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NOTE

OPENING THE FLOODGATES?: CORPORATE GOVERNANCE AND CORPORATE POLITICAL ACTIVITY AFTER *CITIZENS UNITED*

JOHN PERSINGER*

I would love to have ads on TV against me saying, don't vote for Mike Capuano, he's a horrendous guy, brought to you by the Exxon Corporation.

— Rep. Michael Capuano (D-MA)¹

I. INTRODUCTION

During his 2010 State of the Union address, President Obama took the unusual approach of criticizing the Supreme Court, with several justices sitting mere steps from the House of Representatives dais, for an opinion the Court had delivered only a few days earlier. The President remarked:

With all due deference to separation of powers, last week, the Supreme Court reversed a century of law that I believe will open the floodgates for special interests—including foreign corporations—to spend without limit in our elec-

* Candidate for Juris Doctor, Notre Dame Law School, 2012; A.B., History, Harvard College, 2003. I would like to thank Professor Lloyd Mayer, whose Election Law class sparked an interest in the topic and whose edits helped greatly improve the quality of this Note. I would also like to thank Professor Julian Velasco, who provided guidance on the corporate law issues, and Professor Richard Painter, whose conversations helped flesh out the corporate governance issues. The most important thanks go to my in-house editor—my wife, Sarah Smiles Persinger.

1. Rep. Michael Capuano (D-MA), sponsor of the Shareholder Protection Act of 2011, made this comment at a congressional hearing on *Citizens United v. FEC*, 130 S. Ct. 876 (2010). *Corporate Governance After Citizens United: Hearing Before the Subcomm. on Capital Mkts., Ins. and Gov't Sponsored Enters. of the H. Comm. on Fin. Servs.*, 111th Cong. 4 (2010) [hereinafter *Corporate Governance After Citizens United Hearings*].

tions. I don't think American elections should be bankrolled by America's most powerful interests²

The President's ominous warning for the future of American politics stemmed from his interpretation of the Court's decision in *Citizens United v. FEC*.³ Associate Justice Samuel Alito, one of the justices in attendance, mouthed silently his disagreement with the President's interpretation.⁴ Commentators argued that both individuals breached the normally staid decorum of the State of the Union.⁵ Rarely does the Supreme Court even receive mention in the President's State of the Union Address.⁶ In a divisive election year, however, *Citizens United* added to the political turmoil.

The controversy began with a motion for a preliminary injunction by a nonprofit corporation.⁷ To resolve the nonprofit's challenge, the Court decided that it had to determine whether the Federal Election Campaign Act of 1971 ("FECA")⁸ unconstitutionally prohibited corporations from using general treasury funds for independent political campaign expenditures.⁹ By recognizing that corporations, and presumably unions

2. Barack Obama, President of the United States, Address Before a Joint Session of Congress on the State of the Union (Jan. 27, 2010), in 156 CONG. REC. H418 (daily ed. Jan. 27, 2010) [hereinafter 2010 State of the Union].

3. 130 S. Ct. 876 (2010).

4. Justice Alito mouthed "not true, not true," in response to President Obama's criticism of the Supreme Court's *Citizens United* decision. Martin Kady II, *Justice Alito Mouths 'Not True,' POLITICO* (Jan. 27, 2010, 10:08 PM), http://www.politico.com/blogs/politicolive/0110/Justice_Alitos_You_lie_moment.html.

5. See Brad Knickerbocker, *Obama vs. Alito: Political Dust-Up During State of the Union*, CHRISTIAN SCI. MONITOR, Jan. 30, 2010, available at <http://www.csmonitor.com/USA/2010/0130/Obama-vs.-Alito-Political-dust-up-during-State-of-the-Union>.

6. See Tony Mauro, *High Court is Rare Topic for State of the Union Speeches*, BLOG OF LEGAL TIMES (Jan. 27, 2010, 11:43 PM), <http://legaltimes.typepad.com/blt/2010/01/high-court-is-rare-topic-for-state-of-the-unionspeeches.html> (explaining how other Presidents have mentioned the Supreme Court by name only nine times since 1913, and none have given direct criticisms of court opinions).

7. See *infra* Part III.A.

8. 2 U.S.C. §§ 431–55 (2006).

9. *Citizens United*, 130 S. Ct. at 886. It is important to note that not all of the Justices agreed that the Court had to reach this issue. Associate Justice John Paul Stevens, writing in dissent, argued that the Court could have decided the case on three narrower grounds: (1) "a feature-length film distributed through video-on-demand does not qualify as an 'electioneering communication' under § 203 of BCRA, 2 U.S.C. § 441b"; (2) "§ 501(c)(4) nonprofits that accept only a *de minimis* amount of money from for-profit corporations" could be exempted from the statute; and (3) "feature-length video-on-demand film [that] looks so unlike the types of electoral advocacy Congress has found deserving of regula-

as well, are entitled to First Amendment protection for political speech, the Court struck down the limits on expenditures.¹⁰ The idea that corporations are entitled to the same First Amendment rights as individuals did not resonate with the American public,¹¹ and politicians moved quickly to capitalize on this public opinion.¹²

Citizens United is not the first time that the country has been concerned about corporate political activity.¹³ Each time national attention has focused on the issue, Congress has responded with mixed results.¹⁴ Drawing on this history, this Note will attempt to provide a better understanding of why the Court reached its decision in *Citizens United* and why Congress's efforts to reform the campaign finance system should fail. Foremost among these reasons is the fact that Congressional reform efforts, driven by the mistaken view that corporate political activity is not an "ordinary business decision,"¹⁵ will create unnecessary and burdensome regulations.¹⁶ These regulations would have a negative effect on corporations, regardless of size or level of political activity, without truly limiting corporate influence in the U.S. political system. Part II of this Note will detail how America's corporate campaign finance system developed, the motivations for regulating the system, and whether regulation has had much of an impact on the system. Part III will explain what the Court decided in *Citizens United*, why it was significant, and what the Court left unresolved. Finally, Part IV will argue that the congressional response to *Citizens United* creates an unnecessary regulatory burden for for-profit corporations.¹⁷

tion" could be decided under an as-applied challenge. *Id.* at 936–38 (Stevens, J., dissenting). See also Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 585–90 (2011) (outlining the history of sharp division in the Court in the area of campaign finance).

10. *Citizens United*, 130 S. Ct. at 913.

11. See Dan Eggen, *Corporate Sponsorship is Campaign Issue on Which Both Parties Can Agree*, WASH. POST, Feb. 18, 2010, at A15.

12. See *infra* Part III.D.

13. See *infra* Part II.

14. *Id.*

15. See *infra* Part IV.B.

16. See *infra* Part IV.C.

17. The corporation at issue in *Citizens United* was a not-for-profit corporation. 130 S. Ct. 876, 886 (2010). Although the Court's decision applies to both for-profit and not-for-profit corporations, the Shareholder Protection Act of 2011 and similar legislative proposals only address for-profit corporations' political activity. Therefore, this Note will only discuss the potential regulatory burdens for for-profit corporations. See Shareholder Protection Act of 2011, H.R. 2517, 112th Cong. (2011).

II. AN OVERVIEW OF CORPORATIONS AND CAMPAIGN FINANCE REGULATION

A. *A First Attempt At Curbing Corporate Political Activity*

When President Obama claimed that *Citizens United* “reversed a century of law,”¹⁸ he was referencing America’s first federal campaign finance law: the Tillman Act.¹⁹ Governmental regulation of corporate political involvement did not emerge until the end of the nineteenth century, with the states taking the initial lead after the 1896 presidential elections. For his successful presidential campaign, Republican William McKinley spent “a then unheard of \$7 million, mostly solicited from corporations,” to defeat the populist Williams Jennings Bryan.²⁰ In retaliation, several pro-Bryan states enacted prohibitions on direct corporate contributions to political campaigns.²¹

Federal regulation of corporate political donations only became an issue after a state inquiry into self-dealing by corporate executives. In 1905, the State of New York initiated an investigation to determine whether executives at major life insurance companies—including the state’s three largest, New York Life Insurance Company, Equitable Life Assurance Society, and Mutual Life Insurance Company—used company finances for personal dealings.²² The Joint Committee of the Senate and Assembly of the State of New York to Investigate and Examine into the Business and Affairs of Life Insurance Companies Doing Business in the State of New York eventually turned its focus to political contributions by these insurance companies.²³ Several executives testified to donating specific amounts to help the re-election efforts of President Theodore Roosevelt in the 1904

18. 2010 State of the Union, *supra* note 2.

19. Federal Corrupt Practices Act of 1907 (Tillman Act), Pub. L. No. 59-36, 34 Stat. 864.

20. Bradley A. Smith, *Campaign Finance Reform: Searching for Corruption in All the Wrong Places*, 2003 CATO SUP. CT. REV. 187, 191 (2002-2003); see also Melvin I. Urofsky, *Campaign Finance Reform Before 1971*, 1 ALB. GOV’T L. REV. 1, 10-12 (2008) (detailing how McKinley’s campaign manager coordinated donations from corporations across the country).

21. Smith, *supra* note 20, at 191 (noting that Nebraska was Bryan’s home state and Missouri, Florida, and Tennessee had large Democratic majorities in their legislatures); see also Urofsky, *supra* note 20, at 13 (explaining that the four states, Nebraska, Missouri, Florida, and Tennessee, passed the bans “partly out of political pique”); Adam Winkler, “*Other People’s Money*”: Corporations, Agency Costs, and Campaign Finance Laws, 92 GEO. L.J. 871, 884 (2004).

22. See Urofsky, *supra* note 20, at 14-15; Winkler, *supra* note 21, at 887-93.

23. See Urofsky, *supra* note 20, at 14-15; Winkler, *supra* note 21, at 891-93.

election.²⁴ These testimonies and the Committee's efforts to expose the issue of corporate cash for political campaigns became known as the "Great Wall Street Scandal" or the "New York Life Insurance Scandal," spurring an intense public outcry and media examination about the role of corporations in financing the domestic political system.²⁵

Even though a proposed federal campaign finance law had failed only a few years earlier, the Great Wall Street Scandal and President Roosevelt's call for reform created the momentum for the first ban on corporate political donations.²⁶ In 1901, Republican Senator William E. Chandler of New Hampshire had sponsored a bill that banned corporate contributions, but the bill never reached the floor for a vote.²⁷ Four years after the bill's death, the Great Wall Street Scandal shifted public opinion of corporate political involvement.²⁸ Sensing this shift in public opinion, President Roosevelt used his annual message to Congress, on December 5, 1905, to propose that "[a]ll contributions by corporations to any political committee or for any political purpose should be forbidden by law."²⁹ He emphasized that

24. See Urofsky, *supra* note 20, at 14–15; Winkler, *supra* note 21, at 891–93. The Republican Roosevelt defeated Democratic nominee Alton B. Parker in that election. Supreme Court Associate Justice Felix Frankfurter later quoted Parker's concern over corporate political involvement, when deciding a case about union dues paying for express advocacy. *United States v. UAW-CIO*, 352 U.S. 567, 572 (1957) (quoting *Contributions to Political Committees In Presidential and Other Campaigns: Hearing Before H. Comm. on Election of President, Vice-President, and Representatives. in Cong.*, 59th Cong. (1906) ("The greatest moral question which now confronts us is, Shall the trusts and corporations be prevented from contributing money to control or aid in controlling elections?")).

25. See Urofsky, *supra* note 20, at 14–15; Winkler, *supra* note 21, at 891–93.

26. See Urofsky, *supra* note 20, at 15–17. It is interesting to highlight President Roosevelt's role in the first efforts to reform the campaign finance system. While he did call for a ban on corporate campaign contributions, it was the exposure of corporate contributions to his presidential campaign that spurred reform in the first place. See *id.*

27. S. 5849, 57th Cong. (1901); 34 CONG. REC. 1821 (1901); see also ROBERT E. MUTCH, *CAMPAIGNS, CONGRESS AND COURTS: THE MAKING OF FEDERAL CAMPAIGN FINANCE LAW 4–5* (1988) (providing historical context).

28. See MUTCH, *supra* note 27, at 2 (explaining how various media outlets around the country reported on the testimonies because the hearings had "caused a profound sensation as it furnished the first tangible evidence of connections between [an] insurance company and a political party") (quoting *George W. Perkins On Stand*, NEW-YORK TRIBUNE, Sept. 16, 1905, at 1)); Urofsky, *supra* note 19, at 14–15; Winkler, *supra* note 21, at 891–93.

29. 40 CONG. REC. 96 (1905).

“directors should not be permitted to use stockholders’ money for such purposes.”³⁰

With public opinion supporting reform and a Republican president providing political cover, Congress now had the political will and capital to regulate campaign finance for the first time. Senator Chandler tried initially to get another Republican senator to sponsor a new campaign finance bill.³¹ When that failed, he turned to his friend, the populist and racist Senator Benjamin R. Tillman, a Democrat from South Carolina, to initiate a bill.³² While the bill passed in the Senate without debate, the House of Representatives adjourned for the 1906 congressional elections without voting on the bill.³³ When the new Congress returned and with the Republicans maintaining the majority, the House passed the bill and President Roosevelt signed it into law on January 26, 1907.³⁴ As the first federal campaign finance law, the Tillman Act prohibited corporations and national banks from donating to the campaigns of candidates for public office.³⁵

While the Act banned corporate contributions to political campaigns, several shortcomings prevented the Act from stemming the full influence of corporations on elections. In regard to elections, the Act did not initially prohibit corporate contributions to primary campaigns.³⁶ As for the type of corporations that fell under the Act, the Act only applied to corporations that

30. *Id.*

31. See Mutch, *supra* note 27, at 5.

32. *Id.* Senator Tillman played a unique role in these early reform efforts. Tillman had been a close friend of Senator Chandler, the original Senate promoter of campaign finance, and they shared a mutual dislike of President Roosevelt. See FRANCIS BUTLER SIMKINS, PITCHFORK BEN TILLMAN: SOUTH CAROLINIAN, 18–19, 408–18 (1944) (detailing how, after President Roosevelt’s staff rescinded an invitation to the White House, Tillman “declared that he had been treated ‘in a cowardly and ungentlemanly way’ by ‘this ill-bred creature who is accidentally President’”); Allison R. Hayward, *Revisiting the Fable of Reform*, 45 HARV. J. ON LEGIS. 421, 441 (2008). His motivation for banning corporate contributions may not have been shareholder protection, which President Roosevelt pushed. Instead, he may have been motivated by his “overarching racial agenda, which aimed to attack and limit the power of northern businesses,” whom he saw “as an enemy of [his] violent, agrarian, segregationist policies.” Bradley A. Smith, *A Moderate, Modern Campaign Finance Reform Agenda*, 12 NEXUS 3, 4 (2007).

33. See Mutch, *supra* note 27, at 6–7.

34. *Id.*; Tillman Act of 1907, Pub. L. No. 59-36, 34 Stat. 864.

35. See *id.*

36. See *id.* Congress eventually extended the ban on corporate contributions to primary campaigns with the 1911 amendments to the Federal Corrupt Practices Act, also known as the 1910 Publicity Act. Publicity of Political Contributions Act, Pub. L. No. 61-274, 36 Stat. 822 (1910).

had been chartered federally, as opposed to state-charted corporations.³⁷ Federally chartered corporations, such as railroads, have been described as representing “only a small percentage of companies” at the time.³⁸ Even corporations that fell under the Act’s jurisdiction found ways to get around the direct contributions ban.³⁹ Instead of donating cash, corporations provided in-kind items, such as office space, equipment, free travel, and even employees.⁴⁰ Most importantly, corporate contributions did not subsidize because the Tillman Act provided no enforcement mechanism.⁴¹ Without any instruction from Congress on how to police Tillman Act violations, the federal government’s first attempt to regulate corporate political activity lacked any effectiveness.

B. *Political Reactions Spur Another Attempt At Reform*

Despite the Tillman Act’s many shortcomings, Congress did not further regulate corporate political activity until union influence over election campaigns provoked a Republican backlash. Just as the Republicans had relied on corporations to fund the presidential campaign for the party’s nominee at the turn of the century, Democrats began to rely on unions as campaign financiers beginning in the 1930’s.⁴² Republicans found an opportunity to restrict union political contributions when the United Mine Workers went on strike in the midst of World War II.⁴³ In response to the strike, Congress passed the War Labor Disputes

37. See Tillman Act of 1907.

38. Urofsky, *supra* note 20, at 17; see also Mutch, *supra* note 27, at 7 (“Senator Joseph P. Foraker (R-OH), who chaired the subcommittee formed to consider the measure, did not believe Congress had the power to regulate state-charted corporations, even those engaged in interstate commerce, and he struck out the words ‘or any corporation engaged in interstate commerce or foreign commerce.’” (quoting S. REP. NO. 3056, at 1 (1906))).

39. Urofsky, *supra* note 20, at 17; BRADLEY A. SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM 24 (2001).

40. See SMITH, *supra* note 39, at 24; Urofsky, *supra* note 20, at 17.

41. See Tillman Act of 1907.

42. See GEORGE THAYER, WHO SHAKES THE MONEY TREE?: AMERICAN CAMPAIGN FINANCING PRACTICES FROM 1789 TO THE PRESENT 69–71 (1973) (detailing how the Democratic National Committee had spent only \$2.2 million in 1932, leaving the committee \$600,000 in debt, but then raised nearly \$500,000 from the Congress of Industrial Organizations alone for the 1936 efforts); Hayward, *supra* note 32, at 441–54; Joseph E. Kallenbach, *Taft-Hartley and Union Political Contributions and Expenditures*, 33 MINN. L. REV. 1, 1–2 (1948); Urofsky, *supra* note 20, at 22–29; Winkler, *supra* note 21, at 928–30.

43. See Hayward, *supra* note 32, at 441–54; Kallenbach, *supra* note 42, at 4–5; Urofsky, *supra* note 20, at 22–29.

Act, also known as the Smith-Connally Act of 1943.⁴⁴ The Act intended “to secure defense production against work stoppages,”⁴⁵ but it also included a provision that prohibited unions from making political donations until the end of the war.⁴⁶ Unions now faced the same prohibitions on campaign contributions as corporations.

Similar to the corporate reaction to the Tillman Act, the Smith-Connally Act did not end union influence in election campaigns. Unions created opportunities to support political candidates by means other than direct contributions.⁴⁷ Congress

44. War Labor Disputes (Smith-Connally) Act of 1943, Pub. L. No. 78-89, 57 Stat. 163 (1943). Congress overrode President Roosevelt’s veto to enact the law. See Urofsky, *supra* note 20, at 26. President Roosevelt did not veto the bill because he disapproved of the regulations on union political activity. Rather, he vetoed the bill because he thought it constrained the President’s powers during wartime labor disputes. In fact, he seemed open to the ban. 89 CONG. REC. 6487–88 (1943) (“If there be merit in the prohibition, it should not be confined to wartime, and careful consideration should be given to the appropriateness of extending the prohibition to other nonprofit organizations.”).

Although President Roosevelt’s veto did not weigh in on the merits of the ban on union campaign contributions, supporters and opponents of the measure did weigh in before a House hearing on the issue. *To Regulate Labor Organizations: Hearing on H.R. 804 and H.R. 1483 Before the Subcomm. of the H. Comm. on Labor*, 78th Cong. (1943). Congressman Gerald W. Landis (R-IN), the author of the union campaign contribution ban, testified as to why he proposed the measure. *Id.* at 2. He commented that he noticed “[t]he public was aroused by many rumors of huge war chests being maintained by labor unions, of enormous fees and dues being extorted from war workers, of political contributions to parties and candidates which later were held as clubs over the head of high Federal officials.” *Id.* Through his bill, he sought to “put labor unions on exactly the same basis, insofar as their financial activities are concerned, as corporations have been on for many years.” *Id.* at 1. In opposition to this bill, American Federation of Labor representative Lewis Hines questioned:

[i]f it has been good over the years for the employers to elect Representatives to Congress—and there are many Representatives in Congress elected by employers—why is it not good for organized labor and the trade-union movement to put forth a little effort and financial support, if necessary, to help elect their friends who have passed humanitarian legislation?

Id. at 85.

45. *United States v. UAW-CIO*, 352 U.S. 567, 578 (1957).

46. Smith-Connally Act of 1943 § 9.

47. The most notable avenue around the Smith-Connally Act restrictions resulted in the creation of the first political action committee (“PAC”). The Congress of Industrial Organizations established a PAC that solicited voluntary contributions from members for the sole purpose of engaging in overt, partisan political activity. See Hayward, *supra* note 32, at 454–55; Urofsky, *supra* note 20, at 26; Winkler, *supra* note 21, at 929–30; Kallenbach, *supra* note 42, at 6–8. See also *Separate Segregated Funds and Nonconnected PACs*, FED. ELECTION COMM’N, 1–2, <http://www.fec.gov/pages/brochures/ssfvnonconnected.pdf> (last visited Sept. 15, 2011).

failed to provide an enforcement mechanism in the legislation, so violations often went unpunished and creative measures were never questioned.⁴⁸ Lastly, since Congress passed the bill as a war-time measure, the Smith-Connally Act permitted the political contribution ban to expire when the war terminated.⁴⁹

The temporary prohibitions became permanent after congressional Republicans seized another political opportunity and, in the process, created more regulation for corporate political activity. Republicans gained majorities in both the House and the Senate after the 1946 elections.⁵⁰ Overriding President Harry Truman's veto,⁵¹ the new Congress enacted a sweeping overhaul of the system that regulated labor union activity.⁵² The newly enacted Labor Management Relations Act of 1947, also known as the Taft-Hartley Act, made permanent the Smith-Connally Act's prohibition on union campaign contributions, and it regulated political activity in new ways.⁵³ The Taft-Hartley Act prohibited expenditures made to support a candidate for public office, whereas previously only direct cash contributions had been prohibited.⁵⁴ The Act also applied to primaries in addition to general elections.⁵⁵ Most importantly for the purposes of this Note, Congress extended these prohibitions to corporations as well as unions.⁵⁶

C. *The Modern Campaign Finance System*

The Taft-Hartley Act did not end corporate political activity, and political motivations spurred Congress to enact one more

48. Smith-Connally Act of 1943 § 10.

49. *Id.* § 10; *see also* Kallenbach, *supra* note 42, at 6 (explaining that the timing for expiration would be "within six months after termination of hostilities as determined by the President, or sooner, upon the passage of a concurrent resolution by Congress").

50. *See* Hayward, *supra* note 32, at 456; Urofsky, *supra* note 20, at 27.

51. In his message returning the 1947 Labor-Management Relations Act without approval, President Truman referred to the Act as a "dangerous intrusion on free speech, unwarranted by any demonstration of need, and quite foreign to the stated purposes of this bill." H.R. Doc. No. 80-334, at 9 (1947).

52. Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified in scattered sections of Title 29).

53. *Id.* at sec. 304 (repealed).

54. *Id.* By prohibiting expenditures, Congress banned corporations from donating the in-kind items that arose as an avenue around the Tillman Act restrictions. *See supra* notes 34-36 and accompanying text.

55. Taft-Hartley Act of 1947 § 304.

56. *Id.* Whereas the Tillman Act only pertained to federally-chartered corporations, the Taft-Hartley Act regulated "any corporation organized by authority of any law of Congress." *Id.*; *see also supra* note 36 and accompanying text.

series of regulations that shaped the modern campaign finance system. When the Taft-Hartley Act passed, Congress regulated the campaign finance system for the third time⁵⁷ without providing any governmental structure to administer and enforce the regulations.⁵⁸ Similar to the Tillman Act⁵⁹ and the Smith-Connally Act,⁶⁰ the Taft-Hartley Act remained largely ineffective.⁶¹ Rather than curtailing the flow of money into politics, campaign costs increased dramatically in the 1950's and 1960's.⁶² Democrats, with control of Congress and fear of Republican reliance on corporate financial support, initiated a series of campaign finance reforms in the late 1960's.⁶³

In the 1970's, a series of campaign finance regulations altered corporate political involvement in several ways. The first initiative, the Federal Election Campaign Act of 1971 ("FECA"),⁶⁴ permitted corporations to use general treasury funds to "establish, operate and solicit voluntary contributions for the organization's separate segregated fund."⁶⁵ Corporations use separate segregated funds, known as political action committees ("PACs"),⁶⁶ to "make contributions and expenditures to influence federal elections."⁶⁷ After the Watergate scandal exposed President Richard Nixon's campaign financing practices,⁶⁸ Con-

57. For the two previous attempts see Tillman Act of 1907, Pub. L. No. 59-36, 34 Stat. 864; Smith-Connally Act of 1943, Pub. L. No. 78-89, 57 Stat. 163.

58. See Taft-Hartley Act of 1947.

59. Tillman Act of 1907.

60. Smith-Connally Act of 1943.

61. See Lloyd Hitoshi Mayer, *Breaching a Leaking Dam?: Corporate Money and Elections*, 4 CHARLESTON L. REV. 91, 98 (2009); Kenneth A. Gross, *The Enforcement of Campaign Finance Rules: A System in Search of Reform*, 9 YALE L. & POL'Y REV. 279, 281 (1991) (quoting the FEC Chairman saying that there had been little or no campaign finance enforcement for well over half a century).

62. The increase in the costs of campaigns was mainly due to the proliferation of television advertising, and the expensive costs associated with such advertising. For example, candidates for federal office spent an estimated \$140 million in 1952. Twenty-years later that number would triple to an estimated \$425 million in 1972. See Urofsky, *supra* note 20 and accompanying text.

63. See Smith, *supra* note 20, at 6.

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

65. Appendix 4: *The Federal Election Campaign Laws: A Short History*, FED. ELECTION COMMISSION, <http://www.fec.gov/info/appfour.htm> (last visited Sept. 25, 2011).

66. See Hayward, *supra* note 32, at 441-54.

67. *Separate Segregated Funds and Nonconnected PACs*, FED. ELECTION COMM'N, <http://www.fec.gov/pages/brochures/ssfvnonconnected.pdf> (last visited Sept. 25, 2011).

68. See generally Urofsky, *supra* note 20, 50-55.

gress enacted several amendments to FECA in 1974.⁶⁹ The most significant amendment created the Federal Election Commission ("FEC") and empowered the agency to enforce campaign finance laws.⁷⁰ Another significant amendment, which affected corporations, limited the amount that could be spent on political expenditures.⁷¹

Foreshadowing *Citizens United* and the corporate political activity controversy, the Supreme Court struck down these latest regulations on free speech grounds.⁷² Senator James L. Buckley, a Republican from New York, and Eugene McCarthy, a former Democratic Senator from Minnesota, challenged the constitutionality of several aspects of the 1974 amendments, including the limits on expenditures for individuals.⁷³ The Supreme Court declared the expenditure limits an unconstitutional infringement

69. Act of Oct. 15, 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified in scattered sections of Titles 2, 5, 18, 26, and 47).

70. 2 U.S.C. § 437c (2006); see also *Appendix 4: The Federal Election Campaign Laws: A Short History*, *supra* note 65 ("The Commission was given jurisdiction in civil enforcement matters, authority to write regulations and responsibility for monitoring compliance with the FECA. Additionally, the amendments transferred from [Government Accountability Office] to the Commission the function of serving as a national clearinghouse for information on the administration of elections.").

71. 2 U.S.C. § 431. At the time, this amendment affected corporations indirectly since corporations could only make expenditures through PACs. See *supra* note 44. However, after *Citizens United* declared that corporations could use general treasury funds for express advocacy, any impact on expenditure amounts is relevant. See *Citizens United v. FEC*, 130 S. Ct. 876 (2010). Express advocacy pertains to those "communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Buckley v. Valeo*, 424 U.S. 1, 44 & 44 n.52 (1976) (explaining that the "magic words" of express advocacy include "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," or "reject").

72. *Buckley*, 424 U.S. at 50–51. The Court did, however, uphold many of FECA's provisions, including the limits on individual contributions to campaigns, the disclosure and reporting requirements, and the public financing of presidential elections. *Id.* at 26, 66–68, 108.

73. *Id.* at 23. *Buckley* also decided a constitutional challenge to the 1974 amendment's limitation on direct contributions. See 2 U.S.C. § 441a (2006). The Court upheld the constitutionality of these limitations. *Buckley*, 424 U.S. at 27, 29 (holding that "the weighty interests served by" preventing corruption and "quid pro quo" agreements "are sufficient to justify the limited effect upon First Amendment freedoms caused by" the ceilings on direct contributions). As applied to corporations, this ruling did not drastically affect their freedom of political speech because these organizations had been prohibited from making direct contributions to candidates since 1907. See Tillman Act of 1907, Pub. L. No. 59-36, 34 Stat. 864.

ment on the freedom of speech.⁷⁴ To get to this point, the Court clarified that spending money on political activity is speech, not conduct, and thus protected by the First Amendment.⁷⁵ Even though *Buckley* challenged the limits on individuals, and not corporations or unions, this distinction laid the foundation for the Court's decision in *Citizens United*.⁷⁶

Long before *Citizens United*, the Supreme Court relied on the idea that money is political speech in order to permit some types of corporate political activity. In the 1970's, several banks and corporations, located in Massachusetts challenged the constitutionality of a state law that prohibited corporations from making any expenditures "for the purpose of . . . influencing or affecting the vote on any question submitted to the voters."⁷⁷ The corporations wanted to spend money in opposition to a state referendum.⁷⁸ The Supreme Court struck down the state's expenditure prohibitions declaring that "[t]he speech proposed by appellants is at the heart of the First Amendment's protection."⁷⁹ To get to this decision, the Court framed the issue as a matter of "whether the corporate identity of the speaker deprives this proposed speech of what otherwise would be its clear entitlement to protection."⁸⁰ The Court rejected the proposition "that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation."⁸¹

Bellotti also rejected a primary argument relied on by proponents of restricting corporate political activity. Massachusetts

74. *Buckley*, 424 U.S. at 58–59 (declaring the limits an infringement on the ability to "engage in protected political expression," which are "restrictions that the First Amendment cannot tolerate").

75. *Id.* at 16–19 ("A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech."). *Id.* at 19.

76. *See infra* Part III.B.

77. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 768 (1978) (quoting MASS. GEN. LAWS ANN. ch. 55, § 8 (West Supp. 1977) (amended 2010)).

78. *Id.* at 769.

79. *Id.* at 776.

80. *Id.* at 778.

81. *Id.* at 784.

argued that the state law served a legitimate governmental interest in protecting corporate shareholders from having corporate resources spent “in furtherance of views with which some shareholders may disagree.”⁸² The Court rejected this argument as being both underinclusive and overinclusive.⁸³ It was underinclusive because corporations, while not being able to spend money on referendums, may spend money to support or defeat legislation through various lobbying activities.⁸⁴ It was overinclusive because it prohibited “corporation[s] from supporting or opposing a referendum proposal even if its shareholders unanimously authorized the contribution or expenditure.”⁸⁵

Buckley’s and *Bellotti’s* prohibitions on speaker-based restrictions came into question after the Supreme Court further restricted corporate political spending. A decade after these two cases, in *Austin v. Michigan Chamber of Commerce*, the Court upheld a Michigan state law that prohibited corporate independent expenditures.⁸⁶ The Court identified antidistortion as a new governmental interest for why the state could restrict this type of political speech.⁸⁷ The Court defined antidistortion as Michigan’s interest in preventing “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.”⁸⁸ The Court found that this interest was “a sufficiently compelling rationale to support its restriction on independent expenditures by corporations.”⁸⁹

82. *Id.* at 792–93.

83. *Id.* at 793–95.

84. *Id.* at 793.

85. *Id.* at 794.

86. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 656 (1990) (holding that nonprofit corporation Michigan Chamber of Commerce could not use general treasury funds for a newspaper ad supporting a candidate for state office), *overruled by* *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

87. *Id.* at 658–60. The Court accepted this antidistortion argument on the suggestion that it prevents corruption. *Id.* at 659–60. The Court commented that “the corrosive and distorting effects of immense aggregations of wealth” are “a different type of corruption in the political arena” than the typical quid pro quo agreement. *Id.* In contrast, where *Buckley* permitted the government to limit political speech, on direct contributions, the Court explicitly cited the corruption of quid pro quo agreements as a sufficient justification for the limitations. *Buckley v. Valeo*, 424 U.S. 1, 24–29 (1976); *see also supra* note 53.

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

89. *Id.*

Despite *Buckley* and *Bellotti* rejecting the anti-corruption and shareholder protection arguments,⁹⁰ after *Austin*, the Court seemed to say that the federal and state governments may still restrict corporate political speech, so long as those governments rely on the antidistortion argument. Other than to suggest that there might be a link to corruption,⁹¹ the *Austin* Court did not clarify why antidistortion is a compelling interest, but anticorruption and shareholder protection are not. This discrepancy between the *Buckley* and *Austin* lines of precedent and the uncertainty over what types of corporate political activity is permitted set the conditions for the *Citizens United* challenge.

III. CITIZENS UNITED: THE ROBERTS COURT'S DEREGULATION OF CORPORATE CAMPAIGN FINANCE

A. *What the Court Had to Decide*

The *Citizens United* controversy over corporate political speech actually began as a nonprofit's preemptory action against potential civil and criminal penalties.⁹² Citizens United is a nonprofit that "[t]hrough a combination of education, advocacy, and grass roots organization . . . seeks to reassert the traditional American values of limited government, freedom of enterprise, strong families, and national sovereignty and security."⁹³ Prior to the Democratic Party's 2008 presidential primary elections, Citizens United sought to distribute *Hillary: The Movie* via video-on-demand.⁹⁴ The movie contained interviews about Senator Hillary Clinton, which the Court described as "quite critical of Senator Clinton"⁹⁵ and as "an appeal to vote against Senator Clinton."⁹⁶ To advertise the movie on broadcast and cable television, the organization produced two ten-second ads and one thirty-second ad.⁹⁷ Citizens United funded the documentary, its advertisements, and the organization's general operations with donations.⁹⁸ Most of the donations came from individuals, but the organization also accepted donations from for-profit corporations.⁹⁹

90. See *supra* notes 71–85 and accompanying text.

91. See *Austin*, 494 U.S. at 660.

92. *Citizens United v. FEC*, 130 S. Ct. 876, 888 (2010).

93. *Who We Are*, CITIZENS UNITED, <http://www.citizensunited.org/who-we-are.aspx> (last visited Oct. 3, 2011).

94. *Citizens United*, 130 S. Ct. at 887.

95. *Id.*

96. *Id.* at 890.

97. *Id.* at 914.

98. *Id.* at 887.

99. *Id.*

Citizens United brought a declaratory and injunctive action against the FEC because the group feared that its movie and its ads would violate FECA's § 441b.¹⁰⁰ Section 441b prohibits any corporation or union "from using general treasury funds to make direct contributions to candidates or independent expenditures that expressly advocate the election or defeat of a candidate, through any form of media, in connection with certain qualified federal elections."¹⁰¹ Originally, FECA only prohibited express advocacy, but the Bipartisan Campaign Act of 2002 ("BCRA")¹⁰² amended § 441b to include a prohibition on any "electioneering communication" as well.¹⁰³ Electioneering communication is "'any broadcast, cable or satellite communication' that 'refers to a clearly identified candidate for Federal office' and is made within 30 days of a primary or 60 days of a general election."¹⁰⁴ The FEC has further defined electioneering communications as those that are "publicly distributed."¹⁰⁵ If the individual is a candidate for president, then "publicly distributed" means any communication that "[c]an be received by 50,000 or more persons in a State where a primary election . . . is being held within thirty days."¹⁰⁶

If Citizens United violated § 441b's "ban on corporate-funded independent expenditures," the organization would be subject to civil and criminal penalties established by FECA's § 437g.¹⁰⁷ By bringing the declaratory and injunctive action against the FEC, Citizens United argued that § 441b is unconstitutional as applied to the movie.¹⁰⁸ Relying on Supreme Court precedent, the district court held that § 441b was constitutional both facially and as applied to the movie.¹⁰⁹ Despite the district

100. *Id.* at 888.

101. *Id.* at 887 (citing 2 U.S.C. § 441b (2000) (amended 2002)).

102. Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of Titles 2, 18, 28, 36, and 47).

103. *Citizens United*, 130 S. Ct. at 887; *see also* 2 U.S.C. § 441b(b)(2) (2006), *invalidated by* *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

104. *Citizens United*, 130 S. Ct. at 887 (quoting 2 U.S.C. § 434(f)(3)(A) (2006)).

105. *Id.* at 887.

106. *Citizens United*, 130 S. Ct. at 887 (quoting 11 C.F.R. § 100.29(b)(3)(ii) (2011)).

107. *Citizens United*, 130 S. Ct. at 888; *see also* 2 U.S.C. § 437g (2006).

108. *Citizens United*, 130 S. Ct. at 888. Citizens United also argued that BCRA's disclaimer and disclosure requirements for independent expenditures are unconstitutional as applied to the movie and the ads. *Id.* Since this Note is only examining to what extent corporations may participate in U.S. elections, this secondary argument will not be explored or discussed.

109. *Id.*; *see* *McConnell v. FEC*, 540 U.S. 93 (2003), *overruled by* *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

court's reliance on *McConnell v. FEC*, the Supreme Court overruled *McConnell*'s holding, on both constitutional claims,¹¹⁰ and in the process changed campaign finance rules for corporations.

Before explaining why the ban on corporate independent expenditures is unconstitutional, the Court detailed several reasons why it had to decide this issue. The Court first clarified why, for technical reasons, the movie fell within the definitions of § 441b and thus could not be decided on narrower grounds.¹¹¹ The Court held that the movie did qualify as an "electioneering communication," under 2 U.S.C. § 434(f)(3)(a)(i)'s definition.¹¹² The Court considered the movie to be express advocacy.¹¹³ The Court did not think an exception should be created either for communication released via video-on-demand¹¹⁴ or for "nonprofit corporate political speech funded overwhelmingly by individuals."¹¹⁵

The Court also explained why, for freedom of speech purposes, it had to accept the facial challenge to § 441b.¹¹⁶ "Section 441b is a ban on corporate speech notwithstanding the fact that a PAC created by a corporation can still speak."¹¹⁷ The Court asserted that corporations do have First Amendment protection. It first made this assertion by relying on a line of Supreme Court cases.¹¹⁸ Next, the Court explained how "[t]his protection has been extended by explicit holdings to the context of political speech."¹¹⁹ In sum, "the Court has thus rejected the argument

110. *Citizens United*, 130 S. Ct. at 886.

111. *Id.* at 888–92.

112. *Id.* at 888–89 (explaining that since *Citizens United* wanted to distribute the movie using a cable video-on-demand system with 34.5 million subscribers, the movie could be received by 50,000 people; therefore, the requirements of 11 C.F.R. § 100.29(b)(3)(ii) are met).

113. *Id.* at 889–90 ("[T]he film would be understood by most viewers as an extended criticism of Senator Clinton's character and her fitness for the office of the Presidency. . . . [T]here is no reasonable interpretation of *Hillary* other than as an appeal to vote against Senator Clinton.").

114. *Id.* at 890–91 (explaining that the Court should not get into deciding "which means of communications are to be preferred for the particular type of message and speaker").

115. *Id.* at 891–92 (reasoning that even with a case-by-case analysis, some political speech would be chilled).

116. *Id.* at 892–896 ("[T]he Court cannot resolve this case on a narrower ground without chilling political speech.").

117. *Id.* at 897–98 (describing many of the regulations that PACs must abide by in order to engage in political activity).

118. *Id.* at 899–900. Some of those cases include *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); and *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975).

119. *Citizens United*, 130 S. Ct. at 900 (citing *NAACP v. Button*, 371 U.S. 415, 428–29 (1963) ("We hold that the activities of the NAACP . . . are modes of

that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not ‘natural persons.’”¹²⁰ Under § 441b, corporations had been treated differently. The Government argued that, even if the First Amendment fully protected the political speech of corporations, three compelling interests permitted the prohibition on corporate independent expenditures: (1) antidistortion; (2) anticorruption; and, (3) shareholder protection. In rehashing and reconciling the divide between *Buckley* and *Austin*, the Court addressed each of these three arguments.

B. *What the Court Decided*

First, the Court dismissed the Government’s reliance on the *Austin* antidistortion interest from an idealistic, freedom of speech perspective.¹²¹ At the outset of this reasoning, the Court noted that “[p]olitical speech is ‘indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.’”¹²² Since political speech holds such stature, the Court explained that the Government may not discriminate against speakers based on the resources enabling them to speak.¹²³ The Court claimed that *Austin* perpetuated such discrimination, by focusing on corporations, and in the process, interfered “with the ‘open marketplace’ of ideas protected by the First Amendment.”¹²⁴

The Court reasoned that the antidistortion argument had problems from a practical perspective as well. Focusing on media corporations, the Court argued that “under the Government’s [antidistortion] reasoning, wealthy media corporations could have their voices diminished to put them on par with other media entities,” and this “would produce the dangerous, and unacceptable, consequence that Congress could ban political

expression and association protected by the First and Fourteenth Amendments . . .”).

120. *Id.* (quoting *Bellotti*, 435 U.S. at 776).

121. *Id.* at 904–08.

122. *Id.* at 904 (quoting *Bellotti*, 435 U.S. at 777) (The inherent “worth of the speech ‘does not depend upon the identity of its source, whether corporation, association, union, or individual.’”). *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976)).

123. *Id.* (quoting *Buckley*, 424 U.S. at 48) (“*Buckley* rejected the premise that the Government has an interest ‘in equalizing the relative ability of individuals and groups to influence the outcome of elections.’”). *Id.*

124. *Id.* at 906 (quoting *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008)).

speech of media corporations.”¹²⁵ Furthermore, a ban on corporate independent expenditures would most drastically affect small businesses and associations. “[W]ealthy corporations could still lobby elected officials . . . [a]nd wealthy individuals and unincorporated associations can spend unlimited amounts on independent expenditures.”¹²⁶ The Court made it clear that the *Austin* antidistortion argument fails, on both an idealistic and a practical level.

Although the Government pushed the antidistortion principle as its primary argument, it also relied on the *Buckley* anticorruption argument. Again, the Court dismissed the Government’s argument for idealistic and practical reasons. The *Buckley* Court did not think that the anticorruption argument was strong enough to justify an independent expenditure ban or a limit on individuals.¹²⁷ Following *Buckley*’s lead, the *Citizens United* Court concluded that “independent expenditures, including those made by corporations, do not give rise to corruption or the appearance.”¹²⁸ To support its position, the Court noted that quid pro quo agreements are covered by federal bribery laws.¹²⁹ Additionally, the record in *McConnell* was “over 100,000 pages”¹³⁰ and had no “direct examples of votes being exchanged for . . . expenditures.”¹³¹ Thus, the outright ban on corporate independent expenditures realistically was not needed to prevent quid pro quo agreements.

The Court also sought to dismiss the anticorruption argument from an idealistic perspective. In balancing the value of free speech against the governmental interest in preventing corruption, the Court noted that “[l]imits on independent expenditures, such as § 441b, have a chilling effect extending well beyond the Government’s interest in preventing *quid pro quo* corruption.”¹³² Even if independent expenditures lead to “influence over or access to elected officials,” this does not mean that elected “officials are corrupt.”¹³³ Influence and access are inevi-

125. *Id.* at 905–06 (“The law’s exception for media corporations is, on its own terms, all but an admission of the invalidity of the antidistortion rationale.”)

126. *Id.* at 908.

127. *See supra* note 72 and accompanying text.

128. *Citizens United*, 130 S. Ct. at 909.

129. *Id.* at 908; 18 U.S.C. § 201.

130. *Citizens United*, 130 S. Ct. at 910.

131. *McConnell v. FEC*, 251 F. Supp. 2d 176, 209 (D.D.C. 2003), *rev’d*, 540 U.S. 93, *overruled by Citizens United*, 130 S. Ct. 876 (2010) (opinion of Kollar-Kotelly, J.).

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

133. *Id.* at 910.

table in a representative democracy.¹³⁴ “The appearance of influence or access,” the Court explained, “will not cause the electorate to lose faith in our democracy.”¹³⁵ The Court believed that it properly balances the electorate’s right to political speech and protection from government corruption.

While emphasizing the idealistic freedom of speech concerns as a means to reject the Government’s primary and secondary arguments, the Court dismissed the Government’s last concern solely for practical reasons. The Government’s final argument was that dissenting shareholders should be protected “from being compelled to fund corporate political speech.”¹³⁶ The Court concisely pointed out how this argument, like the *Austin* antidistortion principle, “would allow the Government to ban the political speech even of media corporations.”¹³⁷ Furthermore, the Court reasoned that if protecting shareholder interests was Congress’s concern, then the statute was both underinclusive and overinclusive.¹³⁸ It was underinclusive because it only blocked certain media within thirty days of a primary and sixty days of a general election.¹³⁹ It was overinclusive “because it covers all corporations, including nonprofit corporations and for-profit corporations with only single shareholders.”¹⁴⁰ From a practical perspective, the Court did not believe the statute advanced the Government’s interests.

Although the Court does not touch upon idealistic freedom of speech concerns when rebutting the Government’s shareholder protection argument, it is important to note how much emphasis the Court placed on these concerns throughout the opinion. The Court’s language is straightforward and unambiguous when explaining that the opinion overrules *Austin* and “the part of *McConnell* that upheld BCRA § 203’s extension of § 441b’s restrictions on corporate independent expenditures.”¹⁴¹ Yet, in order to get to that point, the Court used quite romantic language to explain the importance of the freedom of speech in democracies¹⁴² and the inherent dangers of restricting political

134. *McConnell*, 251 F. Supp. 2d at 297.

135. *Citizens United*, 130 S. Ct. at 910.

136. *Id.* at 911.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 913.

142. *Id.* at 899 (“By contrast, it is inherent in the nature of the political process that voters must be free to obtain information from diverse sources in order to determine how to cast their votes.”); *id.* at 906 (quoting *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008)) (referring to political

speech.¹⁴³ Some commentators might argue that such flowery language is characteristic of any opinion written by Associate Justice Anthony Kennedy.¹⁴⁴ However, the lofty rhetoric should not cause one to disregard the overarching significance of the opinion. The Court sends a clear message that, regardless of whether the speaker is an individual, a corporation, or a union, the First Amendment guarantees protection of political speech, and any restrictions on this speech will be subject to strict scrutiny.

C. *The Practical Implications*

Citizens United did not, despite President Obama's State of the Union claims, overturn one hundred years of precedent.¹⁴⁵

speech as the "open marketplace' of ideas"); *id.* at 917 (quoting *McConnell v. FEC*, 540 U.S. 93, 341 (2003), *overruled by Citizens United*, 130 S. Ct. 976 (2010)) ("The First Amendment underwrites the freedom to experiment and to create in the realm of thought and speech. Citizens must be free to use new forms, and new forums, for the expression of ideas. The civic discourse belongs to the people, and the Government may not prescribe the means used to conduct it."); *see also id.* at 898 ("Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people."); *id.* ("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.").

143. *Id.* at 899 ("By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice."); *id.* ("The Government may not . . . deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration."); *id.* at 917 (asserting that a blackout period for independent expenditures forces speech to "be suppressed in the realm where its necessity is most evident: in the public dialogue preceding a real election"); *see also id.* at 882, 892, 895 (holding that any restrictions or rules for regulating political speech create a "chilling" effect).

144. *See, e.g.*, Clifford R. Goldstein, *Justice Kennedy's "Notorious Mystery Passage,"* LIBERTY (July–Aug. 1997), <http://www.libertymagazine.org/index.php?id=1585>; Garrett Epps & Dahlia Lithwick, *The Sphinx of Sacramento: Will the Real Anthony Kennedy Please Stand Up?*, SLATE (Apr. 27, 2007, 6:01 PM), <http://www.slate.com/id/2165133/>; Rich Lowry, *America's Worst Justice*, NAT'L REV. ONLINE (Jul. 1, 2008, 12:00 AM), <http://www.nationalreview.com/articles/224915/americas-worst-justice/rich-lowry>; Eric A. Posner, *The Decider*, NEW REPUBLIC (Jan. 11, 2010, 12:04 AM), <http://www.tnr.com/book/review/the-decider> (reviewing FRANK J. COLUCCI, JUSTICE KENNEDY'S JURISPRUDENCE: THE FULL AND NECESSARY MEANING OF LIBERTY (2009)). *See generally* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992) ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.").

145. Several courts have recognized that *Citizens United* did not overturn the Tillman Act's ban on direct corporate contributions. *See Thalheimer v. City of San Diego*, 645 F.3d 1109, 1125–26 (9th Cir. 2011) ("[T]he *Citizens United* Court expressly did not extend its holding to the contribution context."); Minn.

Although 1907's Tillman Act prohibited corporations and unions from making direct contributions to candidates¹⁴⁶ and 1947's Taft-Hartley Act outlawed independent expenditures from general treasury funds,¹⁴⁷ enforcement of campaign finance laws remained largely ineffective for decades.¹⁴⁸ As a result, in 1971 FECA revamped the entire system and, in the process created an exemption for corporations and unions to use general treasury funds for "the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes."¹⁴⁹ These "separate segregated funds," also known as Political Action Committees ("PACs"), can collect "contributions from a limited class of individuals and [can use] this money to make contributions and expenditures to influence federal elections."¹⁵⁰ Through these PACs, corporations and unions have had vehicles to voice political speech, and even express advocacy.¹⁵¹

By overruling *Austin* and part of *McConnell*, the Court's decision altered the Taft-Hartley restrictions but not the Tillman Act's explicit ban on direct corporate-to-candidate contributions. Corporations are still not allowed to donate directly to candidates, whether in cash or in-kind.¹⁵² What has changed is that corporations and unions may now use general treasury funds to

Citizens Concerned for Life v. Swanson, 640 F.3d 304, 319 (8th Cir. 2011), ("Minnesota can generally ban all direct corporate contributions"), *reh'g en banc granted, opinion vacated* (July 12, 2011). *But see* *United States v. Danielczyk*, No. 1:11cr85 (JCC), 2011 WL 2268063, at *6 (E.D. Va. June 7, 2011) ("2 U.S.C. § 441b(a)'s flat ban on direct corporate contributions to political campaigns is unconstitutional as applied to the circumstances of *this case*, as opposed to being unconstitutional as applied to all corporate donations.").

146. *See supra* note 36 and accompanying text.

147. *See supra* note 54; *see also* 11 C.F.R. § 114.2 (2011).

148. *See supra* note 61 and accompanying text.

149. 2 U.S.C. § 441b(b)(2); *see also* 11 C.F.R. § 100.5(b) (2011).

150. *Separate Segregated Funds and Nonconnected PACs, supra* note 67. The limited class for corporations is defined as stockholders, executive personnel, administrative personnel and family members. 11 C.F.R. § 114.5(g)(1) (2011). For unions, the limited class is union members, executive personnel, administrative personnel, and family members. 11 C.F.R. § 114.5(g)(2) (2011). In contrast to Separate Segregated Funds, Nonconnected PACs can solicit the general public, and they must use these contributions to establish and support the operations of the PAC. *Separate Segregated Funds and Nonconnected PACs, supra* note 67, at 1–2.

151. *See generally* Press Release, Fed. Election Comm'n, PAC Activity Remains Steady in 2009 (Apr. 6, 2010), *available at* <http://www.fec.gov/press/press2010/20100406PAC.shtml> (detailing that 4,618 PACs raised \$555.7 million, spent \$464.6 million, and contributed \$174.4 million to candidates in 2009).

152. *See* *Citizens United v. FEC*, 130 S. Ct. 876, 887 (2010).

expressly advocate for a candidate's election or defeat.¹⁵³ They also may now use such funds to pay for "electioneering communications," which had been prohibited by BCRA § 203.¹⁵⁴

The Court's rejection of *Austin* left "no basis for allowing the Government to limit corporate independent expenditures."¹⁵⁵ Without any limitations on independent expenditures, corporations no longer have to rely on PACs to engage in the political process and, maybe most significantly, may spend as much money as they can afford. From the Court's perspective, not having to rely on a PAC should promote political speech since PACs "[do] not allow corporations to speak," are "burdensome alternatives," and are "expensive to administer and subject to extensive regulations."¹⁵⁶ The Court's declaration that § 441b is unconstitutional meant that *Citizens United* could make *Hillary: The Movie* available via video-on-demand without being subject to § 437's civil and criminal penalties.

D. *The Congressional Reaction*

Many members of Congress reacted swiftly to the *Citizens United* decision. Following the President's tone at the State of the Union, members in the House and Senate introduced several bills to correct the decision's many misperceptions.¹⁵⁷ Congressional members also held hearings to investigate how the legislature could respond to the Court's decision.¹⁵⁸ Among Congress's many concerns about the decision, several members

153. *Id.* at 913.

154. *See id.*

155. *Id.*

156. *Id.* at 897.

157. Many bills, proposed in the days after the decision, focused on the misperception that *Citizens United* now permits foreign corporations to engage in the U.S. political process. *See* Prevent Foreign Influence in our Elections Act, H.R. 4540, 111th Cong. (2010); American Elections Act of 2010, S. 2959, 111th Cong. (2010); Save Our Democracy From Foreign Influence Act of 2010, H.R. 4523, 111th Cong. (2010); Prohibiting Foreign Influence in American Elections Act, H.R. 4522, 111th Cong. (2010); Freedom From Foreign-Based Manipulation in American Elections Act of 2010, H.R. 4517, 111th Cong. (2010); America is for Americans Act, H.R. 4510, 111th Cong. (2010); Prohibiting Foreign Influence in American Elections Act, S. 2954, 111th Cong. (2010).

158. *See First Amendment and Campaign Finance Reform After Citizens United: Hearing Before the Subcomm. on the Constitution, Civil Rights, & Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. (2010); *Corporate Governance After Citizens United Hearings*, *supra* note 1; "We the People?" *Corporate Spending in American Elections After Citizens United: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (2010); *Corporate America vs. the Voter: Examining the Supreme Court's Decision to Allow Unlimited Corporate Spending in Elections: Hearing Before the S. Comm. on Rules & Admin.*, 111th Cong. (2010).

focused on the corporate governance issues.¹⁵⁹ These efforts have resulted in the Shareholder Protection Act of 2011.¹⁶⁰ The Act proposed amending the Securities and Exchange Act of 1934¹⁶¹ to create several regulatory restrictions on corporate political activity. The Shareholder Protection Act would require corporations to obtain shareholder approval of corporate political activity, disclose the money spent on political activities, and acquire board of director support before spending significant sums.¹⁶² As will be discussed, there are problems with each of these proposals that make the Act an unnecessary regulation. Fortunately, the Act has not become law.¹⁶³ Unfortunately, congressional dissatisfaction with *Citizens United* did not die with the Shareholder Protection Act. There may still be greater governmental restrictions on corporate political speech.¹⁶⁴ Part III will explain why these regulations create extra regulatory burdens for corporations.

IV. THE PROBLEMS WITH CONGRESS'S ATTEMPT TO REGULATE CAMPAIGN FINANCE POST-CITIZENS UNITED

A. Campaign Finance Post-Citizens United

Citizens United did not “open the floodgates” for corporate spending in political campaigns.¹⁶⁵ It simply highlighted how much money had been gushing into the system for years. As discussed, previous events in the last century also focused the nation's attention on corporate political activity.¹⁶⁶ Despite the concerns raised by these events and the political reactions, corporate money continued to flow into political campaigns.¹⁶⁷ The

159. See *Corporate Governance After Citizens United Hearings*, *supra* note 1.

160. H.R. 2517, 112th Cong. (2011).

161. *Id.* sec. 3, § 14C.

162. H.R. 2517

163. The Act has been introduced and referred to the House Committee on Financial Services. The Committee, however, has not taken any action on the Act. See GovTrack, <http://www.govtrack.us/congress/bill.xpd?bill=h112-2517> (last visited Sept. 6, 2011).

164. See Democracy Is Strengthened by Casting Light on Spending in Elections Act (DISCLOSE Act), H.R. 5175, 111th Cong. (2010); S. 3628, 111th Cong. (2010). In the last Congress, the House passed the DISCLOSE Act, but the Senate failed to bring it to a vote. See GovTrack, <http://www.govtrack.us/congress/bill.xpd?bill=h111-5175> (last visited Oct. 3, 2011). It is unlikely to be introduced in this new Congress. See Richard L. Hasen, *Kirk Offers Hope vs. Secret Donors*, POLITICO (Nov. 5, 2010, 4:45 AM), <http://www.politico.com/news/stories/1110/44718.html>.

165. 2010 State of the Union, *supra* note 2.

166. See *supra* Part I. A–B.

167. *Id.*

lack of proper enforcement mechanisms in campaign finance legislation contributed to this increasing flow of corporate money.¹⁶⁸ Yet, even after Congress created the FEC to enforce campaign finance laws,¹⁶⁹ corporations still spent heavily on political activity.¹⁷⁰ Although *Citizens United* did nothing to reverse this trend, and it may have even contributed to an increase in corporate political spending, the reality is that previous laws had also not prevented significant corporate political spending.¹⁷¹ Now may be the time to recognize that, notwithstanding much wishful hoping, our political system will never be entirely free from corporate money.

At least for the foreseeable future, the main reason why corporate money will continue to flow into politics is because the Roberts Court is unlikely to uphold restrictions on First Amendment-protected speech. Before John G. Roberts, Jr. became Chief Justice in 2005, the Supreme Court recognized that money spent on political activity may be considered speech for First Amendment purposes.¹⁷² Since 2005, the Court has struck down several attempts to regulate money spent on political activity, citing the importance of speech in the American democratic process.¹⁷³ The Court's language in *Citizens United* suggests that it is

168. *Id.*

169. *See supra* note 65 and accompanying text.

170. For the 1987–88 political cycle, which included the 1988 presidential election, the FEC reported that 2008 corporate PACs had contributed over \$56 million to candidates. After the 1999–2000 election cycle, which included the 2000 presidential election, the FEC reported that 1725 corporate PACs contributed over \$91 million to candidates. Press Release, Fed. Election Comm'n, Historical Overview of PAC Financial Activity (May 31, 2001), available at <http://www.fec.gov/press/press2001/053101pacfund/pachis00.htm>.

171. *See* T.W. Farnam, 72 *Super PACs Spent \$83.7 Million On Election*, WASH. POST, Dec. 4, 2010, at A3 (reporting that corporations, unions, and associations took advantage of loosened campaign finance regulations); *see also* Press Release, The Campaign Fin. Inst., Non-Party Spending Doubled in 2010 But Did Not Dictate The Results (Nov. 5, 2010), http://www.cfinst.org/Press/PReleases/10-11-05/Non-Party_Spending_Doubled_But_Did_Not_Dictate_Results.aspx (estimating that non-party groups spent \$280 million, an increase of 130% from 2008, on independent expenditures and electioneering communications).

172. *See supra* note 75 and accompanying text.

173. In June of the Court's October 2010 term, Chief Justice Roberts authored the opinion that struck down Arizona's public financing system for political campaigns. *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011). The Arizona Citizens Clean Elections Act provided public funds for the primary and general election campaigns of candidates for state office. *Id.* at 2813. The Act also matched, dollar-for-dollar and up to a certain extent, any amount in which a privately-funded candidate or independent group exceeded the initial allotment of public funds. *Id.* at 2814. By explain-

not likely to accept restrictions on corporate political speech any time soon.¹⁷⁴ Combine this judicial reluctance to regulate campaign finance with an electorate concerned about corporate political activity,¹⁷⁵ and it creates an interesting predicament for corporations.

ing how this negatively impacted any candidate wishing to raise and spend as much money as possible, the Court struck down Arizona's law as inhibiting "robust and wide-open political debate without sufficient justification." *Id.* at 2829.

In *Davis v. FEC*, 554 U.S. 724 (2008), the Court struck down the Bipartisan Campaign Reform Act of 2002 § 319(a)–(b). These sections required any self-financing candidate for public office to declare their intent to spend more than \$350,000 of their own money. If a candidate declared this intent, then their opponent would be permitted to receive contributions from individuals that exceeded the normal limits. The Court struck down these sections as an unconstitutional burden on an individual's First Amendment rights by forcing the candidate to choose between the "right to engage in unfettered political speech and subjection to discriminatory fundraising limitations." 554 U.S. at 739.

A year earlier, in *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007), the Court weakened the Bipartisan Campaign Reform Act sections that would later be declared unconstitutional in *Citizens United*. BCRA's § 203 prohibited any "electioneering communication" from being aired thirty days before a primary and sixty days before a general election. Whereas *Citizens United* dealt with the use of general treasury funds for express advocacy, *Wisconsin Right to Life* ("WRTL") dealt with general treasury funds for issue advocacy. Distinguishing issue advocacy from express advocacy, the Court struck down BCRA § 203 as applied to WRTL's issue ads. Chief Justice Roberts used noticeably strong language to reject the idea that issue advocacy is equivalent to campaign contributions and thus, should be subjected to regulation. 551 U.S. at 478 ("Enough is enough.").

In Chief Justice Robert's first full year, the Court struck down both expenditure limits and, in a rare occasion, contribution limits. *Randall v. Sorrell*, 548 U.S. 230 (2006). Vermont had enacted a campaign finance system that limited the amounts candidates could spend on their campaigns. Finding no reason to overrule the prohibition on personal expenditure limits set by *Buckley v. Valeo*, 424 U.S. 1 (1976), and citing the series of cases that have since upheld *Buckley*, the Court struck down Vermont's expenditures limits. *Randall*, 548 U.S. at 240–46. Vermont's system had also set a very low limit for the amount that could be donated to candidate's campaigns. The Court struck down these limits as well, finding that the limits were so low that they did not justify the state's interest in preventing corruption. *Id.* at 246–53.

See generally Robert Barnes, *In Wis., Feingold Feels Impact of Court Ruling*, WASH. POST, Nov. 1, 2010, at A8; Adam Liptak, *The Most Conservative Court in Decades*, N.Y. TIMES, July 25, 2010, at A1.

174. See *supra* note 156 and accompanying text.

175. According to a Washington Post-ABC News poll, "[e]ight in 10 respondents said they opposed a Supreme Court ruling last month that allows unfettered political spending by corporations, with 65 percent 'strongly' opposed." Eggen, *supra* note 11.

B. *The Corporate Conundrum*

For-profit corporations do not exist primarily to influence public policy. Traditionally, the recognized legal purpose of such corporations is to maximize the investments of its shareholders.¹⁷⁶ The law is clear that management's primary goal should be to increase profits.¹⁷⁷ The law is less clear, however, on what measures management should use to achieve these goals. This is particularly true as the corporate structure has evolved and shareholder ownership has become more dispersed.¹⁷⁸ There is a clear divide between shareholders' ownership of the corporation and management's control of the corporation, both legally and as a practical matter for many corporations, including large corporations.¹⁷⁹ As a result of this divide, courts have been very deferential to management when reviewing mismanagement claims.¹⁸⁰

Judicial deference to management decisions applies even when the connection to corporate profits is not completely clear. For example, courts have accepted the idea that corporations may donate to charitable organizations, as long as there is a rational relationship to shareholders' interests.¹⁸¹ State laws have reflected this change.¹⁸² That "rational relationship" most often comes down to the "goodwill" that corporations retain from the public for supporting philanthropic endeavors.¹⁸³ How

176. See *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919) ("A business corporation is organized and carried on primarily for the profit of the stockholders.").

177. *Id.*

178. See ADOLF A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 112–16 (special ed. 1991) (explaining how there is a separation between ownership and control in modern corporations).

179. *Id.*

180. Courts apply what is known as the "Business Judgment Rule." See *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993). The rule operates to "protect corporate officers and directors and the decisions they make," and not to have courts "second-guess these business judgments." *Id.* "To rebut the rule, a shareholder plaintiff assumes the burden of providing evidence that directors, in reaching their challenged decision, breached any one of the *triads* of their fiduciary duty—good faith, loyalty or due care." *Id.*

181. See *A.P. Smith Mfg. Co. v. Barlow*, 98 A.2d 581 (N.J. 1953) (permitting corporate donations to a university so long as donations were rationally related to benefit the corporation).

182. See DEL. CODE ANN. tit. 8, § 122(9) (2001) (permitting boards to "[m]ake donations for the public welfare or for charitable, scientific or educational purposes, and in time of war or other national emergency").

183. See Victor Brudney & Allen Ferrell, *Corporate Charitable Giving*, 69 U. CHI. L. REV. 1191, 1193 (2002) (describing corporate charitable donations as "'goodwill' gifts . . . that arguably will produce future intangible benefits from a favorable public image of the firm"). Other scholars have argued that corpora-

a corporation purchases that “goodwill” by deciding which charities to support is a management decision. Many scholars have argued that corporate charity has led to wasteful spending, plagued by executives’ conflicts-of-interests.¹⁸⁴ Regardless of management’s true intentions, as discussed, courts give great deference to executives’ decisions on corporate charity.¹⁸⁵

Unlike corporate charity, corporate political spending does have tangible benefits, and corporations therefore should be free to engage in political activity. Now that *Citizens United* has relaxed the regulatory burdens on corporate political activity, management has to decide whether to contribute corporate money for independent expenditures. There are two primary drawbacks to corporate political activity. First, corporations have different constituencies, including shareholders, executives, the board of directors, and consumers, who likely all have different political ideologies. Within those constituencies, there may also be a diverse array of political ideologies. It is easy to offend a particular constituent through political activity, which could result in a harmful backlash against the corporation.¹⁸⁶ Second, similar to the decision to spend corporate charitable donations, there are inherent conflicts-of-interest and ethical concerns regarding the decision to engage in political speech.¹⁸⁷

tions donate because they are motivated by altruism. See M. Todd Henderson & Anup Malani, *Corporate Philanthropy and the Market For Altruism*, 109 COLUM. L. REV. 571, 571–72 (2009). Whatever may be a corporation’s motivation to donate, it is still difficult to quantify how donations improve shareholders’ investments.

184. See Jayne W. Barnard, *Corporate Philanthropy, Executives’ Pet Charities, and the Agency Problem*, 41 N.Y.L. SCH. L. REV. 1147, 1149 (1997) (explaining how many CEOs use corporate donations to advance their own personal interests with “little, if any benefit, to the corporation”); Faith Stevelman Kahn, *Pandora’s Box: Managerial Discretion and the Problem of Corporate Philanthropy*, 44 UCLA L. REV. 579, 586 (1997) (“The absence of substantive regulation, in combination with the absence of a disclosure requirement, has meant that corporate senior executives have had a blank check to make corporate charitable contributions independent of both business objectives and shareholder preferences.”); see also Kahn v. Sullivan, 594 A.2d 48, 50–51 (Del. 1991) (upholding a shareholder settlement after a CEO had the company provide the funds for a museum that would display his personal art collection).

185. See *supra* note 180 and accompanying text.

186. See Emily Friedman, *Target, Best Buy Angers Gay Customers By Making Contribution to GOP Candidate*, ABC NEWS (July 28, 2010), <http://abcnews.go.com/Business/target-best-buy-fire-campaign-contributions-minnesota-candidate/story?id=11270194> (explaining that companies were boycotted over decisions to donate to a political group supporting the Republican Party’s Minnesota gubernatorial candidate).

187. See *supra* note 184 and accompanying text.

The potential benefits from corporate political activity and the potential consequences of not engaging in corporate political activity may outweigh any potential drawbacks. Moreover, the decision of whether corporate political activity is beneficial to the corporation and its shareholders should generally rest, as do most corporate decisions, with the corporation's management. To be clear, the express advocacy permitted by *Citizens United* is not much different from the issue advocacy that has been going on for years.¹⁸⁸ Whether a corporation is expressly advocating support or defeat of a candidate, condemning a candidate's policies through issue advocacy, or contributing to an organization that will engage in both express and issue advocacy, the results are often tangible. Elections provide the opportunity to debate potential public policy issues and regulations. Through political activity, corporations can promote those candidates whose public policy positions will have a positive impact on the corporation's business.¹⁸⁹ Alternatively, corporations that do not voice their political concerns could risk dealing with a government that is unaware of policies negatively impacting the corporation or, worse, openly hostile to a corporation's interests. The "other people's money" argument should not carry much weight when today's corporations have a clear divide between management and ownership,¹⁹⁰ courts give great deference to management's business decisions,¹⁹¹ and corporations might be hampered by potential governmental regulations.¹⁹²

188. Although not done by a corporation, one of the most egregious examples of issue advocacy occurred in a 1996 Montana congressional election. An advertisement described one of the candidates, Bill Yellowtail, as a convicted felon, who slapped his wife and failed to pay child support. The ad then encouraged viewers to call Yellowtail and tell him to support family values. While not expressly advocating Yellowtail's defeat, the ad was clear in its opposition to Yellowtail. See *McConnell v. FEC*, 540 U.S. 93, 194 n.78 (2003) *overruled* by *Citizens United v. FEC*, 130 S. Ct. 976 (2010).

189. See Peter A. Brown, *The Bigger Meaning: High Court Lets Companies Lobby Employees, Suppliers*, WALL ST. J.—CAPITAL J. (Feb. 3, 2010, 11:30 AM), <http://blogs.wsj.com/capitaljournal/2010/02/03/the-bigger-meaning-high-court-lets-companies-lobby-employees-suppliers/> (explaining how *Citizens United* permits corporations to lobby employees on how to vote).

190. See *supra* note 178 and accompanying text.

191. See *supra* note 180 and accompanying text.

192. See Winkler, *supra* note 21, at 873 (attributing original corporate campaign finance regulations to corporate executives who misappropriated shareholders' "money to purchase legislation benefiting the executives themselves").

C. *Why Disclosure and Approval Procedures are a Regulatory Overreaction*

In an era where an oil company caused an eco-disaster in the Gulf of Mexico,¹⁹³ car companies have been taken over by the federal government,¹⁹⁴ and Wall Street banks received a \$700 billion bailout,¹⁹⁵ it is not surprising that there is a clamoring for greater regulation of corporations. Congressional members and scholars, in particular, suggest an increase in federal oversight for corporations engaging in political activity in the wake of *Citizens United*.¹⁹⁶ The primary recommendations to improve oversight include increasing disclosure of corporate political activity,¹⁹⁷ requiring independent director approval for expenditures towards political activity, and insisting on shareholder approval before corporations engage in political activity.¹⁹⁸ The primary assumptions driving these recommendations are that corporate political activity is not an ordinary business decision, greater disclosure will alleviate any distortion concerns, and, thanks to *Citizens United*, corporations are now engaging in express advocacy.¹⁹⁹ As this section explains, there are problems with all of these recommendations, and the underlying assump-

193. See *Gulf of Mexico Oil Spill (2010)*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/subjects/o/oil_spills/gulf_of_mexico_2010/index.html (last updated Sept. 14, 2011).

194. See *Automotive Industry Crisis*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/subjects/c/credit_crisis/auto_industry/index.html (last updated May 25, 2011).

195. See *Economic Crisis and Market Upheavels*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/subjects/c/credit_crisis/index.html (last updated Oct. 3, 2011).

196. See *Corporate Governance After Citizens United Hearings*, *supra* note 1; see also Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83, 83–84 (2010); Carol R. Goforth, “A Corporation Has No Soul”—*Modern Corporations, Corporate Governance, and Involvement in the Political Process*, 47 Hous. L. REV. 617, 624 (2010); Elizabeth Pollman, *Citizens Not United: The Lack of Stockholder Voluntariness in Corporate Political Speech*, 119 YALE L.J. ONLINE 53, 53 (2009); Daniel Winik, Note, *Citizens Informed: Broader Disclosure and Disclaimer For Corporate Electoral Advocacy In the Wake of Citizens United*, 120 YALE L.J. 622, 622–24 (2010).

197. The disclosure at issue in these proposals deals only with disclosure of political activity by the for-profit corporations, such as in *Securities and Exchange Commission* (SEC) filings. It does not deal with disclosure in communications paid for by the corporation or disclosure by special-purpose or conduit organizations that receive corporate contributions. See *infra* note 207. These issues are beyond the scope of this Note.

198. See *supra* note 196.

199. *Id.*

tions, that make the calls for regulation another in the long line of ineffective overreactions to corporate political activity.²⁰⁰

Before discussing the practical problems with increased corporate governance, it is important to note the problems with the underlying assumptions driving the reform suggestions. Most advocates for reform argue that corporate political activity is not an "ordinary business decision," in which courts should give deference to management, since there is the potential for too great a divergence between shareholders' and management's interests.²⁰¹ This is a wrong assumption because politics, similar to research and development or marketing, can have a significant impact upon a corporation. Through politics, the American people can assess which candidates, and the public policies and regulations that they promote, will govern the country. Even if most shareholders are aware of political candidates, it would be difficult to suggest that most shareholders fully understand how a candidate's policies will impact the businesses in which those shareholders are invested.²⁰²

Additionally, as discussed with today's public corporations, shareholders invest in a company with the expectation that management will maximize their investment, and management has a fiduciary duty to act in the corporation's interests. Management is less likely to be conflicted about which political candidates may have the greatest impact on their business. Shareholders, as citizens, may have different priorities when electing candidates.²⁰³ Some may vote for a candidate because of that candidate's for-

200. One issue that this section will not discuss, mainly because it deserves more thorough analysis, is whether the SEC would be the most effective agency to regulate any disclosure requirements, particularly in comparison to the FEC. For a similar discussion, see Professor Mayer's article examining the merits of the FEC versus the IRS, in regards to regulating the tax-exempt 527 "political organizations." Lloyd Mayer, *The Much Maligned 527 and Institutional Choice*, 87 B.U. L. REV. 625 (2007).

201. See *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993), and text in *supra* note 180. .

202. See WILLIAM H. FLANIGAN & NANCY H. ZINGALE, *POLITICAL BEHAVIOR OF THE AMERICAN ELECTORATE* 180 (8th ed. 1994) (explaining how "in most elections many voters are unaware of the stands taken by candidates on issues").

203. Political scientists have spent considerable time studying the presence of "single-issue" voters. See FLANIGAN & ZINGALE, *supra* note 202, 179–86. These voters, "caring intensely about a particular issue, vote for whichever candidate is closest to their views on that issue, regardless of the candidate's party, personal characteristics, or positions on other issues." *Id.* at 179. "The classic example of single-issue voting in American politics was abolition, an issue of such intensity that it destroyed the Whig party, launched several new parties including the Republican Party, and was a major contributing factor to the Civil War." *Id.* at 180.

eign policy positions, while others may elect candidates based on social issues.²⁰⁴ Management, because of its fiduciary duties, will not be a “single-issue” voter.²⁰⁵ It will have to assess a candidate’s entire platform to determine whether that candidate will act in a manner that will help or hinder the corporation’s activities and bottom line. There is no particular reason to believe that management will be any more likely to disregard its fiduciary duties in this context than in the many other contexts where its decisions control.

Corporations also have been engaging in political activity for years without any suggestions that shareholders need to advise on these business decisions. Part II, *supra*, discussed some of the more egregious examples of corporate political activity, but even after the modern campaign finance reforms of the 1970’s, corporations have engaged in political activity. Corporations employ in-house and outside lobbyists to articulate how regulations might impact their business.²⁰⁶ Although corporate PACs use solicited donations to engage in express advocacy, corporations use general treasury funds to establish and run PACs. This includes hiring the staff that makes the decisions as to which candidates to support or oppose. Shareholders have never had any input on these activities. Finally, corporations have for many years funded political communications that fell short of express advocacy and, more recently, electioneering communication that still had the effect of influencing elections.

Corporate campaign finance reform advocates’ other assumptions are just as misleading. Reform advocates argue that increased regulation will curb the distortion that results from corporate political activity.²⁰⁷ It is true that increased regulation might curb some corporate political activity. It does nothing, however, to combat the distortion that can result from wealthy individuals, unions, and close corporations spending unlimited amounts of money to influence elections. Restricting corporate

204. *Id.* at 180.

205. *Id.*

206. In 2010, the U.S. Chamber of Commerce, an association of businesses, spent \$132,067,500 on lobbying activities—the highest amount in the country. The next three highest spenders for lobbying activities were all corporations: PG&E Corp. (\$45,460,000), General Electric (\$39,290,000), and FedEx (\$25,582,074). *Lobbying Spending Database*, CTR. FOR RESPONSIVE POLITICS: OPEN SECRETS.ORG, <http://www.opensecrets.org/lobby/top.php?showYear=2010&indexType=s> (last visited Oct. 3, 2011).

207. The Supreme Court dismissed the antidistortion argument, which the Government pushed in *Citizens United*, for both idealistic and practical freedom of speech reasons. See *supra* Part III.B–C.

political activity in this sense, without restricting other sources, might run afoul of the Court's constitutional concerns.²⁰⁸

Another faulty assumption is that reform advocates believe that corporations actually engaged in express advocacy after *Citizens United*. There is no evidence supporting this proposition. Corporations may have given to "special purpose entities," such as the U.S. Chamber of Commerce, who now can use those donations for express advocacy.²⁰⁹ Yet, before *Citizens United*, corporations had given to these organizations.²¹⁰ The special purpose entities may not have been able to use these donations for express advocacy in the past, but the donations did free up other money that could, in turn, be spent on express advocacy.²¹¹ The donations also could be used for communications that fell short of express advocacy, yet still influence elections. From one perspective, *Citizens United* simply removed the barriers to political

208. See *id.*

209. See RICHARD W. PAINTER, GETTING THE GOVERNMENT AMERICA DESERVES: HOW ETHICS REFORM CAN MAKE A DIFFERENCE, 236–39 (2009). Some scholars have also referred to these as "conduit organizations." See *Corporate Governance After Citizens United Hearings*, *supra* note 1, at 5 (statement of John C. Coffee, Jr., Adolph A. Berle Professor of Law, Columbia University Law School). There is currently considerable debate over how to regulate some of these "special purpose entities," particularly those that are registered as 501(c)(4) non-profit organizations. These organizations, such as Crossroads Grassroots Policy Strategies (GPS) on the right and Priorities USA Action on the left, are not required to disclose their donors. As a result, the concern is that *Citizens United* will inspire corporations to hide their political activity through these nonprofit organizations. The debate is focused on whether these nonprofit organizations should be required to disclose their donors, including corporations. This debate is beyond the scope of this Note. See Ciara Torres-Spelliscy, *Hiding Behind the Tax Code, the Dark Election of 2010 and Why Tax-Exempt Entities Should Be Subject to Robust Federal Campaign Finance Disclosure Laws*, 16 NEXUS: CHAP. J.L. & POL'Y 59 (2011) (explaining how "a large percentage of outside political spending in the federal midterms was masked through the use of non-profit organizations" and how this spending might be regulated); Cory G. Kalanick, Note, *Blowing Up the Pipes: The Use of (c)(4) to Dismantle Campaign Finance Reform*, 95 MINN. L. REV. 2254, 2255 (2011) (examining "the rise of § 501(c)(4) non-profit organizations as a modern tool for bypassing campaign finance regulation"); see also Michael Luo & Stephanie Strom, *Donor Names Remain Secret as Rules Shift*, N.Y. TIMES, Sep. 21, 2010, at A1 (describing the benefit of 501(c)(4) organizations not having to disclose donor's identities, in contrast to 527 political organization); Stephanie Strom, *I.R.S. Sets Sights on Donors' Gifts That Push Policy*, N.Y. TIMES, May 13, 2011, at A1 (reporting that the IRS may use tax provisions to regulate money given for political purposes to § 501(c)(4)).

210. *Id.*

211. Chief Justice Roberts made a similar argument regarding terrorist financing in a recent Supreme Court case. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010). The Chief Justice held that money donated to a designated terrorist organization for humanitarian purposes "frees up other resources within the organization that may be put to violent ends." *Id.* at 2725.

speech that had forced corporations to support PACs or special purpose entities, which may perhaps result in more direct and thus more transparent corporate political activity.

In addition to the problems with the underlying assumptions, there are several problems with the recommended reforms that make them unnecessary. For those advocating disclosure,²¹² disclosure reveals corporate political activity only after it has occurred, even with quarterly reporting. Shareholders do not know, in real time, how corporations may attempt to influence an election. Forcing disclosure in annual reports likely would be ineffective because shareholders may not read the annual reports or, if they have read the report, may not be terribly concerned with an activity that has occurred in what is now, in political terms, the relatively distant past.²¹³ Thus, disclosing corporate political activity creates more regulatory work and financial costs for corporations without likely creating much benefit to shareholders.²¹⁴

Requiring independent board approval for corporate political activity is another ineffective regulation. Campaign finance reform advocates argue that corporate political activity is different than “ordinary business decisions,”²¹⁵ because shareholders’ interests may diverge from directors’ and executives’ interests. Under this assumption, there is no possibility for a corporate board to be independent. Independent board members, similar to shareholders, directors, and executives, have their own political interests. Why can these individuals, but not other directors

212. See *supra* note 197 and accompanying text.

213. See FRANK EASTERBROOK & DANIEL FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 66 (1991) (explaining how shareholders do not have “the appropriate incentive to study the firm’s affairs and vote intelligently”).

214. To understand the financial costs that companies incur when complying with SEC reporting requirements, see the Securities and Exchange Commission’s report on Section 404 of the Sarbanes-Oxley Act of 2002. SEC. & EXCH. COMM’N, *FINAL REPORT OF THE ADVISORY COMMITTEE ON SMALL PUBLIC COMPANIES* 33 (2006), available at <http://www.sec.gov/info/smallbus/acspc/acspc-finalreport.pdf>. Section 404 directed the SEC to adopt rules requiring management reports on internal control over financial reporting. Sarbanes-Oxley Act of 2002, Pub. L. 107-204, 116 Stat. 745, § 404. The SEC report detailed Section 404 compliance costs as a percentage of a company’s revenue. SEC. & EXCH. COMM’N, *FINAL REPORT OF THE ADVISORY COMMITTEE ON SMALL PUBLIC COMPANIES* *supra*, at 33. Companies with a market capitalization of less than \$100 million spent 2.55% of revenue on compliance. Companies between \$100–\$499 million spent 0.53% of revenue. Companies between \$500–\$999 million spent 0.27% of revenue. Companies between \$1–\$4.9 billion spent 0.16% of revenue. Companies with more than \$5 billion in market capitalization spent 0.06% of revenue. *Id.*

215. See *supra* Part IV.C.

or executives, be assumed to place their own political preferences behind the political interests that are most important to the corporation?

Shareholder approval is another recommendation that, in actuality, would create more regulatory burdens than provide any positive reform. There are two methods to provide for shareholder approval: a blanket approval that permits management to engage in corporate political activity, or approval each time that management sought to expend money for corporate political activity. For either of these approaches, obtaining a shareholder vote on a particular issue is never a straight-forward activity.²¹⁶ For the blanket approval approach, it is not clear how much shareholder support is needed, how long the approval would last or what types of corporate political activity would be approved. For the every-time approval approach, considering how difficult it is to coordinate a shareholder vote²¹⁷ and how quickly time moves in political campaigns,²¹⁸ corporations might miss the opportunity to engage in political activity. Having to seek the shareholders' approval would severely inhibit a corporation's freedom of speech.

216. See EASTERBROOK & FISCHER, *supra* note 213, at 66 (noting how the costs of shareholder voting creates collective action problems, such as votes rarely being held and shareholders not expecting their votes to be consequential). Professor Bainbridge has also written extensively about the problems with shareholder voting and how shareholder votes do not exercise any effective control over managerial decisions. See Stephen M. Bainbridge, *The Case for Limited Shareholder Voting Rights*, 53 UCLA L. REV. 601, 613, 623 (2006) ("[C]ollective action problems preclude the shareholders from exercising meaningful day-to-day or even year-to-year control over managerial decisions Even if one could overcome the seemingly intractable collective action problems plaguing shareholder decisionmaking, active shareholder participation in corporate decisionmaking would still be precluded by the shareholders' widely divergent interests and distinctly different levels of information."); Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 570 (2003) (explaining how restrictions render shareholder voting ineffective by preventing shareholders from owning "sufficient stock to exercise meaningful control over the firm" and prohibiting shareholders from "band[ing] together to exercise such control").

217. See *supra* note 216 and accompanying text.

218. The Internet and cable television have not only increased the amount of coverage of political campaigns, they have also increased the speed with which the media covers political campaigns. This has forced campaigns to respond more quickly and to create more coverage for these media outlets. See James Poniewozik, *Campaign '08: The Media's 24-Minute News Cycle*, TIME (Oct. 31, 2008), available at <http://www.time.com/time/magazine/article/0,9171,1855330-1,00.html>.

V. CONCLUSION

Despite the politicized rhetoric, *Citizens United* did not “open the floodgates” for corporate spending in the 2010 elections.²¹⁹ In the 2010 midterm election cycle, corporations did not seem eager to participate directly through independent expenditures.²²⁰ While some corporations gave to independent groups to further their political interests,²²¹ the potential drawbacks to electoral participation kept many corporations out of the political arena.²²² Corporations are owned by shareholders of all political backgrounds. They hire employees of all political backgrounds. They sell goods and services to customers of all political backgrounds. Having to choose sides in an election could possibly alienate a significant percentage of a corporation’s shareholders, employees or customers. Most corporations do not want to take this kind of business risk.

Citizens United’s greatest impact on the midterm elections may have been in drawing attention to the vast amount of money in politics.²²³ If there had been any egregious examples of a corporation attempting to influence the outcome of a specific race, the political rhetoric about *Citizens United* may have been justified. Yet no such examples have emerged. Even without any support, Congress has attempted to increase government authority over political speech.²²⁴ There might be other ways to curtail the influence of money in politics without creating unnecessary regulatory burdens or unconstitutionally restricting the freedom of speech,²²⁵ but the Shareholder Protection Act,²²⁶ and any legisla-

219. 2010 State of the Union, *supra* note 2.

220. See Brody Mullins & John D. McKinnon, *Campaign’s Big Spender: Public-Employees Union Now Leads All Groups in Independent Election Outlays*, WALL ST. J., Oct. 22, 2010, at A1 (detailing that unions and outside groups, but not corporations, were the biggest political spenders in 2009–10).

221. *Id.*

222. See Friedman, *supra* note 186.

223. See Farnam, *supra* note 171 (reporting that corporations, unions, and associations took advantage of loosened campaign finance regulations).

224. See Shareholder Protection Act of 2011, H.R. 2517, 112th Cong. (2011); DISCLOSE Act, H.R. 5175, 111th Cong. (2010).

225. Campaign finance reform proponents frequently argue for public financing of political campaigns. In the previous Congress, a public financing bill was introduced in both the House and Senate, but failed to become law. See Fair Elections Now Act, S. 752 111th Cong. (2010); H.R. 1826, 111th Cong. (2010); see also FAIR ELECTIONS NOW ACT, <http://fairelectionsnow.org/> (last visited Oct. 3, 2011) (providing background information on the public financing initiative). The merits of public financing of political campaigns warrants a separate article.

226. See H.R. 2517.

tion with the same recommendations,²²⁷ is not the most efficient approach. Congress also should note that targeting one flow of money, while ignoring the vast sums spent by wealthy individuals, unions, and close corporations, does nothing to stop a flood.

227. See DISCLOSE Act, H.R. 5175.