greater detail

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75. "[N]o person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state." U.S. CONST. art. I, § 9, cl. 8.

76. Teachout, *supra* note 74, at 172.

77. U.S. CONST. art. I, § 9, cl. 8.

78. 52 Stat. 601 (1938) (current version at 22 U.S.C. § 611 (2006)); Evan C. Zoldan, Note, *Strangers in a Strange Land: Domestic Subsidiaries of Foreign Corporations and the Ban on Political Contributions from Foreign Sources*, 34 LAW & POL'Y INT'L BUS. 573, 576–77 (2003).

79. *See* Zoldan, supra note 78 (noting that the 1966 amendments "reflected Congress' decision that foreign corporations would be treated with suspicion; their primary designation would be as agents of foreign powers rather than as corporations, qualified by the nationality of their owners").

80. 22 U.S.C. § 611(b) (2006) ("The term 'foreign principal' includes . . . a partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country.").

81. Savarin, *supra* note 53, at 792.

82. 47 U.S.C. § 310(b).

83. *Id.*

84. Donald Evans, *FCC Seeks Further Input on Foreign Ownership Rules*, COMMON L. BLOG (Apr. 13, 2012), http://www.commlawblog.com/2012/04/articles/broadcast/fcc-seeks-further-input-on-foreign-ownership-rules.

85. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 208(a), § 310, 88 Stat. 1263, 1281–82 (1974).

below.[86] And in 1989, the FEC took the position that "a foreign national with control or ownership of a domestic subsidiary could not make decisions with regard to that subsidiary's participation in the U.S. political process. This quickly developed into the regulatory loophole for foreign-controlled and foreign-owned domestic corporations that Congress and the courts find themselves confronting today."[87]

Despite these limitations, U.S. law does permit some foreign influence. Under FARA, foreign lobbyists may spend limitlessly, directly lobbying elected officials.[88] Foreign nationals may make "in kind" contributions of volunteer services to candidates "even if the value of those services is significantly greater than the legal limit for monetary contributions."[89] For instance, Elton John, a Brit, helped raise $2.5 million dollars when he performed at a 2008 Hillary Clinton presidential campaign event.[90] Foreign-owned press, such as The *Economist*, may advocate via editorials for particular candidates in U.S. elections.[91] These examples of foreign actors engaging in the U.S. political system do not represent new phenomena; their participation has long been accepted as political speech.[92]

3. Legislation Regulating Foreign-Linked Corporate Political Contributions

Congress's most recent, major campaign-finance legislation, BCRA, was at the center of the *Citizens United* case.[93] Among other

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86. *See* Savarin, *supra* note 53, at 793–94 (discussing the FEC's role in administering the Bentsen Amendment); *infra* Part II.B.3 (discussing the Bentsen Amendment).

87. Vega, *supra* note 9, at 973–74 (citation omitted).

88. Paul Sherman, *IJ Files Brief in Important Follow-Up to Citizens United*, CONGRESS SHALL MAKE NO LAW (Oct. 5, 2011, 10:14 AM), http:// http://makenolaw.org/component/content/article/5/224-ij-files-brief-in-important-follow-up-to-citizens-united.

89. *Id.*

90. *Id.*

91. "Foreign-owned magazines and newspapers—like the British-owned weekly magazine, *The Economist*, which has a U.S. circulation of over 760,000—routinely advocate the defeat or election of American political candidates through editorial endorsements." *Id.*

92. *Id.*

93. Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1, 7 (2012) (noting that the "bombshell question" in *Citizens United* was, in part, determining whether "the Court [should] overrule . . . the part of McConnell v. Federal Election Comm'n, which addresses the facial validity of Section 203 [of BCRA]" (citation omitted)). Michael S. Kang has explained the interest surrounding the campaign-finance legislation:

> The restrictions on corporate electioneering in BCRA were, after all, supported by a number of large corporations, including General Motors, Ford Motors, Monsanto, Time Warner, Dell, Cisco, and IBM. The legal ability of corporations

reforms, BCRA added the category of "electioneering communications" to the political communications covered under the FECA. The § 441b prohibition against use of treasury funds to make independent expenditures to finance electioneering communications was struck down in *Citizens United*.[94] More germane to this Note, BCRA reaffirmed and expanded the ban on contributions and independent expenditures from foreign sources.[95]

Passed in 1974, the Bentsen Amendment to FECA prohibited "foreign nationals from making contributions or expenditures in connection with any United States election (federal, state or local), either directly or through another person."[96] FECA defines *foreign national* to include foreign corporations but not domestic subsidiaries.[97] The Bentsen Amendment does not bar permanent resident aliens from making electoral contributions.[98]

Under current law, domestic subsidiaries of foreign corporations may make state-level contributions to campaigns so long as the foreign parent or owner does not finance the political speech.[99]

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to spend politically in support of legislators opens the door to a form of extortion against deep-pocket corporations by those very same legislators.

Id. at 16 (emphasis omitted) (footnotes omitted).

94. *See* Citizens United v. Federal Election Comm'n, 130 S. Ct. 876, 913 (2010) (noting that "BCRA § 203 amended [2 U.S.C.] § 441b to prohibit any 'electioneering communication' as well" before invalidating BCRA § 203).

95. *See* Bipartisan Campaign Reform Act, Pub. L. No. 107-155, § 303, 116 Stat. 81, 96 (2002) (codified in sections of 2 U.S.C., 18 U.S.C., 28 U.S.C., 36 U.S.C., and 47 U.S.C.) (amending FECA § 319 to strengthen the foreign-money ban). Some have even gone as far as to argue for striking down the ban on foreign independent expenditures as they "constitute a far more transparent channel of influence than the status quo of lobbying" and using PACs. James Ianelli, *Noncitizens and* Citizens United, 56 LOY. L. REV. 869, 873 (2010).

96. *Federal and State Campaign Finance Laws*, FEC, http://www.fec.gov/pages/brochures/statefed.shtml (Oct. 1995) (citing 2 U.S.C. § 441e; 11 C.F.R. § 110.20 (2011)).

97. *See id.* (including foreign corporations under the definition of *foreign national*, while discussing domestic subsidiaries of a foreign corporation separately); *see also, e.g.*, Matthew Mosk, *Foreign Company Admits Illegal Cash Donations to U.S. State Campaigns*, ABC NEWS (July 1, 2011), http://abcnews.go.com/Blotter/foreign-company-admits-illegal-cash-donations-us-state/story?id=13979521#.TsR8DlafnKc (discussing penalties levied against Invista S.A.R.L., a chemical company registered in Luxembourg but headquartered in Kansas, for making illegal political contributions).

98. *See* 2 U.S.C. § 441e(b) (defining *foreign national* so as to include "an individual who is not a citizen of the United States or a national of the United States . . . and who is not lawfully admitted for permanent residence . . . .").

99. "These domestic subsidiaries have contributed to federal candidates through political action committees (PACs) for decades and have made direct corporate contributions and expenditures in the 28 states that allow corporate funding of elections." Kenneth A. Gross, *Alito Was Right*, FOREIGN POL'Y (Feb. 2, 2010), http://www.foreignpolicy.com/articles/2010/02/02/alito_was_right?print=yes&hidecomments=yes&page=full. Long before the *Citizens United* decision, the FEC interpreted § 441e to require a domestic subsidiary to demonstrate that it has adequate funds in its account—not the parent corporation's account—to make corporate donations in state

Regarding federal contributions, domestic subsidiaries of foreign corporations may *not* establish a federal PAC if the "foreign parent corporation finances the PAC's establishment, administration, or solicitation costs; or [i]ndividual foreign nationals" participate in the operation of the PAC's operation or in decision making regarding contributions or expenditures.[100] One former FEC Commissioner contended that top corporate management "always" controls a PAC.[101] The Commissioner rejected the concept that foreign nationals have no influence over the domestic subsidiary's PAC's activities.[102] Even so, the prohibition on such entanglement would likely result in severe penalties in the court of public opinion as well as a damaging enforcement action brought by the FEC.

Following BCRA, the FEC considered whether to interpret BCRA as prohibiting domestic subsidiaries of foreign corporations "from making donations in connection with State and local elections."[103]

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and local elections. *See, e.g.*, Fed. Election Comm'n Advisory Opinion No. 1989-20 (Oct. 27, 1989) (noting that a domestic subsidiary of a Japanese parent corporation could not establish a PAC because the domestic subsidiary was primarily funded by the parent corporation). One example of a subsidiary of a foreign corporation unlawfully influencing the electoral system follows:

> [Itinere North America, LLC] was formed under Maryland law and develops proposals for road concession projects in the United States. It made a total of $55,500 in contributions to Virginia candidates and committees between June 2007 and January 2008. As a domestic entity, the campaign finance issue arose because the LLC used funds that came from its ultimate Spanish parent through its immediate Maryland parent to make these contributions. The LLC did not use revenues generated from U.S. operations that had been properly segregated. Thus, the LLC indirectly used foreign funds for such contributions.

Carol A. Laham & D. Mark Renaud, *Domestic Subsidiary of Foreign Corporation Pays Finè for State Candidate Contributions*, ELECTION LAW NEWS (Sept. 2009), www.wileyrein.com/publications.cfm?sp=articles&newsletter=8&id=5506. The FEC ultimately imposed a small civil penalty since the company self-reported the violation. *See id.* For another example, see Conciliation Agreement, *In re* Transurban Group, MUR 6093 (Fed. Election Comm'n 2009), *available at* http://eqs.nictusa.com/eqsdocsMUR/29044224176.pdf (imposing a civil penalty against a domestic subsidiary for violating § 441e in making political contributions using funds that were provided by its foreign parent corporation).

100. *Foreign Nationals*, FED. ELECTION COMMISSION (July 2003), http://www.fec.gov/pages/brochures/foreign.shtml#ftn1 (citing 11 C.F.R. § 110.20(i) (2011)); *see also* Fed. Election Comm'n Advisory Opinion 2000-17 (July 28, 2000) (providing the FEC's interpretation of many of the laws that apply to the formation and governance of PACs by domestic subsidiaries of foreign corporations).

101. MARTIN TOLCHIN & SUSAN TOLCHIN, BUYING INTO AMERICA: HOW FOREIGN MONEY IS CHANGING THE FACE OF OUR NATION 19 (1988) (quoting Thomas E. Harris, Fed. Election Comm'n Comm'r).

102. *Id.*

103. Fed. Election Comm'n Advisory Opinion 2006-15, at 2–3 (May 19, 2006) (addressing the question of whether a particular domestic subsidiary of a foreign parent corporation may "make donations and disbursements of corporate funds in connection with State and local elections, to the extent permitted by State and local law, from funds generated by their U.S. operations").

The FEC Office of the General Counsel provided its legal opinion that "BCRA does not mandate a rule-making regarding U.S. subsidiaries."[104] Nonetheless, on August 22, 2002, the FEC issued a NPRM; the proposed regulation sought to eliminate all federal PACs established by domestic subsidiaries of foreign corporations.[105]

In response to the FEC proposal, Bridgestone/Firestone, a wholly owned U.S. subsidiary of Bridgestone Corporation, a Japanese entity, and other domestic subsidiaries of foreign corporations such as DaimlerChrysler North America Holding Corporation and Philips Electronics North America Corporation submitted comments.[106] Finding the NPRM "unwarranted and unreasonable," Bridgestone/Firestone outlined several arguments.[107] First, Bridgestone/Firestone argued that Congress made no change in BCRA to the "existing statutory exception permitting foreign corporations' domestic subsidiaries to make contributions in state and local elections, to establish a PAC, and to guarantee the 'restricted class' American employees an equal opportunity to voice their political views by contributing to the company's PAC."[108] Bridgestone/Firestone further argued that there is "no reasonable public policy rationale for overthrowing longstanding agency policy."[109] Finally, Bridgestone/Firestone maintained that defining which companies are foreign "controlled" is impracticable.[110] These arguments preview the underpinnings for treating domestic subsidiaries equal to other U.S. corporations, which this Note presents in Part IV.

Ultimately, the FEC found no congressional intent[111] to broaden the prohibition on foreign involvement to include U.S. subsidiaries of

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104. Memorandum from the Office of the Gen. Counsel on the Draft Notice of Proposed Rulemaking on Contribution Limitations and Prohibitions to the Fed. Election Comm'n 31 (Aug. 13, 2002), *available at* http://www.fec.gov/agenda/agendas2002/mtgdoc02-57.pdf.

105. *See* 67 Fed. Reg. 54,366, 54,372 (Aug. 22, 2002) ("[T]he Commission seeks comment on whether BCRA's new statutory language prohibits foreign controlled U.S. corporations, including a U.S. subsidiary of a foreign corporation, from making corporate donations, or from making federal contributions from their PACs, or both.").

106. *See, e.g.*, Letter from Steven J. Akey, Vice President, Bridgestone/Firestone Americas Holding, Inc., to Mai T. Dinh, Fed. Election Comm'n (Sept. 13, 2002), *available at* http://www.fec.gov/pdf/nprm/contribution_lim_pro/bridgestone.pdf. *See generally Contribution Limitations and Prohibitions, Comments on This Rulemaking*, FED. ELECTION COMM'N, http://www.fec.gov/pdf/nprm/contribution_lim_pro/comments.html (last visited Oct. 31, 2012) (listing all of the comments the FEC received on the NPRM).

107. Letter from Steven J. Akey to Mai T. Dinh, *supra* note 106, at 4.

108. *Id.*

109. *Id.*

110. *Id.* at 4–5.

111. *See* Letter from John McCain and Russell D. Feingold, U.S. Senators, and Christopher Shays and Marty Meehan, Members of Congress, http://www.fec.gov/pdf/nprm/contribution_lim_pro/mccain.pdf. Key co-sponsors of BCRA noted: "The issue of whether foreign-controlled U.S. corporations should be barred from making non-

foreign corporations.[112] In fact, the FEC has long deemed three factors paramount—the first two of which determine the FARA foreign principal definition: where the corporation was chartered, its principal place of business, and whether foreign nationals were solicited for contributions to the corporate PAC.[113] The FEC continues to examine these factors when determining whether a corporation with foreign ties may make independent expenditures supporting political campaigns.[114] The FEC's finding, to narrowly read BCRA and avoid regulation of domestic subsidiaries, corresponds to its longstanding viewpoint of who constitutes a foreign national.

4. Domestic Subsidiaries, as Discussed in *Citizens United*

After *Citizens United*, "foreign corporations' American subsidiaries may make unlimited independent expenditures" and run PACs.[115] Before Justice Stevens' reference to foreign-controlled corporations having equal political-speech rights to those of individual Americans in the dissenting opinion,[116] the Justices considered this possibility during the *Citizens United* oral arguments.[117] Justice Ginsburg pressed the counsel for Citizens United, former U.S. Solicitor General Theodore B. Olson, on whether Congress could limit spending by multinational corporations.[118] In response, Olson noted the constitutionality of imposing campaign-finance limits on foreign-controlled corporations would depend on

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federal donations of corporate treasury funds in states that permit such donations, or establishing a federal political action committee, is a controversial one that would have been addressed explicitly had BCRA intended to address it." *Id.*

112. *See* Fed. Election Comm'n Advisory Opinion 2006-15, at 3 ("When promulgating the Final Rules [to implement BCRA], the Commission indicated that it found no evidence of Congressional intent to broaden the prohibition on foreign national involvement in U.S. elections to cover U.S. subsidiaries of foreign corporations.").

113. *See generally* Savarin, *supra* note 53, at 801–05 (discussing the FEC's method for determining when a corporation is considered a foreign national under FECA).

114. *See* 22 U.S.C. § 611(b) (2006) (defining *foreign principal* to include a corporation that is "organized under the laws of or having its principal place of business in a foreign country"); *see also* 11 C.F.R. 110.20 (2011) (defining *foreign national* to include a "foreign principal, as defined in 22 U.S.C. 611(b)," and requiring that "[n]o person shall knowingly solicit, accept, or receive from a foreign national any contribution or donation").

115. Vega, *supra* note 9, at 977 (citations omitted).

116. *See* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 930 (2010) (Stevens, J., concurring in part and dissenting in part) (criticizing the majority opinion for, among other things, relying on the idea that "corporations must be treated identically to natural persons in the political sphere").

117. Transcript of Oral Argument, Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010) (No. 08-205).

118. *Id.* at 5.

whether the government "established a compelling governmental interest and a narrowly tailored remedy to that interest."[119] Then, Justice Scalia asked whether Congress could prevent foreign individuals from funding political speech.[120] Scalia presented the presumed constitutionality of preventing foreign nationals from engaging in political speech as an open question. This Note focuses more narrowly on domestic subsidiaries, yet arguments for equalizing foreign nationals' speech only buttress limited restrictions on domestic subsidiaries.

C. *Lower Court Decisions Since* Citizens United

Since *Citizens United*, the courts have again addressed corporate political speech, including foreign-national speech.[121] These decisions may provide insight into how to analyze a domestic subsidiary's speech. In *Bluman v. Federal Election Commission*, the U.S. District Court for the District of Columbia granted the FEC's motion to dismiss a complaint challenging the constitutionality of the statute prohibiting contributions and expenditures by foreign nationals.[122] The plaintiffs, who were resident aliens, attacked the supposedly less controversial government regulation of purely foreign individuals and corporations.[123] In dismissing the suit, the court relied on the principle that foreign nationals do not have a constitutional right to participate in activities of democratic self-governance within the United States.[124] Deeming the government to have a compelling interest in limiting such participation, the court found that political contributions and express-advocacy expenditures constitute part of the process of democratic self-government.[125] Of particular interest, the court noted that foreign countries also distinguish between citizens and noncitizens in the campaign-finance arena: "[I]t is part of a common international understanding of the meaning of sovereignty

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119. *Id.*

120. *Id.* at 6.

121. For examples of cases addressing corporate political speech and foreign-national speech, see Ognibene v. Parkes, 671 F.3d 174, 179 (2d Cir. 2011); Bluman v. Fed. Election Comm'n, 800 F. Supp. 2d 281, 283 (D.D.C. 2011), *aff'd*, 132 S.Ct. 1087 (2012); United States v. Danielczyk, 788 F. Supp. 2d 472, 481 (E.D. Va.), *opinion clarified on denial of reconsideration*, 791 F. Supp. 2d 513 (E.D. Va. 2011), *rev'd*, 683 F.3d 611 (4th Cir. 2012), *rev'd*, 683 F.3d 611 (4th Cir. 2012); Minn. Citizens Concerned for Life, Inc. v. Swanson, 741 F. Supp. 2d 1115, 1119 (D. Minn. 2010), *aff'd in part, rev'd in part*, 692 F.3d 864 (8th Cir. 2012); Vt. Right to Life Comm., Inc. v. Sorrell, No. 2:09-cv-188, 2012 U.S. Dist. LEXIS 86175, at *17 (D. Vt. June 21, 2012).

122. *Bluman*, 800 F. Supp. 2d at 283, 292. Foreign nationals who make independent expenditures tied to a federal election commit a felony under 2 U.S.C. § 441e(a)(1)(C). Ianelli, *supra* note 95, at 870.

123. *See Bluman*, 800 F. Supp. 2d at 283.

124. *Id.* at 288.

125. *Id.*

and shared concern about foreign influence over elections."[126] Without further comment, the Supreme Court upheld the lower court's ruling.[127]

Though the *Bluman* decision seemingly shut the door on challenges to foreign nationals' contributions, the domestic subsidiaries question was again left untouched. The *Bluman* opinion, however, poses dangerous implications for foreign-linked U.S. corporations. On appeal to the Supreme Court, the appellants argued against a constriction of their political speech based on an erroneous notion of their having "less than full-fledged First Amendment rights."[128] The outcome in *Bluman* certainly begets a minimized panoply of rights. The reasoning underlying the decision—a restriction on foreign participation in democratic self-government—employs an overly broad concept of self-government. As the appellants asserted, "[Campaign advocacy] is participation in political *dialogue*, to be sure, but not in *self-government*. Only if Americans find [the] views convincing will those *citizens* choose to govern themselves accordingly."[129] Moreover, in other First Amendment jurisprudence, the Supreme Court has found that "the fear that speech might persuade provides no lawful basis for quieting it."[130]

The *Bluman* court's reliance on influence from foreign-linked political speech implies that foreign-linked corporate speech could face the same fate if challenged in court. But as the appellants in *Bluman* noted, the government did not cite—and could not cite—"*any* case recognizing an interest in 'influence prevention' as even *legitimate*, much less *compelling*" as demanded under the strict scrutiny test.[131] Turning to protection of sovereignty as a justification for limiting foreign-linked political speech, *Bluman*'s rationale would seem to offer opponents of foreign-linked corporate speech an avenue through which to challenge the current status of the law.

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126. *Id.* at 292.

127. *See* Kenneth P. Doyle, *Ban on Foreign Money in U.S. Campaigns Upheld by Supreme Court in Summary Order*, BLOOMBERGBNA MONEY & POLITICS REP., Jan. 10, 2012 (commenting on the *Bluman* decision that, "The Supreme Court without further comment . . . upheld a federal law against foreigners' providing money in U.S. election campaigns").

128. Opposition to Motion To Dismiss or Affirm at 5, Bluman v. Fed. Election Comm'n, 800 F. Supp. 2d 281 (D.D.C. 2011) (No. 11-275).

129. *Id.* at 6.

130. Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2670 (2011) (citing Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam)).

131. Opposition to Motion To Dismiss or Affirm *supra* note 128, at 9.

III. CORPORATE POLITICAL-SPEECH REGULATIONS AND JURISPRUDENCE FROM BUCKLEY TO *CITIZENS UNITED*

The Supreme Court has wrestled with regulations on corporate political speech, demonstrating anything but a linear jurisprudence. Since *Buckley*, the Supreme Court "has been the preeminent force in shaping and constraining our campaign finance laws."[132] Prior to *Citizens United*, the Court had relied upon three main rationales in supporting the Government's interest in restricting corporate political speech: anticorruption, antidistortion, and shareholder protection.[133] The *Citizens United* decision represents a shift in the Court's corporate political-speech jurisprudence: the decision overturned *Austin v. Michican State Chamber of Commerce* and partially overturned *McConnell*, which relied on the antidistortion rationale and the anticorruption rationale respectively.[134] Because such reasoning may hold greater weight in the context of foreign-connected U.S. corporations, Part III reviews the evolution of corporate campaign-finance jurisprudence.

A. *Beginning with* Buckley

The Supreme Court in *Buckley* evaluated the 1974 amendments to FECA, a comprehensive statute enacted in 1971 and aimed at resolving campaign-finance concerns.[135] FECA required full reporting of campaign contributions and expenditures and provided a framework for PACs established by corporations and unions.[136] While FECA banned direct contributions from corporate treasuries, the statute permitted SSFs.[137] FECA and its implementing regulations permitted these corporate PACs "to solicit voluntary contributions from those most intimately associated with the firm and its interests: executives, employees, shareholders, administrative personnel, and the immediate families of those constituencies."[138] Addressing several FECA provisions in *Buckley*, the Court upheld individual contribution limits since they "serve the basic governmental interest in safeguarding the integrity of the electoral process without directly

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132. Briffault, *supra* note 39, at 887.

133. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 961 (2010).

134. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 154 (2003).

135. *See* Buckley v. Valeo, 424 U.S. 1, 7 (1976) (describing the 1974 amendments). The key amendment at issue, known as the Bentsen Amendment, 2 U.S.C. §§ 431–455 (2006), aimed to prohibit "all foreign nationals, with the exception of resident aliens, from making any contributions in U.S. elections." Savarin, *supra* note 53, at 793.

136. 2 U.S.C. § 441b (2006).

137. *Id.* at 197.

138. Winkler, *supra* note 38, at 934.

impinging upon the rights of individual citizens and candidates to engage in political debate and discussion."[139] In its discussion of contribution limits, the Court identified FECA's primary purpose as preventing "actual and apparent corruption of the political process"; an interest justifying restrictions on political speech.[140] And although it upheld individual-contribution limits, the Court struck down the independent-expenditure ceilings, limitations on a candidate's expenditures from his own personal funds, and ceilings on overall campaign expenditures, finding the provisions to overly burden protected political expression.[141]

Deeming independent-expenditure ceilings to "impose direct and substantial restraints on the quantity of political speech," the Court found "the governmental interest in preventing corruption and the appearance of corruption" inadequate to justify the restrictions.[142] Rejecting "equalizing the relative ability" of groups to influence elections as an adequate governmental interest, the Court noted:

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure 'the widest possible dissemination of information from diverse and antagonistic sources,'" and "'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"[143]

Thus, from the beginning, the Court has curtailed restrictions on political expression.

Regarding limits on candidates' expenditures from personal resources, the Court found the governmental interest in "equalizing the relative financial resources of candidates competing for elective office" insufficient to support the infringement of an individual's First Amendment rights.[144] And, finally, in rejecting the overall campaign-expenditures limitations, the Court noted: "The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise."[145]

B. *After* Bellotti*: Supreme Court Upholds Corporate Political-Speech Regulations*

Whether the First Amendment political-speech protection applies differently to corporations, as opposed to individuals, was first

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139. *Buckley*, 424 U.S. at 58.
140. *Id.* at 53.
141. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 913 (2010).
142. *Buckley*, 424 U.S. at 39, 45.
143. *Id.* at 48–49 (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254, 266, 269 (1964)).
144. *Id.* at 54.
145. *Id.* at 57.

addressed in *First National Bank of Boston v. Bellotti*.[146] Banks and corporations challenged a Massachusetts statute prohibiting them from making certain expenditures aimed at influencing referenda.[147] The Supreme Court held the statute was unconstitutional, finding constitutional protections of corporate speech no different than constitutional protections of "natural persons."[148] Rejecting the lower court's holding that the First Amendment only protects corporate speech directly pertaining to the corporation's business interests, the *Bellotti* majority noted: "If a legislature may direct business corporations to 'stick to business,' it also may limit other corporations—religious, charitable, or civic—to their respective 'business' when addressing the public. Such power in government to channel the expression of views is unacceptable under the First Amendment."[149] Moreover, the Court found there was no compelling state interest to justify prohibiting corporate speech.[150]

The Court did not outright reject the two main justifications advanced for prohibiting corporate speech: (1) antidistortion, or "the State's interest in sustaining the active role of the individual citizen in the electoral process" and (2) shareholder protection, or "the interest in protecting the rights of shareholders whose views differ from those expressed" by corporate management.[151] Briefly mentioning these rationales, the Court found these interests inapplicable in the context of the referenda at issue.[152] The Court recognized the First Amendment's role in "affording the public access to discussion, debate, and the dissemination of information and ideas."[153]

Nonetheless, the Supreme Court's jurisprudence continued to distinguish between corporate and other speakers. In *Federal Election Commission v. National Right to Work Committee*, the Supreme Court "unanimously concluded that the economic advantages provided by the corporate form gave corporations unique power that justified special regulation of corporate campaign activities."[154] The Court embraced the antidistortion and shareholder protection rationales. In *Austin*, the Supreme Court evaluated the constitutionality of a Michigan statute that prohibited corporations from using corporate treasure for independent expenditures—while

146. First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 767 (1978).
147. *Id.* at 769.
148. *Id.* at 776.
149. *Id.* at 785.
150. *Id.* at 795.
151. *Id.* at 787.
152. *Id.* at 787–88.
153. *Id.* at 783.
154. William D. Araiza, *Campaign Finance Regulation: The Resilience of the American Model*, 2 AMSTERDAM L.F. 55, 56 (2009).

permitting PAC spending—in elections.[155] Reversing the Sixth Circuit, the Court held the statute was constitutional because there was a compelling government interest and it was narrowly tailored.[156] The statute addressed the compelling state interest of eliminating "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."[157] The Court found it narrowly tailored because the statute did "not impose an *absolute* ban on all forms of corporate political spending but permits corporations to make independent political expenditures" via PACs.[158]

In *Federal Election Commission v. Beaumont*, the ban on corporate contributions was challenged as applied to nonprofit advocacy corporations.[159] The Court held that a nonprofit advocacy group was constitutionally prohibited from making direct contributions despite the minimized potential for corruption and distortion of the electoral system.[160] Describing its campaign-finance-regulation jurisprudence, the Supreme Court suggested that its jurisprudence displays respect for the "legislative judgment that the special characteristics of the corporate structure require particularly careful regulation."[161]

The Supreme Court began evaluating the constitutionality of campaign-finance restrictions in BCRA in *McConnell*. In *McConnell*, the Court considered several BCRA provisions.[162] Of interest to this Note, the Court upheld BCRA's restriction on corporations that prohibited them from using corporate treasury funds to finance "electioneering communications," or those broadcast, cable, or satellite communications "aired just prior to elections that are ostensibly about issues but obviously designed to help" particular favored candidates.[163]

Thus, from *Bellotti* to *Citizen's United*, the Supreme Court consistently upheld regulations of corporate campaign finance designed to minimize corporate political speech. Clearly, corporate electioneering possibilities expanded following *Citizens United*.

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155. Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 654 (1990).
156. *Id.* at 652.
157. *Id.* at 660.
158. *Id.*
159. 539 U.S. 146, 150 (2003). For the ban on corporate contributions that was challenged, see 2 U.S.C. § 441b(a) (2006).
160. Fed. Election Comm'n v. Beaumont, 539 U.S. 146, 149 (2003).
161. *Id.* at 155 (citing Fed. Election Comm'n v. Nat'l Right To Work Comm., 459 U.S. 197, 209–10 (1982)); *Austin*, 494 U.S. at 661.
162. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 94 (2003).
163. Winkler, *supra* note 38, at 936.

C. *Shift to Deregulation*

Shifting from tightly circumscribed limits on electioneering, the Supreme Court has opened the electoral process to an era of expanded sources of funds to support candidates and issues. Election law professor Richard Hasen describes the "Manichean struggle over the constitutionality of campaign finance regulation" as driven by a "fundamental difference in worldviews," which has resulted in a swinging pendulum of jurisprudence.[164] The current Roberts Court has moved away *from* deference to legislative efforts to regulate *to* deregulation.[165]

In *Citizens United*, a 5–4 majority struck down 2 U.S.C. § 441b, which restricted corporate electoral spending.[166] The Supreme Court found, "Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether."[167] Critics argue that the Court "could have decided the corporate spending question in *Citizens United* without revisiting the *Austin* and *McConnell* holdings allowing corporate spending limits."[168]

While the Court's holding was a departure from more recent precedent, Congress only prohibited corporate independent expenditures beginning in 1947.[169] Even then, the Labor Management Relations Act, which achieved the restriction, had to surpass President Truman's veto.[170] This context underlines the historically contentious nature of campaign finance and difficulty in finding appropriate legal guideposts to resolve such questions.

IV. RATIONALES FOR TREATING U.S. SUBSIDIARIES THE SAME AS OTHER U.S. CORPORATIONS

This Note focuses neither on voting nor policy outcomes but on political speech, which surely affects the former. Nonetheless, the premise adopted from the outset was that the U.S. democratic process has the capacity to intake speech from corporate and individual actors—rejecting any legal distinction between their respective political speech. With disclosure and identification requirements

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164. Richard L. Hasen, *What the Court Did—and Why*, AM. INT., July/Aug. 2010, www.the-american-interest.com/article-bd.cfm?piece=853.

165. *Id.*

166. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 886 (2010).

167. *Id.*

168. Hasen, *supra* note 164.

169. Direct contributions were first banned in 1907. *See infra* note 40 and accompanying text.

170. *Citizens United*, 130 S. Ct. at 953.

regulating corporate political speech, treating corporate actors differently based on their foreign connections serves little purpose beyond political rhetoric. Policy considerations, including the company's ability to express its views on regulatory demands, taxation, and other issues that may impact its U.S. citizen employees, and the U.S. government's interest in attracting foreign investment, support an expansive view of corporate political speech. This Part presents the rationale for permitting a full corporate political-speech arsenal for foreign-linked domestic corporations.

A. *Speech Is Valuable in and of Itself*

This Note adopts the theory that speech is valuable in and of itself—not because it reflects the preexisting views of the electorate.[171] The Alexander Meiklejohn theory of the First Amendment posits that speech's purpose is "to give to every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal."[172] According to Meiklejohn, the First Amendment provides that "no idea, no opinion, no doubt, no belief, no counterbelief, no relevant information, may be kept from them."[173] The Supreme Court's First Amendment jurisprudence on corporate political speech "does *not* take the truth or falsity of the communication into account."[174]

The Supreme Court has faced tension between two competing theories: an absolute amount of speech and a relative allocation of speech. Following the absolute allocation approach, "If one believes that political speech in itself is a good thing, regardless of its source and its relative allocation, then one should not be concerned if speech comes in unequal amounts from proponents of different views."[175] Under the "absolute" theory, speech from "non-members of the polity, such as foreigners and non-natural entities such as corporations" does not cause concern.[176] The relative allocation theory, on the other hand, views speech as "valuable because it reflects, in rough proportions, the pre-existing . . . views of the electorate" and aims for

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171. *See* Araiza, *supra* note 154, at 55 (describing the Supreme Court's "growing skepticism about the argument that corporate political speech risks corrupting the political process by skewing debate").

172. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 88 (Lawbook Exchange 2000) (1948).

173. *Id.* at 88–89.

174. Michael R. Siebecker, *Corporate Speech, Securities Regulation, and an Institutional Approach to the First Amendment*, 48 WM. & MARY L. REV. 613, 616 (2006) (emphasis added).

175. Araiza, *supra* note 154, at 59.

176. *Id.*

such an allocation of speech.[177] Dating to *Bellotti*, the Court has rejected a paternalistic approach to the First Amendment and recognized "that people are ordinarily the best judges of their own interests."[178]

In the realm of candidate spending limits, 5–4 majorities of the Supreme Court struck down laws that imposed burdens on candidates' political speech in *Davis v. Federal Election Commission* and *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*.[179] In *Davis*, the Supreme Court addressed a First Amendment challenge to a BCRA provision known as the "Millionaire's Amendment,"[180] which, in response to "self-financing" candidates,[181] permits "non-self-financing" candidates to receive individual contributions at triple the "normal limit (e.g., $6,900 rather than the current $2,300), even from individuals who have reached the normal aggregate contributions cap, and may accept coordinated party expenditures without limit."[182] The Supreme Court found a "substantial burden on the exercise of the First Amendment right to use personal funds for campaign speech," and concluded that the Government had failed to advance any compelling interest that would justify such a burden.[183]

Finding an even greater burden on speech in *Arizona Free Enterprise*, the Supreme Court examined the constitutionality of a provision in the Arizona Citizens Clean Elections Act that provided publicly financed state office candidate matching funds to those of privately financed candidates.[184] The matching funding was dependent on and in "direct response to the political speech of privately financed candidates and independent expenditure groups."[185] The provision imposed a substantial burden on privately financed candidates and independent-expenditure groups' political speech.[186] The Supreme Court held that the State of Arizona's matching-funds scheme lacked any compelling interest in equalizing electoral funding among publicly financed and privately financed

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177. *Id.*

178. First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 791 n.31 (1978); Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 558 (1991).

179. Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2812 (2011); Davis v. Fed. Election Comm'n, 554 U.S. 724, 726 (2008).

180. Bipartisan Campaign Reform Act, Pub. L. No. 107-155, § 319, 116 Stat. 81, 109–12 (2002) (codified at 2 U.S.C. § 441a-1(a)).

181. *Self-financing candidate* refers to a wealthy candidate who spends in excess of a specified threshold of personal funds. *Davis v. FEC*, CAMPAIGN LEGAL CTR., http://www.campaignlegalcenter.org/index.php?option=com_content&view=article&id=120%3Adavis-v-fec&catid=27&Itemid=54 (last updated Oct. 19, 2010).

182. *Davis*, 554 U.S. at 729.

183. *Id.* at 740.

184. *Ariz. Free Enter.*, 131 S. Ct. at 2813–14.

185. *Id.* at 2824.

186. *Id.* at 2820–21.

candidates.[187] The Court found that the "level the playing field" interest, as well as the anticorruption interest, does not justify the matching funds provision under First Amendment scrutiny.[188] Describing the matching-funds provision's approach, the Supreme Court quoted the *Buckley* opinion for the notion that "restrict[ing] the speech of some elements of our society in order to enhance the relative voice of others" is "wholly foreign to the First Amendment."[189] Brushing aside the State of Arizona's attempt at fairness, the Supreme Court stated that the "guiding principle" under the First Amendment vis-à-vis campaign speech is the "unfettered interchange of ideas."[190]

From Alexis de Tocqueville to modern scholars, observers have described the United States as "the interest group society."[191] And if lawmaking often results from "bargains between politically influential interest groups and government officials," the extent to which domestic subsidiaries may engage in the negotiation matters.[192] Unlike other countries, the United States has not focused on allocating speech in proportion to the support it enjoys.[193] Canadian political parties, for instance, receive broadcast time in proportion to their electoral popularity.[194] The United States' lengthy electoral process intentionally puts candidates through the wringer to ferret out the strong from the weak, minimizing the need for proportionality. Behind this approach is implicitly the notion that the American electorate, when exposed to more political speech, will parse through the political spin and determine who would best represent them. If the quantity of speech were allocated according to popularity at any given time, the engagement of an electorate facing political speech from diverse sources—with divergent opinions on the issues—would dwindle, obfuscating the need for the country's lengthy campaigns. Moreover, if the electorate could not separate sources—the candidates' messages from those of PACs or even the foreign

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187. *Id.* at 2825–27.

188. *Id.*

189. *Id.* at 2821 (quoting Buckley v. Valeo, 424 U.S. 1, 48–49 (1976)).

190. *Id.* at 2826 (quoting *Buckley*, 424 U.S. at 14).

191. *See* James M. Lindsay, *Deference and Defiance: The Shifting Rhythms of Executive-Legislative Relations in Foreign Policy*, 33 PRESIDENTIAL STUD. Q. 530, 536 (2003) (quoting JEFFREY M. BERRY, THE INTEREST GROUP SOCIETY (2d ed. 1989)).

192. Adam Winkler, *Free Speech Federalism*, 108 MICH. L. REV. 153, 161 (2009). By "negotiation," this Note refers to the competition among interests presenting differing policy visions and candidates.

193. *See* United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) ("[The First Amendment] presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.").

194. Araiza, *supra* note 154, at 59.

press—how could one expect them to evaluate the substance of political positions?

Preventing American subsidiaries of foreign corporations from making campaign contributions is "antithetical to the First Amendment," for "the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments."[195] Voters surely may consider "the source and credibility of the advocate. But if there be any danger that the people cannot evaluate the information and argument . . . it is a danger contemplated by the Framers of the First Amendment."[196]

B. *Freedom-of-the-Press Jurisprudence Supports Domestic Subsidiaries' Corporate Political Speech*

One lens through which to view corporate political speech draws upon another First Amendment guarantee: freedom of the press. Since scholars conflate the freedom of speech and press clauses, exploring the Supreme Court's line of jurisprudence in that arena makes sense.[197] The "access cases" required the Supreme Court "to decide in effect whether the Government has an affirmative role, under the First Amendment, in securing a balanced ideological marketplace . . . the Court established that the Government cannot decide the limits of fairness in American journalism."[198]

One observer argued that *Citizens United* grants "press freedoms—notably the right to electioneer in the days before federal elections—to nonconventional and noninstitutional press entities . . . ."[199] Taking the press "in its historic connotation" as every publication that "affords a vehicle of information and opinion," increasing the availability of information—even from nontraditional sources—seems valuable.[200] Rather than view *Citizens United* as

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195. Note, *"Foreign" Campaign Contributions and the First Amendment*, 110 HARV. L. REV. 1886, 1894 (1996) (citing First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 791–92 (1978)).

196. *Id.* at 1895 (citing *Bellotti*, 435 U.S. at 791–92). Because the United States was a nation of immigrants in the 1780s, the Founders did not address the issue of who was a foreigner.

197. *See generally* Anthony L. Fargo & Laurence B. Alexander, *Testing the Boundaries of the First Amendment Press Clause: A Proposal for Protecting the Media from Newsgathering Torts*, 32 HARV. J.L. & PUB. POL'Y 1093 (2009) (providing a comprehensive analysis of Supreme Court jurisprudence in the field of First Amendment speech and press law).

198. David Lange, *The Speech and Press Clauses*, 23 UCLA L. REV. 77, 80–81 (1975) (citing Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974) and CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973)).

199. Seth Korman, Citizens United *and the Press: Two Distinct Implications*, 37 RUTGERS L. REC. 1, 2 (2010).

200. *Id.* at 4 (quoting Branzburg v. Hayes, 408 U.S. 665, 704 (1972)).

removing "all benefits specially conferred on the press," the focus should shift to opening the media to citizen journalism that, by default, does not aim to represent a balanced ideological marketplace.[201] This related First Amendment clause, the press clause, may provide support for full rights for domestic subsidiaries.

The courts have rejected attempts to force the media to broadcast balanced viewpoints. At one time, the FCC required broadcast licensees to "operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."[202] Essentially, the so-called "fairness doctrine" required "sufficient presentation of opposing views on controversial issues of public importance."[203] The paternalistic fairness doctrine was eliminated in 1987 when the FCC rejected it.[204] In the 1989 *Syracuse Peace Council v. Federal Communications Commission* decision, the D.C. Circuit Court of Appeals upheld the abolishment, finding the FCC decision "was neither arbitrary, capricious nor an abuse of discretion."[205] The FCC and court found the doctrine disserved the public interest in "diverse sources of information and the broadcaster's interest in free expression."[206] These same interests counsel against limiting domestic subsidiaries' political speech.

Presuming a discerning American electorate, distinguishing between parent and subsidiary corporations' messages should not be problematic. Moreover, the law ought not to presume a subsidiary liable for its parent corporation's actions or policies, and indeed the law does not. The FCPA, which prohibits U.S. companies from paying bribes to foreign governments to obtain business or to secure an improper advantage,[207] does "*not* necessarily" hold domestic corporations liable for the acts of their foreign subsidiaries.[208] Courts generally recognize a "presumption of separateness" between a parent corporation and its subsidiary.[209]

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201. *Id.* at 6.

202. Federal Communications Act, 47 U.S.C. § 315(a)(4) (2006).

203. Jerome A. Barron, *In Defense of "Fairness": A First Amendment Rationale for Broadcasting's "Fairness" Doctrine*, 37 U. COLO. L. REV. 31, 31 (1965).

204. Syracuse Peace Council v. Federal Communications Commission, 867 F.2d 654, 657 (D.C. Cir. 1989).

205. *Id.* at 669.

206. *Id.* at 659.

207. DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS 421–22 (2d ed. 2010).

208. Matthew S. Queler, Wendy Wu & Bettina Chin, *Foreign Corrupt Practices Act*, *in* PROSKAUER ON INTERNATIONAL LITIGATION AND ARBITRATION ch. 27 (2011), *available at* http://www.proskauerguide.com/law_topics/27/I.

209. Am. Protein Corp. v. AB Volvo, 844 F.2d 56, 60 (2d Cir. 1988).

C. *Treaty Obligations Dictate that Domestic Subsidiaries Deserve Equal Treatment*

Foreign policy has dictated reciprocal treaty protections for foreign businesses operating in the United States. As such, subsidiaries may assert parent corporations' treaty protections.[210] If Congress elected to impose political-speech restrictions on domestic subsidiaries, it would need to account for such treaty obligations because federal statutes "ought never to be construed to violate the law of nations if any other possible construction remains."[211] Bilateral friendship, commerce, and navigation (FCN) treaties "provide rules to protect the citizens of one country, and their property and other interests in the other country . . ."[212] These treaties contain varying levels of protection: guaranteeing foreign nationals the same treatment accorded U.S. citizens, that they would be treated "as well as the nationals of any other country," or that their "vital rights" would be protected.[213]

In some circumstances, U.S. subsidiaries of foreign corporations obtain advantages over domestic corporations thanks to these treaties. For instance, the 1953 Japan–U.S. FCN Treaty accords "national treatment" and "most favored nation treatment" to corporations in the respective countries.[214] In other words, "nationals of one party are not to be discriminated against by the other party."[215] The treaty

> has the effect of according nationals of one party engaging in business within the territory of the other party the same treatment accorded nationals of the other party. For example, an American subsidiary of a Japanese parent [like Bridgestone/Firestone] is to have the same rights as any domestically owned American corporation.[216]

Federal courts have repeatedly permitted domestic subsidiaries to invoke such treaty protections, permitting the employment of foreign nationals even when antidiscrimination laws (on the basis of national origin) like Title IV would otherwise have been violated.[217]

For foreigners who merely avail themselves of the U.S. market, the United States has consented to certain protections against

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210. Keith Sealing, *Sex, Allies and BFOQS: The Case for Not Allowing Foreign Corporations To Violate Title VII in the United States*, 55 ME. L. REV. 89, 113 (2003).

211. Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804).

212. Sealing, *supra* note 210, at 91.

213. *Id.*

214. Japan Friendship Commerce and Navigation Treaty, U.S.-Japan, art. IV, Apr. 9, 1953, 4 U.S.T. 2063.

215. United States v. R.P. Oldham Co., 152 F. Supp. 818, 822 (N.D. Cal. 1957).

216. *Id.* at 824.

217. *See, e.g.*, Fortino v. Quasar Co., 950 F.2d 389, 391–94 (7th Cir. 1991) (involving U.S. subsidiary of Japanese company); Schanfield v. Sojitz Corp. of Am., 663 F. Supp. 2d 305, 311 (S.D.N.Y. 2009) (same).

discriminatory treatment. The national treatment principle, incorporated into all three main World Trade Organization (WTO) agreements, requires countries to treat foreigners and locals equally—"at least after the foreign goods, [services, and intellectual property] have entered the market."[218] This WTO provision aims to influence domestic policymaking, covering "explicitly discriminatory internal measures" as well as "measures that indirectly have such consequences."[219] However, sovereign states still may employ legitimate, nonprotectionist regulations under the national treatment principle. The national treatment principle and FCN treaties seek to level the playing field for domestic and foreign companies. Those benchmarks weaken the justification for curbing corporate political speech based on a foreign link.

D. *Policy Considerations Favor Including Domestic Subsidiaries Within the Realm of Permissible Corporate Political-Speech Actors*

Any congressional action to limit foreign-linked corporate speech should account for policy concerns rather than gaining political points for "restricting foreign influence." Actual and perceived regulatory demands that companies encounter, along with taxation policy, can help or hinder investment in the United States. As such, domestic subsidiaries operating in the United States should have a voice to explicate their views. Finally, U.S.-citizen employees deserve an employer-centric avenue (i.e. corporate PAC) through which to express political speech like their fellow citizens who work for 100 percent American-owned corporations.

1. Satisfying Demands of the Regulatory State

Regulatory mandates impact all companies doing business in the United States, including domestic subsidiaries. Corporations push back against regulations that they find cost-prohibitive, impracticable, or otherwise unreasonable.[220] And when "the cost of

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218. *Principles of the Trading System: Trade Without Discrimination*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (last visited Dec. 14, 2012).

219. Henrik Horn & Petros C. Mavroidis, *Still Hazy After All These Years: The Interpretation of National Treatment in the GATT/WTO Case-Law on Tax Discrimination*, 15 EUR. J. INT'L L. 40 (2004).

220. The U.S. Chamber of Commerce, a lobbying organization representing more than three million businesses, states as one of its policy priorities for 2012: "Push back against legislation and regulations that hinder business' ability to raise capital or mitigate risk." *U.S. Chamber Policy Priorities for 2012: Capital Markets, Corporate Governance, and Securities Regulation*, U.S. CHAMBER COM., http://www.uschamber.com/issues/priorities/corporate-governance-capital-markets-and-

regulation outweighs its perceived benefits[,] issuers and investors can and do migrate to other markets."[221] Though the restrictions on political speech may or may not always weigh down the scale enough to cause migration, this policy question undoubtedly remains a concern of corporate decision makers.

Preventing precious foreign investors interested in establishing domestic subsidiaries and U.S. corporations from leaving the country likely requires minimized regulatory burdens. But the regulatory system certainly weighs in favor of granting domestic subsidiaries, like other U.S. corporations, full political-speech capabilities.

Darden Restaurants, a public company incorporated in Florida[222] and the parent company of Olive Garden, Red Lobster, and LongHorn Steakhouse, faces the same "plate piled high with more and more federal, state and local regulations" as McCain Foods USA, Inc., a private company incorporated in Illinois and the subsidiary of a Canadian company.[223] Likewise, why should Toyota Motor North America, Inc., a subsidiary of a Japanese corporation, have any less political capital available (through SSFs) when faced with the National Highway Traffic Safety Administration (NHTSA) regulations than Delaware-incorporated Ford Motor Company?[224] Recent years have seen Toyota pay tens of millions in civil penalties for failure to "comply with the requirements of the National Traffic and Motor Vehicle Safety Act for reporting safety defects" to NHTSA.[225] Why should one corporation—and by extension, its employees—lose one of the most powerful tools of advocacy, political speech?

Economists have found that a country's tax and regulatory system strongly affects the value of corporate equity.[226] For corporate managers charged with maximizing shareholder value, accounting for

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securities-regulation (last visited Dec. 14, 2012) (discussing Dodd–Frank and environmental regulations, among others).

221. ALAN R. PALMITER, EXAMPLES & EXPLANATIONS: SECURITIES REGULATION 7 (4th ed. 2008).

222. *Articles of Incorporation*, DARDEN RESTAURANTS INC., http://www.darden.com/corporate/articles_of_inc.asp (last visited Oct. 29, 2012).

223. Clarence Otis, Jr., *What's Stopping Job Creation? Too Much Regulation*, CNN (Dec. 6, 2011, 1:22 PM), http://www.cnn.com/2011/12/06/opinion/otis-regulations-job-creation/index.html. *See generally Food Products: Company Overview of McCain Foods USA, Inc.*, BLOOMBERG BUSINESSWEEK, http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=4206976 (last visited Oct. 19, 2012) (providing a brief background of McCain Foods).

224. *F Stock Quote—Ford Motor Company*, NASDAQ, http://www.nasdaq.com/symbol/f (last visited Oct. 29, 2012).

225. *See* Press Release, Nat'l Highway Traffic Safety Admin., Toyota Motor Corp. Will Pay $32.425 Million in Civil Penalties as Result of Two Department of Transportation Investigations (Dec. 20, 2010), *available at* http://www.nhtsa.gov/PR/DOT-216-10 (announcing auto-recall-related penalties).

226. Ellen R. McGrattan & Edward C. Prescott, *Taxes, Regulations, and the Value of U.S. and U.K. Corporations*, 72 REV. ECON. STUD. 767, 767 (2005).

regulatory burdens when determining where to do business must weigh heavily. Consequently, burdens on political speech, which likely indicate a broader policy choice vis-à-vis foreign investors, cannot sit well with corporate actors.

2. Lack of Electoral Vote Should Not Result in Taxation Without Representation

Even if the vocal opposition to *Citizens United* wanted to isolate corporations to fend for themselves, politically speaking, American representative democracy rejects this notion.[227] Congressmen represent and should represent corporations based in their districts as much as they do the Social Security-receiving grandparents who consistently show up at the polls, or children who do not yet have the right to vote.[228]

Like other U.S. corporations, foreign-owned U.S. corporations pay taxes. Although loopholes exist, corporations remain taxable, and their common refrain condemns the higher tax rates they must pay vis-à-vis their foreign competitors. Corporations lobby to cut the 35 percent U.S. corporate tax rate, now one of the highest in the world.[229] During the 2012 election season, OdysseyRe, a U.S. subsidiary of a Canadian company, cited then-Republican presidential nominee Mitt Romney's stance on tax policy as a key reason for donating $1 million dollars to Restore Our Future, a super PAC supporting Romney.[230] The OdysseyRe general counsel stated that the subsidiary "operates at a significant disadvantage" vis-à-vis competitors in "more favorable tax jurisdictions."[231]

Those subject to taxes should have ample access to the political process; the premise underlying this concept is that taxpayers should have the "right to defend themselves against potentially unfair

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227. *See* STEVEN S. SMITH, JASON M. ROBERTS & RYAN J. VANDER WIELEN, THE AMERICAN CONGRESS 64 (7th ed. 2011) ("Defenders of the ruling argue that the Court, by expanding the number of players who can attempt to influence elections, has created a more competitive political environment.").

228. *See* ANDREA LOUISE CAMPBELL, HOW POLICIES MAKE CITIZENS: SENIOR POLITICAL ACTIVISM AND THE AMERICAN WELFARE STATE 2 (2003) (stating that senior citizens "are the Über-citizens of the American polity, voting and making campaign contributions at rates higher than those of any other age group").

229. *See, e.g.*, Laura D'Andrea Tyson, *The Merits of a Corporate Tax Overhaul*, ECONOMIX (Mar. 9, 2012, 6:00 AM), http://economix.blogs.nytimes.com/2012/03/09/the-merits-of-a-corporate-tax-overhaul (discussing Obama plan); John D. McKinnon, *More Firms Enjoy Tax-Free Status*, WALL ST. J. (Jan. 10, 2012), http://online.wsj.com/article/SB10001424052970203733504577026361246836488.html (discussing pass-through taxation).

230. Michael Beckel, *Connecticut Firm at Center of New 'Citizens United' Controversy*, CONN. MIRROR (Oct. 5, 2012), http://www.ctmirror.org/story/17658/connecticut-firm-center-new-citizens-united-controversy.

231. *Id.*

government policies."[232] In fact, people—who indeed make the choices for corporations—"appear to rebel against taxation without commensurate government services."[233] In the domestic subsidiary context, perhaps over-provision of government services, i.e. regulation, causes a "rebellion" against taxation, or reductions in or elimination of business in the United States. U.S. companies shift operations overseas, reaping tax benefits, yet those choosing to keep jobs and profits in the United States face "one of the highest tax rates in the world."[234] U.S. subsidiaries of foreign corporations are subject to "anti-deferral" provisions designed to prevent the shelter of income in offshore entities.[235]

The United States has the distinction as the only developed country that has failed to reform its corporate tax code in the last thirty years.[236] Until new legislation enters into force, the law ought not to restrict the political rights of domestic subsidiaries of foreign corporations that invest in the United States while "American" corporations ship production and jobs overseas and even hide corporate profits in foreign subsidiaries overseas. Despite tax disadvantages, "high-tax foreign jurisdictions often attract multinationals for a host of nontax reasons, including access to consumer, labor, and capital markets"; however, scores of studies have shown that "taxes, among other factors, influence the foreign location decisions of multinational firms."[237]

3. Interest in Attracting Foreign Investment

The United States has a policy interest in attracting foreign investment.[238] With globalization's rise, competition for foreign investment has increased, and "[d]omestic subsidiaries have a vested interest" in fostering foreign investment in the United States, advocating laws and regulations beneficial to international

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232. *See* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 11 (rev. ed. 2009) (tracing the development of right to vote arguments).

233. Michael L. Ross, *Does Taxation Lead to Representation?*, 34 BRIT. J. POL. SCI. 229, 247 (2004).

234. Barack Obama, President, State of the Union Address (Jan. 24, 2012), *available at* http://www.cnn.com/2012/01/24/politics/sotu-transcript/index.html?hpt=hp_t1.

235. Daniel Cassidy, *Federal Taxation of International Transactions*, *in* DOING BUSINESS IN WASHINGTON STATE: A GUIDE FOR FOREIGN BUSINESS AND INVESTMENT 83, 84 (Randy J. Aliment ed., 2010).

236. Tyson, *supra* note 229.

237. Scott D. Dyreng et al., *Taxes and the Clustering of Foreign Subsidiaries* (working paper, 2011) (citation omitted).

238. High corporate income taxes do the "most harm[ ]" to economic growth, according to the Organization for Economic Co-operation and Development. Asa Johansson et al., *Tax and Economic Growth* 2 (Org. for Econ. Co-operation and Dev., Econ. Dep't, Working Paper No. 620, 2008).

business.[239] Chief financial officers of U.S. subsidiaries of foreign-based companies cited the political environment as one of the most important factors for the location of major investments, according to a 2011 survey conducted by PricewaterhouseCoopers.[240]

Favoring nationalistic concerns over a policy of boosting foreign investment would likely threaten international relations. In *Barcelona Traction, Light & Power Co.*, the Belgian government sought to exercise diplomatic protection on behalf of Belgian shareholders in a Canadian company, Barcelona Traction, which had subsidiaries in Spain.[241] The Spanish government's refusal to authorize a transfer of foreign currency necessary for servicing Barcelona Traction's bonds had resulted in the Spanish courts seizing Barcelona Traction and the subsidiaries' assets, thus harming the Belgian stockholders.[242] The ICJ rejected Belgium's claim, finding it had no standing.[243] The ICJ "articulated a rule . . . that a corporation is a national of the state in which it is incorporated for the purpose of diplomatic protection."[244] While most states have accepted this "rule," most also require a "genuine link" between the espousing state and the injured corporation.[245] This Note does not address potential claims corporations would pursue against the United States in international bodies; however, domestic subsidiaries of foreign corporations meet both criteria. Political-speech protectionism clearly conflicts with a policy to promote foreign investment in the form of domestic subsidiaries in the United States.

4. Interests of U.S.-Citizen Employees

Domestic subsidiaries of foreign corporations employ 21 million U.S. citizens directly or indirectly.[246] Although U.S. corporations seek

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239. Evan C. Zoldan, *Strangers in a Strange Land: Domestic Subsidiaries of Foreign Corporations and the Ban on Political Contributions from Foreign Sources*, 34 LAW & POL'Y INT'L BUS. 573, 583 (2003) (citation omitted).

240. ORG. FOR INT'L INV., U.S. ECONOMY CONFIDENCE RATING: A SURVEY OF 100 CFOS OF U.S. SUBSIDIARIES OF FOREIGN COMPANIES 3 (2011), *available at* http://www.ofii.org/docs/OFII_CFO_Survey_2011.pdf.

241. *See* Barcelona Traction, Light & Power Co. (Belg. v. Spain), 1970 I.C.J. 3, 6, ¶ 2 (Feb. 5) (outlining the questions at issue).

242. *See id.* at 7, ¶¶ 10–11 (explaining the issuance of Barcelona Traction's bonds and why their service was discontinued).

243. *See id.* at 50, ¶ 101 (denying *jus standi*).

244. Lawrence Jahoon Lee, Barcelona Traction *in the 21st Century: Revisiting Its Customary and Policy Underpinnings 35 Years Later*, 42 STAN. J. INT'L L. 237, 237 (2006).

245. *See id.* at 238 (introducing the argument that most states have required something more than the incorporation rule).

246. U.S. CHAMBER OF COMMERCE INV. POLICY FORUM, TOP 10 OVERLOOKED FACTS ABOUT INTERNATIONAL INVESTMENT 3 (2012) (citing ORG. FOR INT'L INV., CHAIN REACTION, GLOBAL INVESTMENT WORKS FOR AMERICA (2012)).

some foreign workers when unable to fill positions domestically, most employees are U.S. citizens.[247] The function of PACs in facilitating collective political speech allows employees to band together to promote their interests.[248] Unions organize to insure jobs for their members; likewise, employees at domestic subsidiaries have an interest in uniting to ensure the continued presence of their foreign-controlled corporation in the United States. Americans' political rights "should not be abridged because of where they work."[249] There is no justification for allowing American employees of Ford or Exxon-Mobil to participate in a corporate PAC while excluding Americans who work for Daimler-Chrylser or Shell Oil.[250] Clearly, U.S.-citizen employees have other avenues through which to raise their political voices, but the convenience and psychological power of partaking in a company-sponsored PAC should not be withheld based on an arbitrary determination of their employer's status as foreign.[251]

V. LEGISLATIVE PROPOSALS TO ELIMINATE "FOREIGN INFLUENCE"

If Congress passes legislation affecting domestic subsidiaries' political speech, the legislation would undoubtedly face legal challenge from the Organization for International Investment, and its member organizations, which are known for their vigilance in contesting restrictions on domestic subsidiaries.[252] Opponents to restriction on domestic subsidiaries' political speech may choose to

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247. *See* METRO. POLICY PROGRAM AT BROOKINGS, THE SEARCH FOR SKILLS: DEMAND FOR H-1B IMMIGRANT WORKERS IN U.S. METROPOLITAN AREAS 1 (2012), *available at* http://www.brookings.edu/research/reports/2012/07/18-h1b-visas-labor-immigration#overview (summarizing the findings of a number of H-1B requests as a proportion of the overall workforce).

248. Letter from David W. Carroll, Vice President, Lafarge N. Am., to Mai Dinh, Fed. Election Comm'n 2–3 (Sept. 9, 2002), *available at* http://www.fec.gov/pdf/nprm/contribution_lim_pro/lafarge.pdf.

249. Letter from Randall B. Moorhead, Vice President, Philips Elec. N. Am. Corp., to Mai T. Dinh, Fed. Election Comm'n 2 (Sept. 13, 2002), *available at* http://www.fec.gov/pdf/nprm/contribution_lim_pro/philips.pdf.

250. *See id.* (labeling this inability to participate in PACs as "absurd").

251. The SEC has stated 20 percent as the minimum level of ownership necessary for effective control of a corporation. *Cf. In re* Request for Declaratory Ruling Concerning the Citizenship Requirements of Sections 310(b)(3) & (4) of the Commc'ns Act of 1934, as Amended, 103 F.C.C. 2d 511, 515–16 (1985) (applying strictly the requirements of the Communications Act of 1934 by disallowing more than 20 percent foreign ownership of a licensee).

252. *See, e.g.*, Brief for Nat'l Foreign Trade Council et al. as Amici Curiae Supporting Respondents, Kiobel v. Royal Dutch Petroleum Co., No. 10-1491 (U.S. Feb. 3, 2012); Brief for Org. for Int'l Inv. & Ass'n of Int'l Auto. Mfg., Inc. as Amici Curiae Supporting Petitioner, J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780 (2011) (No. 09-1343); Brief for Nat'l Foreign Trade Council & Org. for Int'l Inv. as Amici Curiae Supporting Defendant/Appellee, Bauman v. DaimlerChrysler AG, 644 F.3d 909 (9th Cir. 2011) (No. 07-15386).

base their argument on a constitutional distinction. The Constitution trumps congressional prerogative and federal statutes, and perhaps restricting foreign-related speech is a foreign policy matter within the executive's domain.[253] Constitutional law scholar Edward Corwin suggested the Constitution offers "an invitation to struggle for the privilege of directing American foreign policy."[254] The executive branch has "consistently adhered to an 'executive primacy' interpretation of the Constitution's allocation of power over foreign affairs."[255] Ultimately, the argument that power over domestic subsidiaries' political speech falls within the executive's domain cannot square with the reasons for treating subsidiaries equally laid out in Part IV.[256] The tension amounts to whether attempts to inhibit foreign participation in the electoral process require executive branch action or congressional legislation. Moreover, would the Supreme Court find the action constitutional?

Assuming proposals vis-à-vis foreign-controlled domestic subsidiaries fall within the legislative domain, the substance of the legislation must be evaluated, with special attention paid to the considerations that Part IV outlines and the permissible legal justifications that Part III discussed. Despite vociferous opposition to *Citizens United*, Congress has yet to enact legislation to counteract the perceived threat of foreign influence.[257] In the immediate aftermath of the Supreme Court decision, U.S. representatives and senators introduced a host of measures. The most widely supported, the Democracy Is Strengthened by Casting Light on Spending in Elections Act (the DISCLOSE Act), proposed a series of amendments to FECA to prohibit foreign influence in federal elections and establish additional disclosure requirements.[258] Specifically, the DISCLOSE Act would have applied "the ban on contributions and expenditures by foreign nationals to foreign-controlled domestic corporations."[259] The disclosure components would require groups

253. *See* U.S. CONST. art. VI, cl. 2 (Supremacy Clause).

254. JOHN LEHMAN, MAKING WAR: THE 200-YEAR-OLD BATTLE BETWEEN PRESIDENT AND CONGRESS OVER THE WAY AMERICA GOES TO WAR (1992) (quoting Edwin Corwin), *available at* http://www.foreignaffairs.com/articles/47796/gregory-f-treverton/making-war-the-200-year-old-battle-between-president-and-congres.

255. H. Jefferson Powell, *The President's Authority over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527, 528 (1999).

256. *See supra* Part IV (describing strong foreign-policy considerations *and* impacts on domestic policy, over which Congress certainly has authority).

257. *See generally* Paul Blumenthal, *Ron Wyden: Campaign Disclosure Reform Chances 'Greater Than Ever Before'*, HUFFINGTON POST (Feb. 11, 2013, 5:20 PM), http://www.huffingtonpost.com/2013/02/11/ron-wyden-campaign-disclosure_n_2663981.html (indicating an enhanced legislative will to tackle campaign-finance reform, which would likely include clarifying foreign-linked entities' status).

258. H.R. 5175, 111th Cong. (2010).

259. CONG. RESEARCH SERV., OFFICIAL SUMMARY: H.R. 5175, 111th Cong. § 102 (2010) (passed as amended June 24, 2010).

spending $10,000 or more to report within twenty-four hours to the FEC and disclose the identity of donors whose contributions exceeded $10,000. While it passed the House of Representatives in 2010, cloture blocked its progress in the Senate.[260] In early 2012, House Democratic leadership announced its intention to reintroduce a modified version of the DISCLOSE Act, stating it "really goes to the heart of the matter of an opportunity society and reigniting the American dream in a way that works for everybody."[261] The Senate introduced a revised version of the DISCLOSE Act in July 2012, but it again died due to a failed vote for cloture.[262] Though the Senate bill did not include the controversial, aforementioned ban on foreign-controlled domestic corporations' political speech, whether a newly enacted piece of campaign finance legislation would do so remains at issue.[263]

Harsher in tone, but with the same proposed effect as the original 2010 House version of the DISCLOSE Act, the America is for Americans Act would have amended FECA's definition of "foreign national" to include domestic corporations with one or more foreign principals with direct or indirect ownership interests.[264] Similar to the America is for Americans Act but with even greater restrictions, the Prohibiting Foreign Influence in American Elections Act sought to prohibit any "subsidiary of a foreign principal," as well as corporations with one or more foreign principals from (a) serving on the board of directors, (b) having a direct or indirect ownership interest, or (c) directly or indirectly holding its debt.[265] Along the same lines, the American Elections Act of 2010 also proposed restrictions based upon foreign ownership and control of the corporation.[266] Finally, the Ethics in Foreign Lobbying Act of 2013 seeks to amend FECA to prohibit PAC contributions "sponsored by foreign-controlled corporations and associations" (at least 50-percent owned by a non-U.S. citizen or foreign national).[267] The 50-percent

260. Michael A. Memoli, *Disclose Act Fails To Advance in Senate*, L.A. TIMES, Sept. 24, 2010, at 2.

261. Sean Lengell, *House Dems Say They'll Reintroduce Campaign Finance Bill*, WASH. TIMES (Jan. 26, 2012, 4:28 PM), http://www.washingtontimes.com/blog/inside-politics/2012/jan/26/house-dems-say-theyll-reintroduce-campaign-finance.

262. CONG. RESEARCH SERV., OFFICIAL SUMMARY: S. 3369, 112th Cong. (2012).

263. *See* Sam Stein, *Disclose Act: Super PAC Transparency Legislation To Be Introduced by House Democrats*, HUFFINGTON POST (Jan. 25, 2012, 5:06 PM), http://www.huffingtonpost.com/2012/01/25/disclose-act-super-pac-chris-van-hollen_n_1232008.html.

264. H.R. 4510, 111th Cong. § 2 (2010).

265. H.R. 4522, 111th Cong. (2010).

266. *See* S. 2959, 111th Cong. § 2 (2010) (defining foreign corporations that are prohibited from making political contributions).

267. H.R. 195, 113th Cong. § 2 (2013).

rule was considered in the early 1990s and received support from seventy-three U.S. Senators at one time.[268]

Instead of enlarging federal election law, Congress ought to restrain from imposing requirements exclusive to domestic subsidiaries of foreign corporations of any sort. To relieve the haze of confusion, Congress should immediately pass a concurrent resolution expressing the principle that domestic subsidiaries of foreign corporations retain equal rights and responsibilities under the law as other U.S. corporations.[269] Businesses exploring participation in the new markets demand the order and stability that a "firmly-established legal infrastructure" provides.[270]

Ultimately, all of the proposed legislative enactments suffer a prima facie flaw: they presume domestic subsidiaries of foreign corporations dangerous to American democracy. To survive constitutional challenge, the legislation would need to articulate a compelling interest. Protecting the American psyche from perceived threats would not qualify as a compelling governmental interest. Those bringing forth proposals to roll back foreign-linked corporate influence claim the measures are "justified by the compelling interest of the United States both in preventing those with greater financial resources from obtaining undue influence in the political arena at the expense of the less economically powerful, and in protecting U.S. sovereignty as well as the U.S. citizens' right to self-determination."[271] Evoking powerful ideals like self-determination and sovereignty does not mean foreign-linked political speech indeed threatens the fulfillment of those principles. After all, only natural person, U.S. citizens may exercise the franchise in a private, coercion-free ballot box.

Even if Congress were able to develop a compelling reason to restrict domestic subsidiaries' political speech, it would have difficulty crafting a narrowly tailored measure. In the above proposals, the specific provisions recklessly define *foreign national* and arbitrarily demarcate foreign-controlled versus United States-controlled. At worst, the 50 percent threshold seems excessive.[272] If

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268. *Public Hearing on Proposed Foreign National Regulations*, FED. ELECTION COMM'N REC., Dec. 1990, at 2–3.

269. *See generally Forms of Congressional Action*, LIBR. CONGRESS, http://thomas.loc.gov/home/lawsmade.bysec/formsofaction.html (last visited Oct. 21, 2012) (describing the concurrent resolution's use "for expressing facts, principles, opinions, and purposes of the two Houses").

270. *See* Martha F. Davis & Johanna Kalb, *Oklahoma and Beyond: Understanding the Wave of State Anti-Transnational Law Initiatives*, 87 IND. L.J. SUPP. 1, 13 (2011) (explaining the challenges presented to businesses by an uncertain legal market).

271. Savarin, *supra* note 53, at 817.

272. *Cf. First Amendment and Campaign Finance Reform After* Citizens United*: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of*

the Ethics in Foreign Lobbying Act of 2013 passes, for example, corporations like Lafarge North America, which employs 16,400 people but is more than 50-percent owned by a French entity,[273] would be prohibited from making direct contributions and sponsoring a PAC for its employees. Even the FCC's "statutory benchmark" in licensing matters for determining whether foreign interests would damage the "public interest" begins at 25 percent.[274] Drawing a line as to when a domestic corporation has too great a foreign link remains a questionable proposition.

Returning to the conversation surrounding rationales for restricting corporate political speech (the anticorruption, antidistortion, and shareholder protection rationales), this Note has established that the fear of actual corruption is unfounded.[275] The law continues to prohibit foreign nationals from making contributions or pulling the strings of domestic subsidiaries. Moreover, the fear of corruption of the political process, relied upon in *Buckley*, should have minimal influence as the role of corporate political finance has received great attention and cemented itself in the discerning voter's mind as a factor in our political system. The antidistortion rationale, highlighted in *Austin*, also ignores a key reality of electoral politics: "No matter how loudly an idea is expressed, and no matter its initial popularity, it lives or dies according to how many people ultimately believe it. If corporate-funded expression convinces no one, then it distorts nothing."[276] Worrying about corporate speech correlating to the public's standing opinion on an issue, as *Austin* suggested, seems

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the H. Comm. on the Judiciary, 111th Cong. 91 (2010). In response to Representative Jerrold Nadler's suggestion of a requirement that "no corporation with more than . . . 5 percent ownership of non-American citizens can use its corporate treasury" for political speech, constitutional law professor Laurence Tribe stated his opinion that the Supreme Court would likely uphold it.

273. *See Company Overview of Lafarge North America, Inc.*, BLOOMBERG BUSINESSWEEK (Oct. 29, 2012, 4:25 PM), http://investing.businessweek.com/research/stocks/private/snapshot.asp? privcapId=284956 (providing Lafarge's employment data and company background); *see also Lafarge Rejects Buyout Offer from French Parent*, WICHITA BUS. J. (Mar. 24, 2006, 2:58 PM), http://www.bizjournals.com/wichita/stories/2006/03/20/daily27.html (detailing an attempt by Lafarge's parent company to acquire the 47 percent of Lafarge North America that it did not own).

274. FED. COMMC'NS COMM'N, FOREIGN OWNERSHIP GUIDELINES FOR FCC COMMON CARRIER AND AERONAUTICAL RADIO LICENSES 6–7 (2004), *available at* http://transition.fcc.gov/ib/Foreign_Ownership_Guidelines_Erratum.pdf.

275. *Cf.* Stephen Dinan, *Justice Says Supreme Court Should Revisit Campaign Finance*, WASH. TIMES (Feb. 17, 2012), http://www.washingtontimes.com/news/2012/feb/17/justice-says-supreme-court-should-revisit-campaign/. Justice Ginsburg contends that post-*Citizens United*, it is "exceedingly difficult to maintain that independent expenditures by corporations 'do not give rise to corruption or the appearance of corruption.'" *Id.*

276. Daniel Winik, Note, *Citizens Informed: Broader Disclosure and Disclaimer for Corporate Electoral Advocacy in the Wake of* Citizens United, 120 YALE L.J. 622, 635 (2010).

incongruous with the marketplace of ideas that should prevail in political discourse. The so-called "political speech protectionism," which has found vocal advocates in academia and all branches of government, clashes with the ideal of "enlightened self-government," if not the Constitution.[277]

VI. CONCLUSION

Limiting options of foreign-linked U.S. corporations for engaging in the political process—namely making independent expenditures—would constitute an unjustified government restriction on speech. This Note contests the premise that the political participation of foreign-linked entities is a "problem." The massive amount of political speech expressed in advertisements, stump speeches, position papers, and traditional and new media requires a discerning electorate. Given how technology has transformed the electoral process, the "authenticity of [the] process may have to rely more on an informed and responsibly [sic] populace than a regulatory framework always struggling to keep pace."[278] Foreign-controlled domestic corporations' influence on political speech is relatively negligible and likely even proportionally less than their amount donated in relation to the overall donations. Moreover, these corporations contribute heavily to the economy, investing and paying taxes. Withholding political speech from domestic subsidiaries, which face regulatory burdens and have U.S.-citizen employees who may wish to exercise their political speech in conjunction with their corporate employer, neither jives with policy nor other legal doctrines that treat subsidiaries equally. In no uncertain terms, Congress ought to make clear that domestic subsidiaries of foreign corporations are *not* foreign, and thus not subject to the prohibition on expenditures. The government has a "compelling interest" to *permit* domestic subsidiaries of foreign corporations to influence the political process.[279]

In a transnational economy, foreign-controlled organizations that do business in the United States, including employing millions of Americans, and "subject themselves to American law deserve some

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277. *See* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 898 (2010) ("The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.").

278. Stephen Reader, *Explainer: Can Foreign Companies Make Political Donations?*, WNYC (Jan. 20, 2012), http://www.wnyc.org/articles/its-free-country/2012/jan/20/explainer-can-foreign-companies-make-political-donations/#.

279. Section 104.20(c)(9) of the Code of Federal Regulations, Title II requires the disclosure of donations of $1,000 or more to corporations (including nonprofits) or labor organizations when the donation "was made for the purpose of furthering electioneering communications." 11 C.F.R. § 104.20(c)(9) (2011).

degree of input into the American political process."[280] Ultimately, regulation of domestic subsidiaries' political speech in a manner different from other corporate entities would likely fail under the Court's strict scrutiny standard.[281] After completing the prescriptive measure discussed above (passage of a concurrent resolution), Congress will have signaled and affirmed domestic subsidiaries' corporate political-speech rights, which they deservedly should receive.

> [W]*e apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization.*[282]
>
> —Justice Jackson in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 641 (1943)

Scott L. Friedman[*]

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280. Ianelli, *supra* note 95, at 891.

281. The Court may "defer to Congress's authority over foreign affairs in restricting speech when these restrictions are narrowly drawn." *Id.* at 903; *see also* Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2730–31 (2010) (evaluating a statute regulating support with certain organizations under First and Fifth Amendment limitations).

282. Ronald Dworkin deemed *Citizens United* "the decision that threatens democracy." Ronald Dworkin, *The Decision that Threatens Democracy*, N.Y. REV. BOOKS (May 13, 2010), http://www.nybooks.com/articles/archives/2010/may/13/decision-threatens-democracy/?page=2.

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