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An Unconstitutional Response to *Citizens United*: Mandating Shareholder Approval of Corporate Political Expenditures

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An Unconstitutional Response to *Citizens United*

MANDATING SHAREHOLDER APPROVAL OF CORPORATE POLITICAL EXPENDITURES

> In accepting corporate money, I promise to respect federal election laws the same way I respect the must-shower-before-swimming law at the Y. As a candidate, I am under no obligation to promote the zesty, robust taste of Doritos brand tortilla chips regardless of how great a snack they may be for lunchtime, munch time, anytime.
>
> –Stephen Colbert[1]

INTRODUCTION

Mr. Colbert, the host of a satirical political news show, *The Colbert Report*,[2] took some significant steps toward running for President of the United States in the 2008 election.[3] Although Mr. Colbert's candidacy was sardonic in nature, the real steps he took toward procuring a spot on the ballot in South Carolina brought the potential of sanction by the Federal Election Commission (FEC).[4] Doritos, manufactured by PepsiCo, Inc. (PepsiCo), sponsored Mr. Colbert on Comedy Central at the time he launched his purported candidacy in 2007.[5] A former FEC general counsel stated that PepsiCo's sponsorship of Mr. Colbert's show, and ostensibly of his

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[1] Rick Klein, *No Joke: Colbert's Campaign May Run Afoul of Law*, ABC NEWS (Oct. 24, 2007), http://abcnews.go.com/Politics/Vote2008/story?id=3766656.

[2] Clifford A. Jones, *The Stephen Colbert Problem: The Media Exemption for Corporate Political Advocacy and the "Hail to the Cheese Stephen Colbert Nacho Cheese Doritos® 2008 Presidential Campaign Coverage*," 19 U. FLA. J.L. & PUB. POL'Y 295, 296 n.2 (2008).

[3] Jacques Steinberg, *Colbert Consulted Parties Before Announcing Run*, N.Y. TIMES, Oct. 18, 2007, at E2.

[4] Klein, *supra* note 1.

[5] Jones, *supra* note 2, at 299. Professor Jones notes that "[t]here was apparently no actual sponsorship and Pepsi[C]o, maker of Nacho Cheese Doritos, paid no consideration for being featured in the 'campaign.'" *Id.* at 299 n.17 (citing Richard L. Hasen, *Stephen Colbert's "Hail to the Cheese" Presidential Candidacy: Why the Comedian's Campaign Raises Serious Questions About the Role of Corporate Money in Elections*, FINDLAW.COM (Nov. 9, 2007), http://writ.lp.findlaw.com/commentary/20071109_hasen.html).

candidacy, raised "serious questions."[6] One question was whether PepsiCo's sponsorship violated federal campaign-finance laws that—at the time—barred corporations from directly contributing to candidates or making independent political expenditures from their corporate treasuries.[7] Just a few years later, the legal landscape regulating corporate political activity has changed drastically.

When the Supreme Court decided *Citizens United v. FEC*[8] on January 21, 2010, it caused a major shift in campaign-finance law.[9] In that seminal decision, the Court held a ban on independent corporate political expenditures[10] to be unconstitutional under the First Amendment.[11] Specifically, the Court held that Congress may not ban political speech on the basis of "the corporate identity of the speaker and the content of the political speech."[12] As a result of the five-to-four decision, corporations may now legally use their general treasuries to fund political advertising or make other independent political expenditures.[13]

Within this new paradigm, PepsiCo could seemingly pay for an advertisement that featured Mr. Colbert's candidacy

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[6] Klein, *supra* note 1 (quoting Lawrence M. Noble, counsel at Skadden, Arps, Slate, Meagher & Flom LLP); *see also* Jones, *supra* note 2, at 307-09.

[7] *See* 2 U.S.C. § 441b(a) (2006).

[8] 130 S. Ct. 876 (2010). This note takes no position as to the wisdom of the majority opinion in *Citizens United*. Rather, the focus of this note is to evaluate legislative proposals in light of the decision.

[9] *See* Michael S. Kang, *After* Citizens United, 44 IND. L. REV. 243, 243 (2010) ("*Citizens United* . . . represents the Roberts Court's clear reversal of [the trend of expansion of campaign finance regulation] and a narrow focus on quid pro quo corruption as the exclusive grounds for government regulation."); Molly J. Walker Wilson, *Too Much of a Good Thing: Campaign Speech After* Citizens United, 31 CARDOZO L. REV. 2365, 2392 (2010) ("Unfortunately, the *Citizens United* decision does more than to give corporate interests a place at the table. It gives them a place at the head of the table and a bullhorn."); Adam Liptak, *Justices, 5-4, Reject Corporate Spending Limit*, N.Y. TIMES, Jan. 22, 2010, at A1 (*Citizens United* was a "sharp doctrinal shift"). Although *Citizens United* essentially extended the same theoretical framework announced in *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007), the practical implications of the *Citizens United* decision were extremely broad.

[10] 2 U.S.C. § 441b; *Citizens United*, 130 S. Ct. at 897 ("Section 441b makes it a felony for all corporations—including nonprofit advocacy corporations—either to expressly advocate the election or defeat of candidates or to broadcast electioneering communications within [thirty] days of a primary election and [sixty] days of a general election.").

[11] *Citizens United*, 130 S. Ct. at 917.

[12] *Id.* at 913; *see also* Jeremy R. Peterman, Note, *PACs Post-*Citizens United*: Improving Accountability and Equality in Campaign Finance*, 86 N.Y.U. L. REV. 1160, 1179-80 (2011).

[13] WHITAKER ET AL., CONG. RESEARCH SERV., R41096, LEGISLATIVE OPTIONS AFTER *CITIZENS UNITED V. FEC*: CONSTITUTIONAL AND LEGAL ISSUES 1-2 (2010), *available at* http://www.fas.org/sgp/crs/misc/R41096.pdf; R. SAM GARRETT, CONG. RESEARCH SERV., R41054, CAMPAIGN FINANCE POLICY AFTER *CITIZENS UNITED V. FEDERAL ELECTION COMMISSION*: ISSUES AND OPTIONS FOR CONGRESS 1-2 (2010), *available at* http://assets.opencrs.com/rpts/R41054_20100201.pdf.

(should he run in 2012) and perhaps also feature Doritos-brand tortilla chips, so long as PepsiCo made the expenditure independently and not in coordination with Mr. Colbert.[14] If PepsiCo were to fund such an advertisement, its shareholders could take issue with corporate spending on advertising that featured Mr. Colbert's candidacy.[15] Surely, some shareholders would not want PepsiCo to wade into politics and others might oppose Mr. Colbert's candidacy, whether satirical or not. In *Citizens United*, Justice Kennedy, writing for the majority, addressed the interests of shareholders by stating that "the procedures of corporate democracy"[16] could deal with such concerns.

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[14] Dean Erwin Chemerinsky has suggested that the Supreme Court will go even further in extending political speech rights to corporations in the near future and "hold that corporations have the right to contribute money to candidates for elective office . . . ." Erwin Chemerinsky, *The Future of the First Amendment*, 46 WILLAMETTE L. REV. 623, 638 (2010). If Dean Chemerinsky's prediction comes true, then the direct corporate sponsorship of a political campaign would have constitutional protection. In a recent decision, a district court held the ban on companies' direct contributions to federal candidates to be unconstitutional. United States v. Danielczyk, No. 1:11cr85 (JCC), 2011 WL 2161794, at *19 (E.D. Va. May 26, 2011) (invalidating 2 U.S.C. § 441b(a)); *see also* Nathan Koppel, *Judge Rules Ban on Corporate Campaign Contributions Unconstitutional*, WALL ST. J.L. BLOG (May 27, 2011, 2:44 PM), http://blogs.wsj.com/law/2011/05/27/judge-rules-ban-on-corporate-campaign-contributions-unconstitutional/. However, Professor Hasen has written that he expects the *Danielczyk* decision to be reversed on appeal. Rick Hasen, *Federal District Court, in Criminal Case, Holds that Ban on Direct Corporate Contributions to Candidates Is Unconstitutional Under* Citizens United, ELECTION L. BLOG (May 26, 2011, 9:58 PM), http://electionlawblog.org/?p=18342.

[15] *See* Justin J. Wert, Ronald Keither Gaddie & Charles S. Bullock, III, *Of Benedick and Beatrice:* Citizens United *and the Reign of the Laggard Court*, 20 CORNELL J.L. & PUB. POL'Y 719, 726-27 (2011) ("Taking controversial and highly visible political stands can potentially cost clients and therefore lead to financial costs. Corporate stocks and corporate products have been punished by consumers for overt political activity . . . . A rise in overt, direct political action by most corporations carries with it risks far exceeding the political gains that might be achieved by acting through other agents." (footnotes omitted)); *see also* Matthew A. Melone, Citizens United *and Corporate Political Speech: Did the Supreme Court Enhance Political Discourse or Invite Corruption?*, 60 DEPAUL L. REV. 29, 95-96 (2010) ("[C]orporations are constrained by the potential reaction of customers, employees, shareholders, public interest groups, and non-governmental organizations to open advocacy. Unseemly corporate campaigning may result in loss of customers, employee dissatisfaction, or shareholder agitation in the form of proxy fights." (footnotes omitted)).

[16] *Citizens United*, 130 S. Ct. at 911 (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 794 (1978)). *But see* Ciara Torres-Spelliscy, *Corporate Campaigning*, FORBES.COM (Jan. 29, 2010, 10:00 AM), http://www.forbes.com/2010/01/28/corporate-campaign-politics-legal-opinions-contributors-ciara-torres-spelliscy.html. This note does not challenge the constitutionality of shareholders *sua sponte* restricting their corporation's spending on political endeavors. However, one commentator has pointed out that while "a shareholder could simply dissociate himself from a corporation should its expressed political ideals conflict with his own," the shareholder might already have been harmed "by the time a shareholder first learns his political views conflict with those disseminated by the corporation." Alex Osterlind, Note, *Giving a Voice to the Inanimate: The Right of a Corporation to Political Free Speech*, 76 MO. L. REV. 259, 281 (2011); *see also* Elizabeth Pollman, *Citizens Not United: The Lack of Stockholder*

In the wake of the *Citizens United* decision, academics,[17] think tanks,[18] and legislators[19] have put forth many proposals in an attempt to counteract the increased potential for corporate political involvement that has resulted from the Supreme Court's "robust conception of corporate political speech."[20] Although shareholder-driven governance will certainly be permitted to direct corporations in this arena as the shareholders see fit, some members of Congress and think tanks have proposed to make this voluntary procedure mandatory.[21] Three prominent proposals would make significant changes to the federal securities laws and would mandate shareholder approval of a corporation's political expenditures,[22] similar to the current campaign-finance law in

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Voluntariness in Corporate Political Speech, 119 YALE L.J. ONLINE 53, 58 (2009), http://www.yalelawjournal.org/2009/10/15/pollman.html (concluding that "lack of stockholder assent to corporate political speech is more compelling than ever").

[17] *See, e.g.*, John C. Coffee, Jr., *Corporate Governance After* 'Citizens United,' N.Y. L.J., Mar. 18, 2010, at col. 2.

[18] *See, e.g.*, Press Release, Campaign Fin. Inst., Party Provision in "Disclose" Bill Is a Plus; It Could Be Made Better (May 4, 2010), *available at* http://www.cfinst.org/Press/PReleases/10-05-04/Party_Provision_In_DISCLOSE_Bill_Is_a_Plus_It_Could_Be_Made_Better.aspx; Press Release, Campaign Legal Ctr., Legal Center Offers Possible Legislative Fixes to Citizens United at Request of Senate Committee (Feb. 1, 2010), *available at* http://www.campaignlegalcenter.org/index.php?option=com_content&view=article&id=897:pr3834&catid=63:legal-center-press-releases&Itemid=61; Ciara Torres-Spelliscy, *Corporate Campaign Spending: Giving Shareholders a Voice*, BRENNAN CTR. FOR JUSTICE (Jan. 27, 2010), http://brennan.3cdn.net/54a676e481f019bfb8_bvm6ivakn.pdf [hereinafter Torres-Spelliscy, *Corporate Campaign Spending*].

[19] *See, e.g.*, GARRETT, *supra* note 13, at 2-7; Jonathan Alter, *High-Court Hypocrisy*, NEWSWEEK, Feb. 1, 2010, *available at* 2010 WLNR 1585183; *Democrats Move to Blunt* Citizens United *Ruling*, POLITICO (Apr. 24, 2010, 11:47 PM), http://www.politico.com/news/stories/0410/36303.html; David D. Kirkpatrick, *Democrats Try to Rebuild Campaign-Spending Barriers*, N.Y. TIMES (Feb. 12, 2010), *available at* http://www.nytimes.com/2010/02/12/us/politics/12citizens.html?_r=1.

[20] Paul M. Secunda, *Addressing Political Captive Audience Workplace Meetings in the Post-*Citizens United *Environment*, 120 YALE L.J. ONLINE 17, 17 (May 15, 2010), http://www.yalelawjournal.org/the-yale-law-journal-pocket-part/election-law/addressing-political-captive-audience-workplace-meetings-in-the-post%11citizens-united-environment/. Professor Hasen has referred to the Court's approach as "a kind of First Amendment absolutism . . . ." Richard L. Hasen, *Un-American Influence: Could Foreign Spending on Elections Really Be Illegal?*, SLATE (Oct. 11, 2010, 1:18 PM), http://www.slate.com/id/2270662/. For a list of proposals related to *Citizens United*, see Comment, Citizens United v. FEC*: Corporate Political Speech*, 124 HARV. L. REV. 75, 81 n.62 (2010).

[21] Some commentators have argued that the fears that these proposals seek to address are "overblown, or at the very least misstated" because, in part, "the corporate . . . moneys that are opened up for use by the *Citizens United* decision do not exist in a vacuum, sitting in a massive Scrooge McDuck money vault. These moneys, whether from profits or member dues, also have other obligations . . . . Political activities must be balanced against a variety of other needs and priorities for institutional money." Wert et al., *supra* note 15, at 722-23.

[22] *See infra* Part III.

the United Kingdom.[23] For example, the Brennan Center for Justice urges Congress to amend the federal securities laws by "mandating that corporations obtain the consent of shareholders before making political expenditures."[24]

Lively and divisive political debate has long centered on the interpretation of the First Amendment in the context of political campaign finance. Because the outcome of this debate will have an unquantifiable impact on the future elections of our national leaders—and will dictate upon whom those leaders may rely for financial support—many factions pull in different directions in an attempt to shape the ongoing interpretation of the First Amendment in the corporate-political-speech context.[25] The proponents of the proposals that mandate shareholder approval of political expenditures urge an unrealistically narrow interpretation of *Citizens United*. Although their authors have noble goals, the proposals are unconstitutional under *Citizens United* and other First Amendment jurisprudence.[26]

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[23] Torres-Spelliscy, *Corporate Campaign Spending*, *supra* note 18, at 16; Ciara Torres-Spelliscy, *Corporate Political Spending & Shareholders' Rights: Why the U.S. Should Adopt the British Approach*, *in* RISK MANAGEMENT AND CORPORATE GOVERNANCE (Abolhassan Jalilvand & Tassos Malliaris eds.) (forthcoming 2011) (manuscript at 49-53), *available at* http://ssrn.com/abstract=1474421 [hereinafter Torres-Spelliscy, *Corporate Political Spending*]. For an in-depth discussion of the British approach to political advertising, see Alexander Boer, Note, *Continental Drift: Contextualizing* Citizens United *by Comparing the Diverging British and American Approaches to Political Advertising*, 34 B.C. INT'L & COMP. L. REV. 91, 97-99 (2011).

[24] Torres-Spelliscy, *Corporate Campaign Spending*, *supra* note 18, at 21; *see also* Torres-Spelliscy, *Corporate Political Spending*, *supra* note 23, (manuscript at 59). For a similar proposal, see Ronald Gilson & Michael Klausner, *Corporations Can Now Fund Politicians. What Should Investors Do?*, FORBES, Mar. 29, 2010, *available at* 2010 WLNR 5423725 ("The answer is to mandate that corporations let stockholders vote annually on whether they want the company to exercise the rights that *Citizens United* gave them to get into political races. Managers who seek stockholder approval of political activity would explain the actions they intend to take, how those actions would be in stockholders' interests and what the cost will be.").

[25] Scholars and experts agree that the *Citizens United* decision has significantly impacted the legal and political landscape, but its effects have yet to be fully felt or understood. *E.g.*, Christopher Beam, *Ad Hominem: How Much Has the* Citizens United *Case Changed Campaign Finance in 2010?*, SLATE (Oct. 6, 2010, 6:09 PM), http://www.slate.com/id/2270036/ ("No doubt *Citizens United* set back the cause of campaign finance reform. But the jury is still out on its practical effects.").

[26] *See* WHITAKER, *supra* note 13, at 8 ("The practicalities of when to require [shareholder] votes . . . may need to be carefully considered in order not to run afoul of corporate freedom of speech rights defined by the Supreme Court in *Citizens United*."). The proposals could only be found constitutional if the Supreme Court overruled the very case and doctrine that the proposals seek to "remedy." The proposals, while well-intentioned and logical, also raise several policy and practical issues that would make their implementation difficult or counterproductive. This note will not address these issues due to space limitations.

Part I of this note provides a brief historical overview of campaign-finance law as applied to corporations before *Citizens United*. Part II discusses the *Citizens United* decision and its effects on the legal and political landscape regarding corporate contributions and expenditures. Part III provides an outline of three proposals that would require mandatory shareholder approval of independent political expenditures by corporations. Part IV offers a critique of the proposals through an analysis under *Citizens United* and other First Amendment jurisprudence. Finally, this note concludes that mandatory shareholder approval of political expenditures by corporations is not a constitutional response to the potential problems created by *Citizens United*.

I. PRE-*CITIZENS UNITED* LANDSCAPE

Although *Citizens United* is undoubtedly the new leading case in the area of campaign-finance law,[27] several earlier cases remain good law and will likely bear upon the Court's analysis of the mandatory shareholder-approval proposals. Since *Citizens United* overruled two cases, proper consideration of the current doctrine requires an understanding of the historical doctrine.

The Supreme Court first recognized the political speech rights of corporations in *First National Bank of Boston v. Bellotti*,[28] where it struck down a state statute that banned corporate political expenditures on referenda unrelated to that corporation's proprietary interests.[29] The Court found that, for the purposes of independent expenditures on referenda, corporations had the same free speech rights as individuals.[30] With regard to analysis in future cases, the Court stated that "extending constitutional guarantees to a corporation depends upon 'the nature, history, and purpose of the particular constitutional provision.'"[31] The Court also noted that free

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[27] *See* Breanne Gilpatrick, *Removing Corporate Campaign Finance Restrictions in* Citizens United v. Federal Election Commission, *130 S. Ct. 876 (2010)*, 34 HARV. J.L. & PUB. POL'Y 405, 419 (2011) ("The effect of *Citizens United* already is being felt in federal courtrooms around the country as judges and lawyers come to see the decision as a dramatic shift in how the Court views campaign finance laws.").

[28] First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 778 n.14 (1978) ("In cases where corporate speech has been denied the shelter of the First Amendment, there is no suggestion that the reason was because a corporation rather than an individual or association was involved." (citations omitted)).

[29] *Id.* at 779, 791-92; *see also* Matthew Lambert, *Beyond Corporate Speech: Corporate Powers in a Federalist System*, 37 RUTGERS L. REC. 20, 21 (2010).

[30] *Bellotti*, 435 U.S. at 780 & n.15.

[31] Lambert, *supra* note 29, at 22 (quoting *Bellotti*, 435 U.S. at 778 n.14). Importantly, *Citizens United* viewed *Bellotti* as one of the bases for its jurisprudential

speech is "indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation."[32]

Eight years later, the Supreme Court took a more equivocal and complicated approach to corporate political expenditures in *FEC v. Massachusetts Citizens for Life, Inc.* (*MCFL*).[33] Unlike *Bellotti*, which involved a for-profit corporation that sought to influence votes for a referendum, *MCFL* resolved a First Amendment challenge from a nonprofit corporation that sought to influence an election for political office. In *MCFL*, the Court held that the government could not ban ideological nonprofits, which do not take corporate or union contributions, from spending their treasury funds on explicit political advocacy because no risk of dissenting shareholders existed.[34]

The next major case to bear upon the issue of the political rights of corporations was *Austin v. Michigan Chamber of Commerce*.[35] In *Austin*, the plaintiffs challenged a

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path. For example, the *Citizens United* Court pointed to *Bellotti* as reaffirming the First Amendment "principle that Government lacks the power to ban corporations from speaking." Citizens United v. FEC, 130 S. Ct. 876, 903 (2010).

[32] *Bellotti*, 435 U.S. at 777 (footnote omitted). Commentators have also noted that "[alt]hough the Court took an expansive view of corporate free speech rights, it added an important footnote, footnote 26, stating that 'Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections.'" Richard L. Hasen, Citizens United *and the Illusion of Coherence*, 109 MICH. L. REV. 581, 587-88 (2011); *see also* Wilson, *supra* note 9, at 2371.

[33] 479 U.S. 238 (1986).

[34] *Id.* at 262-63; *see also Citizens United*, 130 S. Ct. at 891 ("[T]he Court found unconstitutional § 441b's restrictions on corporate expenditures as applied to nonprofit corporations that were formed for the sole purpose of promoting political ideas, did not engage in business activities, and did not accept contributions from for-profit corporations or labor unions." (citations omitted)); Hasen, *supra* note 32, at 587-88; Saul Zipkin, *The Election Period and Regulation of the Democratic Process*, 18 WM. & MARY BILL RTS. J. 533, 552 (2010); J. Robert Abraham, Note, *Saving* Buckley*: Creating a Stable Campaign Finance Framework*, 110 COLUM. L. REV. 1078, 1093 n.105 (2010); Stephan Stohler, Comment, *One Person, One Vote, One Dollar? Campaign Finance, Elections, and Elite Democratic Theory*, 12 U. PA. J. CONST. L. 1257, 1262 n.33 (2010). The Court also held that a federal prohibition on corporate and union treasury spending could only apply to express advocacy. FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 249 (1986) ("We therefore hold that an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b."). In *Citizens United*, the Court found that the *MCFL* "exemption" did not apply because "some of the funds [Citizens United used] . . . were donations from for-profit corporations." *Citizens United*, 130 S. Ct. at 891.

[35] *See generally* Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990), *overruled by Citizens United*, 130 S. Ct. 876; *see also Citizens United*, 130 S. Ct. at 913 ("*Austin* is overruled . . . effectively invalidat[ing] not only BCRA Section 203, but also 2 U.S.C. 441b's prohibition on the use of corporate treasury funds for express advocacy" (internal quotation marks and citation omitted)); SpeechNow.org v. FEC, 599 F.3d 686, 694 (D.C. Cir. 2010) (recognizing that *Citizens United* overruled *Austin*).

state law that banned corporations from using funds from their general treasuries to make independent expenditures on behalf of, or in opposition to, state electoral candidates.[36] The *Austin* Court upheld the state law on the basis of a fear that corporations could distort the political process because "the unique state-conferred corporate structure . . . facilitates the amassing of large treasuries . . . [that] can unfairly influence elections when . . . deployed in the form of independent expenditures."[37] After *Austin*, corporations had no constitutional right to make independent campaign expenditures out of their general treasuries, but they could still expend treasury funds on issue advocacy that mentioned specific candidates.[38] For example, corporations could not fund advertisements that urged citizens to vote for or against a candidate in a federal election, but corporations could fund advertisements that urged constituents to contact a specific legislator regarding a particular cause to express support or disapprobation.[39]

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[36] *Austin*, 494 U.S. at 654.

[37] *Id.* at 660. Professor Hasen notes that although the Court explains this opinion with "an anti-corruption rationale, *Austin*'s emphasis on preventing distortion of the electoral process through large corporate spending suggested the Court in fact was espousing an equality rationale . . . ." Hasen, *supra* note 32, at 588 (internal quotation marks and citations omitted). It has also been noted that with its decision in *Austin*, "the Court moved beyond [a] focus on quid pro quo corruption to embrace broader theories" such as "a different type of corruption: '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.'" Abraham, *supra* note 34, at 1086 (quoting *Austin*, 494 U.S. at 659-60); *see also* Wilson, *supra* note 9, at 2371-72.

[38] James Bopp, Jr. & Richard E. Coleson, Citizens United v. FEC*: "Precisely What* WRTL *Sought to Avoid*," 2010 CATO SUP. CT. REV. 29, 32.

[39] Excellent examples of these so-called "issue advocacy" advertisements from the 1996 presidential campaign abound. Although it is not a corporation, the AFL-CIO ran one advertisement titled "No Way" that included this voice-over:

> [Woman]: My husband and I both work. And next year, we'll have two children in college. And it will be very hard to put them through, even with the two incomes.
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> Announcer: Working families are struggling. But Congressman [X] voted with Newt Gingrich to cut college loans, while giving tax breaks to the wealthy. He even wants to eliminate the Department of Education. Congress will vote again on the budget. Tell Congressman [X], don't write off our children's future.
>
> [Woman]: Tell him, his priorities are all wrong.

DEBORAH BECK ET AL., ISSUE ADVOCACY ADVERTISING DURING THE 1996 CAMPAIGN 11 (1997), *available at* http://www.annenbergpublicpolicycenter.org/Downloads/Political_Communication/Advertising_Research_1997/REP16.PDF.

In 2002, Congress reacted to this line of cases in an attempt to increase restrictions on both corporate and private funding of campaigns and independent political expenditures. Congress enacted the Bipartisan Campaign Reform Act (BCRA) and altered the campaign-finance regulatory landscape.[40] The BCRA, in relevant part, banned the use of corporate treasury funds to pay for "electioneering communication[s]" during certain preelection time periods, such as thirty days before a primary election or sixty days before a general election.[41] Professor Hasen has explained that "[e]lectioneering communications are television or radio (not print or Internet) advertisements that feature a candidate for a federal election; they are capable of reaching 50,000 people in the relevant electorate . . . ."[42] In addition, the BCRA preserved the ability of corporations to establish political action committees (PACs) that could solicit and accept contributions from a limited class of individuals, including employees and shareholders.[43] *McConnell v. FEC*[44] consolidated the multiple lawsuits that challenged this section of the BCRA on First Amendment grounds. In *McConnell*, the Court held the ban constitutional, because corporations and unions would "remain free to organize and administer segregated funds, or PACs, for [the] purpose" of funding electioneering communications.[45] Importantly, the Court also noted that "Congress's power to prohibit corporations and unions from using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates in federal elections has been firmly embedded in our law."[46]

Prior to *Citizens United*, the Supreme Court most recently grappled with the First Amendment implications of

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[40] Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of 2 U.S.C., 18 U.S.C., 28 U.S.C., 36 U.S.C., and 47 U.S.C.).

[41] *See* 2 U.S.C. § 441b(b)(2) (2006).

[42] Hasen, *supra* note 32, at 588-89; *see also* 2 U.S.C. § 441b(b)(2).

[43] *See* 11 C.F.R. § 100.6 (2010).

[44] McConnell v. FEC, 540 U.S. 93 (2003), *overruled in part by* Citizens United v. FEC, 130 S. Ct. 876 (2010).

[45] *McConnell*, 540 U.S. at 204; *see also Citizens United*, 130 S. Ct. at 894 ("*McConnell* permitted federal felony punishment for speech by all corporations, including nonprofit ones, that speak on prohibited subjects shortly before federal elections."). *McConnell* relied heavily on *Austin* in its analysis and reasoning. *Id.* at 913 ("The *McConnell* Court relied on the antidistortion interest in *Austin* . . . ."); *see also* Bopp & Coleson, *supra* note 38, at 33 ("[*McConnell*] simply relied on *Austin* . . . ."); Wilson, *supra* note 9, at 2372.

[46] *McConnell*, 540 U.S. at 203.

limiting corporate political expenditures in *FEC v. Wisconsin Right to Life*[47] (*WRTL*). *WRTL* involved a nonprofit organization's challenge to the BCRA's ban on the use of corporate funds for "electioneering communications" during certain preelection time periods—the very provision upheld in *McConnell*.[48] WRTL planned to broadcast radio advertisements within thirty days of a primary election that would call on Wisconsin's U.S. Senators to stop delaying a vote on President George W. Bush's judicial nominees.[49] Despite the Court's purported affirmation of *McConnell*, the Court construed "express advocacy" very narrowly and held that "BCRA § 203 [was] unconstitutional as applied to WRTL's [advertisements]," because the advertisements exemplified issue advocacy, not express advocacy.[50] This decision acted as a harbinger of the hard-line, antiregulation approach to corporate political expenditures that would become the new paradigm.[51]

II. *CITIZENS UNITED*

On January 21, 2010, the Supreme Court decided *Citizens United v. FEC*,[52] in which it struck down the ban on independent corporate political expenditures[53] on First Amendment grounds.[54] Specifically, the Court held that the laws banning corporations from using treasury funds for "electioneering communications" unconstitutionally silenced political speech.[55] The decision extended constitutional

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[47] FEC v. Wis. Right to Life, Inc., 551 U.S. 449 (2007).

[48] *Id.* at 455-56; *see also* 2 U.S.C. § 441b(b)(2); *McConnell*, 540 U.S. at 207. Because the challenge only regarded the BCRA's application to WRTL's specific situation, it was an "as-applied" challenge. *Wis. Right to Life*, 551 U.S. at 456.

[49] *Wis. Right to Life*, 551 U.S. at 458-59.

[50] *Id.* at 481. Professor Hasen notes that although it was not facially invalidated by the Court, "[t]he new functional equivalency test appeared likely to eviscerate [BCRA] § 203." Hasen, *supra* note 32, at 590.

[51] *See* James A. Gardner, *Anti-Regulatory Absolutism in the Campaign Arena:* Citizens United *and the Implied Slippery Slope*, 20 CORNELL J.L. & PUB. POL'Y 673, 679-81 (2011) ("Soon after its ruling in *McConnell*, the Court watered down its holding on corporate and union spending by approving an as-applied challenge to the very provision of BCRA it had recently upheld." (citing *Wis. Right to Life*, 551 U.S. at 456)); Zipkin, *supra* note 34, at 556.

[52] 130 S. Ct. 876 (2010).

[53] 2 U.S.C. § 441b (2006); *Citizens United*, 130 S. Ct. at 897 ("Section 441b makes it a felony for all corporations—including nonprofit advocacy corporations—either to expressly advocate the election or defeat of candidates or to broadcast electioneering communications within 30 days of a primary election and 60 days of a general election.").

[54] *Citizens United*, 130 S. Ct. at 917.

[55] *Id.* at 913.

protection to corporations' ability to use general-treasury funds to make independent political expenditures that are not coordinated with candidates for office.[56]

A. The Facts

Citizens United, a nonprofit corporation, defines itself as "dedicated to restoring our government to citizens' control . . . [t]hrough a combination of education, advocacy, and grass roots organization."[57] It accepts donations from individuals and from for-profit corporations.[58] The suit, which would later send shockwaves through the legal and political communities, resulted from a film that Citizens United produced and released in January 2008 entitled *Hillary: The Movie* (*Hillary*),[59] a ninety-minute documentary about then-Senator Hillary Clinton's candidacy for President.[60] As the Court noted, "*Hillary* mention[ed] Senator Clinton by name and depict[ed] interviews with political commentators and other persons, most of them quite critical of Senator Clinton."[61] Citizens United released the film to theaters and put it out on DVD, but the organization also wanted to arrange for distribution via video-on-demand and run advertisements on broadcast and cable television that included a statement about Clinton, the name of the film, and the movie's web address.[62] Citizens United planned to have at least three of the advertisements broadcasted within thirty days before the 2008 Democratic National Convention and within sixty days before the 2008 general election, ostensibly in violation of the BCRA's

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[56] WHITAKER, *supra* note 13, at 1-2; GARRETT, *supra* note 13, at 1-2.

[57] *About Citizens United*, CITIZENS UNITED, http://www.citizensunited.org/who-we-are.aspx (last visited Oct. 17, 2011).

[58] *Citizens United*, 130 S. Ct. at 887. Professor Hasen has noted that "[b]y taking some for-profit corporate money, the corporation appeared ineligible for the *MCFL* exemption." Hasen, *supra* note 32, at 591 n.59; *see also supra* notes 31-32 and accompanying text.

[59] HILLARY: THE MOVIE (Citizens United Productions 2008).

[60] *Citizens United*, 130 S. Ct. at 887.

[61] *Id.* at 887. Professor Hasen has noted that the documentary "contain[ed] a great many negative statements" about then-Senator Clinton. Hasen, *supra* note 32, at 591-92.

[62] *Citizens United*, 130 S. Ct. at 887 ("Video-on-demand allows digital cable subscribers to select programming from various menus, including movies, television shows, sports, news, and music. The viewer can watch the program at any time and can elect to rewind or pause the program."). The Court noted that they found the statements about then-Senator Clinton to be "pejorative." *Id.* at 887.

ban on electioneering communications within those time periods.[63]

Before *Citizens United*, federal campaign-finance law prohibited corporations and unions from funding independent expenditures that expressly advocated for the election or defeat of a candidate (express advocacy) as well as "'any broadcast, cable, or satellite communication' that 'refer[red] to a clearly identified candidate for Federal office' and [was] made within [thirty] days of a primary or [sixty] days of a general election" (electioneering communication).[64] As an alternative, federal campaign-finance law allowed corporations to establish PACs, which could in turn receive donations from shareholders or employees of the corporation and make independent political expenditures with those funds.[65] If the FEC considered *Hillary* and the advertisements to be either express advocacy, electioneering communications, or both, then it could have subjected Citizens United to civil and criminal penalties.[66] Therefore, Citizens United brought suit to seek declaratory and injunctive relief against the FEC regarding those provisions. The complaint argued that the prohibition on express advocacy and electioneering communications was unconstitutional as applied to the film and its advertisements.[67]

B. The Analysis and Holding

The *Citizens United* decision steeply veered away from critical precedents. From the very beginning of the decision, the Court justified its enormous step in overturning two major decisions, *Austin* and *McConnell*, by framing the outcome of the case as nearly unavoidable. In its rationalization, the Court

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[63] Citizens United v. FEC, 530 F. Supp. 2d 274, 276 (D.D.C. 2008); *see also Citizens United*, 130 S. Ct. at 888. "[B]oth periods are within BCRA's definition of an electioneering communication." *Citizens United*, 530 F. Supp. 2d at 276. Citizens United's complaint "contain[ed] two major claims: (1) that [the] prohibition of corporate disbursements for electioneering communications violates the First Amendment on its face and as applied [in this case]; and (2) that [the statute] requiring disclosure and . . . disclaimers are unconstitutional as applied" to Citizen United's movie and advertisements. *Id.* at 277 (footnotes omitted).

[64] *Citizens United*, 130 S. Ct. at 887 (quoting 2 U.S.C. § 434(f)(2)(A) (2006)); *see also* 2 U.S.C. § 441b(b)(2).

[65] 2 U.S.C. § 441b(b)(2); *Citizens United*, 130 S. Ct. at 887-88; *see also supra* Part I.

[66] *Citizens United*, 130 S. Ct. at 888; *see also* 2 U.S.C. § 437g.

[67] *Citizens United*, 130 S. Ct. at 888; Amended Verified Complaint for Declaratory and Injunctive Relief at 1, Citizens United v. FEC, 530 F. Supp. 2d 274 (D.D.C. 2007) (No. 07-2240-RCL).

explained it could not decide the case on a narrower ground[68]—either through statutory interpretation or a limited constitutional holding.[69] In particular, the Court took great pains to explain the lack of opportunity for a ruling based on the more limited as-applied challenge brought by Citizens United.[70] For example, the Court pointed out that because "the District Court addressed the facial validity of the statute . . .[,] it [was] necessary [for the Court] to consider . . . facial validity" as well.[71] The Court "decline[d] to adopt an interpretation that require[d] intricate case-by-case determinations to verify whether political speech is banned[,]" because such a "course of decision would prolong the substantial, nation-wide chilling effect caused by [section] 441b's prohibitions on corporate expenditures."[72] The Court's conclusion that it could not pursue narrower grounds and its use of statements such as, "First Amendment freedoms need breathing space to survive,"[73] indicated what would later become the sweeping holding of the Court.[74]

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[68] *Citizens United*, 130 S. Ct. at 888 ("[W]e first address whether Citizens United's claim that § 441b cannot be applied to *Hillary* may be resolved on other, narrower grounds."); *see also* Richard Briffault, *Corporations, Corruption, and Complexity: Campaign Finance After* Citizens United, 20 CORNELL J.L. & PUB. POL'Y 643, 664 (2011) ("The Court [was] determined not to resolve Citizens United's complaint on any . . . narrower grounds . . . ."); Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 CALIF. L. REV. 915, 946 (2011) ("[T]he Court could have held a challenged provision of the Bipartisan Campaign Finance Reform Act invalid as applied to the party before it, but instead opted to pronounce it invalid on its face."); Harold Anthony Lloyd, *A Right but Wrong Place: Righting and Rewriting* Citizens United, 56 S.D. L. REV. 219, 220 (2011) (The Court "[d]eclin[ed] to decide the case on narrower grounds and resurrect[ed] a facial challenge that Citizens United had waived . . . .").

[69] *Citizens United*, 130 S. Ct. at 890 ("[T]here is no reasonable interpretation of *Hillary* other than as an appeal to vote against Senator Clinton. Under the standard stated in *McConnell* and further elaborated in *WRTL*, the film qualifies as the functional equivalent of express advocacy."). The Court also noted that although "the Court should construe statutes as necessary to avoid constitutional questions, the series of steps suggested would be difficult to take in view of the language of the statute." *Id.* at 892.

[70] *Id.* at 891-92. An as-applied challenge would only raise the question of whether the relevant statute was constitutionally invalid in a specific situation. However, a facial challenge is a general challenge to the statute itself. Commentators have noted that this case ended the Roberts Court's trend of a "resistance to constitutional challenges seeking the facial invalidation of laws . . . ." Patricia Millett et al., *Mixed Signals: The Roberts Court and Free Speech in the 2009 Term*, 5 CHARLESTON L. REV. 1, 14 (2010).

[71] *Citizens United*, 130 S. Ct. at 893.

[72] *Id.* at 892, 894.

[73] *Id.* at 892 (quoting FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 468-69 (2007)).

[74] In his dissent, Justice Stevens argued that the Court could and should have decided the case on far narrower grounds and that the majority overreached in its decision. *Id.* at 931-32 (Stevens, J., dissenting).

Next, the Court found it "necessary to consider Citizens United's challenge to *Austin* and the facial validity of [section] 441b's expenditure ban."[75] As discussed above, section 441b criminalizes express advocacy or electioneering communications by a corporation.[76] Although the Court acknowledged that PACs provide some alternative for corporations seeking to take part in public political discourse, the Court held that the existence of this alternative was "burdensome," "expensive to administer," "subject to extensive regulations," and thus "[did] not alleviate the First Amendment problems with [section] 441b."[77] In addition, the Court determined that these practical concerns about PACs rendered "[s]ection 441b's prohibition on corporate independent expenditures [as] . . . a ban on speech" whose "purpose and effect [were] to silence entities whose voices the Government deem[ed] to be suspect."[78]

The Court analyzed section 441b as if it applied to individuals, based on the premise that "political speech of corporations or other associations should [not] be treated differently under the First Amendment simply because such associations are not 'natural persons.'"[79] Therefore, the Court considered whether a regulation like section 441b could be applied to an individual and concluded that if Congress enacted such a regulation, "no one would believe that it [was] merely a time, place, or manner restriction on speech."[80] This vast

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[75] *Id.* at 893 (majority opinion). The Court noted that "[a]ny other course of decision would prolong the substantial, nationwide chilling effect caused by [section] 441b's prohibitions on corporate expenditures." *Id.* at 894.

[76] *Id.* at 897 ("Section 441b makes it a felony for all corporations—including nonprofit advocacy corporations—either to expressly *advocate* the election or defeat of candidates or to broadcast electioneering communications within [thirty] days of a primary election and [sixty] days of a general election." (emphasis added)).

[77] *Id.* As part of their exploration of the practical concerns about the PAC alternative to regular corporate political speech, the Court also found that "[g]iven the onerous restrictions, a corporation may not be able to establish a PAC in time to make its views known regarding candidates and issues in a current campaign." *Id.* at 898.

[78] *Id.*

[79] *Id.* at 900 (citing First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 776 (1978)).

[80] *Id.* at 898. Generally, time, place, or manner restrictions on speech are constitutional. The Court also noted that

> [a]s a practical matter, however, given the complexity of the regulations and the deference courts show to administrative determinations, a speaker who wants to avoid threats of criminal liability and the heavy costs of defending against FEC enforcement must ask a governmental agency for prior permission to speak. These onerous restrictions thus function as the equivalent of prior restraint by giving the FEC power analogous to licensing laws implemented in [sixteenth] and [seventeenth] century England, laws

disparity between speakers in the political realm doomed section 441b's chance of being upheld as constitutional. The Court found that laws that restrict the speech of some speakers, but not others, constitute an attempt to control the content of the restricted speakers.[81]

In addition to analyzing the law's actual and potential effects, the Court assessed the interests the law served in order to determine whether its goals justified the means it employed. For these types of assessments, the Court employs various levels of "scrutiny." The level of scrutiny applied often plays a crucial role in dictating the outcome of a First Amendment challenge.[82] In *Citizens United*, the Court stated that "[l]aws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'"[83]

Under the strict scrutiny analysis, only an interest that the Supreme Court recognizes as compelling will justify some of the most dubious legislation.[84] A narrowly tailored law is one that is not over- or underinclusive in serving the compelling interest it purports to further. In *Citizens United*, the Court spent most of its energy determining whether a compelling interest existed rather than analyzing whether the law was narrowly tailored.[85] In order to serve a compelling interest in this

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> and governmental practices of the sort that the First Amendment was drawn to prohibit.

Id. at 895-96 (citations omitted).

[81] *Id.* at 898-99 ("Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others. As instruments to censor, these categories are interrelated: Speech restrictions based on the identity of the speaker are all too often simply a means to control content." (citation omitted)).

[82] *See* Eric Berger, *In Search of a Theory of Deference: The Eighth Amendment, Democratic Pedigree, and Constitutional Decision Making*, 88 WASH. U. L. REV 1, 4 (2010) ("The degree of deference often dictates the result in constitutional cases.").

[83] *Citizens United*, 130 S. Ct. at 898 (quoting FEC v. Wis. Right to Life, 551 U.S. 449, 464 (2007)). Generally, the Court employs a rational basis test that merely requires that the regulation at issue is rationally related to an important governmental interest. When the Court uses the rational basis test, it almost always upholds the law in question. In contrast, strict scrutiny, the most rigorous test available to the Court within existing First Amendment doctrine, almost always results in invalidation of the law in question.

[84] *See* Keirsten G. Anderson, Note, *Protecting Unmarried Cohabitants from the Religious Freedom Restoration Act*, 31 VAL. U. L. REV. 1017, 1023-24 (1997).

[85] One commentator has noted that "[t]he Court did not deny that corporate political speech does present [certain] problems but believed that the statutory ban was both over- and under-inclusive . . . ." Melone, *supra* note 15, at 86. The Court's focus on whether the law served a compelling interest may indicate that the Court was less

case, the Court suggested that the regulation would have to restrict speech or expenditures that "interfere[d] with governmental functions," such as protecting a school or prison's ability to operate.[86] The Court found that this regulation failed to support a government function and actually undermined the political process by preventing voters from "obtain[ing] information from diverse sources," including corporations, "in order to determine how to cast their votes."[87] Therefore, the Court concluded that there is "no basis for the proposition that, in the context of political speech, the Government may impose restrictions [such as section 441b] on certain disfavored speakers," such as corporations.[88]

Finally, the Court sought to provide clarity regarding its decision to overrule *Austin* and partially overrule *McConnell*. The Court based its departure from *Austin* and *McConnell* on the ground that "[t]he ongoing chill upon speech that is beyond all doubt protected makes it necessary in this case to invoke the earlier precedents that a statute [that] chills speech can and must be invalidated where its . . . invalidity has been demonstrated."[89] Specifically, the Court held that the pre-*Austin* line of precedent, as exemplified by *Bellotti*, forbids any restriction on political speech on the basis of the speaker's corporate identity.[90] In addition, the Court found that the post-*Austin* line of precedent would have erroneously permitted such a restriction as justified by an interest in preventing distortion of speech within the political process.[91]

As in previous cases, the Court focused on the compelling governmental interest prong of the strict scrutiny test rather than on the breadth prong. In *Austin*, the Court identified the "compelling governmental interest" as "preventing 'the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of

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concerned with the scope of the solution and more concerned with the definition of the problem that the solution sought to address.

[86] *Citizens United*, 130 S. Ct. at 899. The Court noted that it had "upheld a narrow class of speech restrictions that operate[d] to the disadvantage of certain persons, but th[o]se rulings were based on an interest in allowing government entities to perform their functions." *Id.* (citing Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986); Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119, 129 (1977); Parker v. Levy, 417 U.S. 733, 759 (1974); Civil Serv. Comm'n v. Letter Carriers, 413 U.S. 548, 557 (1973)).

[87] *Id.*

[88] *Id.*

[89] *Id.* at 896 (citing FEC v. Wis. Right to Life, 551 U.S. 449, 482-83 (2007)).

[90] *Id.* at 898-99 (citing First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 784 (1978)).

[91] *Id.* at 903-04.

the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.'"[92] The Court did not take issue with the justification itself but instead focused on the practical outcomes of accepting that justification as a compelling governmental interest. For example, the Court stressed that if "the antidistortion rationale were to be accepted, . . . it would permit Government to ban political speech simply because the speaker is an association that has taken on the corporate form."[93] The Court cast aside the *Austin* Court's reliance on the antidistortion rationale as "an aberration" and held that the true "purpose and effect of [section 441b] is to prevent corporations, including small and nonprofit corporations, from presenting both facts and opinions to the public."[94] Therefore, the Court overruled *Austin* and part of *McConnell*[95] because section 441b was an "unlawful"[96] and "troubling assertion of brooding governmental power."[97] Instead, the Court chose to "return to the principle . . . that the Government may not suppress political speech on the basis of the speaker's corporate identity."[98]

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[92] *Id.* at 903 (quoting Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 660 (1990)).

[93] *Id.* at 904. The Court also noted the Government's argument "that *Austin* permits [the Government] to ban corporate expenditures for almost all forms of communication stemming from a corporation." *Id.* (citation omitted). The Court brought the Government's argument to what it viewed as its logical conclusion and found that "[i]f *Austin* were correct, the Government could prohibit a corporation from expressing political views in media beyond those presented here, such as by printing books." *Id.* For an extensive discussion of the antidistortion rationale, see Richard L. Hasen, Citizens United *and the Orphaned Antidistortion Rationale*, 27 GA. ST. U. L. REV. 989 (2011).

[94] *Id.* at 907. The Court also noted that under section 441b, "certain disfavored associations of citizens—those that have taken on the corporate form—are penalized for engaging in the same political speech" as wealthy individuals and unincorporated associates, who could "spend unlimited amounts on independent expenditures." *Id.* at 908 (citation omitted).

[95] *Citizens United* "overruled the portion of *McConnell* facially upholding the electioneering-communication prohibition. As a result, the [Court's] language about government being able to prohibit 'functional equivalent of express advocacy' is gone." Bopp & Coleson, *supra* note 38, at 58 (quoting *Citizens United*, 130 S. Ct. at 913); *see also* Wilson, *supra* note 9, at 2365 (*Citizens United* overruled "the portion of [*McConnell*] that restricted independent corporate expenditures, as codified in section 203 of [BCRA]" (citations omitted)).

[96] *Citizens United*, 130 S. Ct. at 908.

[97] *Id.* at 904.

[98] *Id.* at 913. The Court based this conclusion on its holding that "[n]o sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations." *Id.*

III. MANDATORY SHAREHOLDER-APPROVAL PROPOSALS

After *Citizens United*, lawmakers,[99] journalists,[100] and think tanks[101] proposed several versions of a mandatory shareholder-approval scheme in an attempt to rein in the new political rights granted to corporations.[102] Three of the most prominent proposals include the End the Hijacking of Shareholder Funds Act,[103] the Shareholder Protection Act of 2010,[104] and the Brennan Center for Justice's proposal.[105] Although the three proposals are similar, they have important distinctions that may bear upon the constitutionality of their limitations on corporate speech under the First Amendment.[106]

A. End the Hijacking of Shareholder Funds Act

On January 21, 2010, the same day the Court handed down its decision in *Citizens United*, U.S. Representative Alan Grayson responded by introducing the End the Hijacking of Shareholder Funds Act (Shareholder Funds Act).[107] At barely

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[99] *See, e.g.*, End the Hijacking of Shareholder Funds Act, H.R. 4487, 111th Cong. § 2 (2010); Shareholder Protection Act of 2010, H.R. 4537, 111th Cong. § 3 (2010).

[100] *See, e.g.*, Alter, *supra* note 19 ("New laws regulating corporate governance are also essential. Britain requires shareholders to vote on corporate political expenditures. We should do the same . . . .").

[101] *See, e.g.*, Torres-Spelliscy, *Corporate Campaign Spending*, *supra* note 18, at 1; Craig Holman, *House Committee Passes Important Checks on Corporate Spending on Elections*, PUB. CITIZEN (July 29, 2010), http://citizenvox.org/2010/07/29/house-committee-passes-important-checks-on-corporate-spending-on-elections/ ("Shareholders should have a say on how their money is spent.").

[102] One commentator's analysis of past corporate political spending "suggest[s] that corporations and unions were major players on the political stage even before *Citizens United*, and it is unclear how much the Court's ruling is likely to change that influence." Gilpatrick, *supra* note 27, at 412.

[103] End the Hijacking of Shareholder Funds Act, H.R. 4487, 111th Cong. (2010).

[104] Shareholder Protection Act of 2010, H.R. 4537, 111th Cong. (2010).

[105] Torres-Spelliscy, *Corporate Political Spending*, *supra* note 23; Torres-Spelliscy, *Corporate Campaign Spending*, *supra* note 18. Since Professor Torres-Spelliscy's book chapter details the general proposal of the published report, this note will consider both publications in tandem as one proposal.

[106] This note will only discuss the shareholder approval proposals. It will not discuss any proposed disclosure requirements because they are not relevant for the purposes of the First Amendment analysis under *Citizens United*. In addition, it is of interest that these proposals were put forth during a "trend toward shareholder empowerment." *See* Martin Gelter, *Taming or Protecting the Modern Corporation? Shareholder-Stakeholder Debates in a Comparative Light*, 7 N.Y.U. J.L. & BUS. 641, 655-58 (2011).

[107] End the Hijacking of Shareholder Funds Act, H.R. 4487, 111th Cong. (2010). Representative Grayson lost his bid for reelection on November 2, 2010. Elspeth Reeve, *What Will Crazy Alan Grayson Do Next?*, ATLANTIC WIRE (Nov. 2, 2010, 10:58 PM), http://www.theatlanticwire.com/politics/2010/11/what-will-crazy-alan-grayson-do-

two pages, the Shareholder Funds Act would, if enacted, require that "[a]ny expenditure by a public company to influence public opinion on matters not related to the company's products or services" have the approval of a "majority of the votes cast by shareholders."[108] Expenditures without this approval would "be considered a breach of a fiduciary duty of the officers and directors who authorized such an expenditure."[109] For such a breach, those officers and directors would be personally liable to the company's shareholders for the amount of the expenditure.[110] Although seemingly simple and straightforward, the proposed bill is too brief for Congress to take it seriously as a piece of legislation that could be enacted in its current form. It has many definitional issues and details that require resolution before enactment could occur. For example, the bill defines only two terms—"public company" and "shareholder." A "public company" is defined as "any issuer that is required to submit periodical or other reports under section 13 of the Securities Exchange Act of 1934 (15 U.S.C. [§] 78m)" and "shareholder" is defined as "any person who owns or holds a share of stock in a public company."[111] In addition, the Shareholder Funds Act does not define those matters that "influence public opinion" or those matters that do—or do not—"relate[] to the company's products or services."[112] These definitional deficiencies raise many questions. Are institutional shareholders, such as mutual or pension funds, given votes under the definition? Do shareholders have just one vote, or one vote for each share of stock they own? Despite its incompleteness, the bill is important because it likely provided the basis for the Shareholder Protection Act of 2010,[113] later proposed by U.S. Representative Michael Capuano.

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next/22443/. It remains to be seen whether this proposed legislation will survive despite his absence from Congress.

[108] End the Hijacking of Shareholder Funds Act, H.R. 4487, 111th Cong. § 2 (2010).

[109] *Id*.

[110] *Id*. (stating that officers and directors would be jointly and severally liable).

[111] *Id*. § 3.

[112] *Id*. § 2. Not only would these definitional issues be difficult for a corporation, an attorney, or a court to interpret, but they may very well render this bill unconstitutionally vague, even without reference to the inevitable First Amendment strict scrutiny analysis that it would have to survive.

[113] Shareholder Protection Act of 2010, H.R. 4537, 111th Cong. (2010).

B. *Shareholder Protection Act*

Introduced six days after *Citizens United* was decided, H.R. 4537, or the Shareholder Protection Act of 2010 (Shareholder Protection Act),[114] is just over eight pages long—four times as long as the Shareholder Funds Act. The Shareholder Protection Act would amend section 14 of the Securities Exchange Act of 1934 in order to require any issuer of securities[115] to obtain "written affirmative authorization" from a majority of its shareholders before spending more than $10,000 in a given fiscal year on political expenditures.[116] Like the Shareholder Funds Act, the Shareholder Protection Act would consider a violation of the prior-approval requirement as a "breach of fiduciary duty of the officers and directors who authorized" the political expenditure, and those officers and directors would be "jointly and severally liable . . . for the amount of such expenditure."[117] The bill defines political expenditures very broadly—beyond the types of activities that section 441b covered before *Citizens United*. In addition to covering corporate independent political expenditures targeted by section 441b, this proposal would also cover expenditures for voter registration campaigns and trade association dues.[118]

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[114] *Id*.

[115] "Issuer" is defined by the federal securities laws as "any person who issues or proposes to issue any security [or] . . . the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provisions of [a] trust or other agreement or instrument under which such securities are issued . . . ." Securities Exchange Act of 1934 § 3(a)(8), 15 U.S.C. § 78c(a)(8) (2006). A "person" is defined broadly in federal securities law as "a natural person, company, government, or political subdivision, agency, or instrumentality of a government." Securities Exchange Act of 1934 § 3(a)(9), 15 U.S.C. § 78c(a)(9); 2 U.S.C. § 434 (f) (2006).

[116] Shareholder Protection Act of 2010, H.R. 4537, 111th Cong. § 3(d) (2010). The bill defines "affirmative authorization" as "the full, free, and written consent of a shareholder, obtained without intimidation or fear of reprisal, and shall not include votes made by a broker or any other representative." *Id*. By not including brokers or representatives, it is unclear whether the bill would allow for institutional investors, mutual funds, or hedge funds to vote either for or against approval of political expenditures. The bill defines "majority of all shareholders" as the "number of shareholders that combined own more than 50 percent of all outstanding shares. Shareholders not casting votes shall not count toward such a majority." *Id*.

[117] *Id*.

[118] *Id*. The bill defines "expenditure for political activities" as

> (i) expenditures in support of, or opposition to, any Federal, State, or local candidate; (ii) contributions to or expenditures in support of any political party, committee, electioneering communication, voter registration campaign, ballot measure campaign, or an issue advocacy campaign; and (iii) dues or other payments to trade associations or other tax exempt organizations that are, or could reasonably be anticipated to be, used for the purposes described in subparagraphs [(i) and (ii)].

In recognition of the special treatment by the Court of media corporations in *Bellotti* and *Citizens United*,[119] the Shareholder Protection Act includes an exception for issuers "whose sole business is the publication or broadcasting of news, commentary, literature, music, entertainment, artistic expression, scientific, historical or academic works, or other forms of information."[120] The bill would require the Securities and Exchange Commission to issue "guidance as it determines necessary or appropriate regarding the extent of the exemption."[121] Although more detailed than the Shareholder Funds Act, the Shareholder Protection Act would actually cover a broader group of corporations. While the Shareholder Funds Act would only cover public companies,[122] the Shareholder Protection Act would cover all issuers of securities, including some private corporations and many small businesses.[123]

C. Brennan Center for Justice Proposal

On the same day that Representative Capuano introduced the Shareholder Protection Act of 2010, the Brennan Center for Justice published a proposal (Brennan Center Proposal) that would "require shareholder authorization of future corporate political spending."[124] The Brennan Center Proposal has the same two essential elements as the Shareholder Funds Act and the Shareholder Protection Act; it would require "corporations [to] obtain the consent of shareholders before making political expenditures" and it would "hold corporate directors personally liable for violations of these policies."[125] In addition, the Brennan Center Proposal

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Id. Section 441b banned corporations from using treasury funds for independent expenditures and electioneering communications in close proximity to elections. 2 U.S.C. § 441b.

[119] *See* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 781 (1978); Citizens United v. FEC, 130 S. Ct. 876, 905-06 (2010).

[120] Shareholder Protection Act of 2010, H.R. 4537, 111th Cong. § 3 (2010).

[121] *Id*. This provision has the potential to bring the Securities and Exchange Commission into conflict with the FEC, which is tasked with providing guidance on federal campaign-finance law.

[122] End the Hijacking of Shareholder Funds Act, H.R. 4487, 111th Cong. § 2 (2010).

[123] H.R. 4537 § 3. However, the bill would carve out some limited exceptions. *See id*. § 3(d).

[124] Torres-Spelliscy, *Corporate Campaign Spending*, *supra* note 18, at 4.

[125] Torres-Spelliscy, *Corporate Campaign Spending*, *supra* note 18, at 21. This proposal would not hold corporate *officers* liable, as would be the case under the Shareholder Funds Act or the Shareholder Protection Act. *See* Torres-Spelliscy, *Corporate Political Spending*, *supra* note 23, (manuscript at 74) (proposing that "[i]f a corporation makes an unauthorized contribution or expenditure for a political activity,

includes disclosure requirements that are undoubtedly constitutional[126] and helpful to shareholders that would facilitate the BCRA's central goal of a transparent democracy.[127] Like the proposed bills' provisions, these requirements would amend federal securities law.[128]

The Brennan Center Proposal would require an "annual shareholder vote to authorize any spending of $10,000 or more" by a corporation for any political activity, but the corporation may also request authorization more frequently.[129] The proposal defines "political activity" as "any contributions or expenditures made directly or indirectly to, or in support of or opposition to, any candidate, political party, committee, electioneering communication, ballot measure campaign, or . . . issue advocacy campaign."[130] For shareholder approval, the corporation's proposed political spending must receive a majority vote from the corporation's shareholders, defined

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then the *directors* at the time that the unauthorized contribution or expenditure was incurred are jointly and severally liable to repay to the corporation the amount of the unauthorized expenditure, with interest at the rate of eight percent per annum" (emphasis added)).

[126] For example, the Brennan Center Proposal urges Congress to require

> disclosure of political spending . . . frequent enough to notify shareholders and the investing public of corporate spending habits, and yet with enough of a time lag between reports so that corporations are not unduly burdened. To accommodate these two competing goals, disclosure of political expenditures should occur quarterly to coincide with company's filing of its Form 10-Qs with SEC. Because the political disclosure will be contemporaneous with the 10-Q filing, transaction costs can be minimized.

Torres-Spelliscy, *Corporate Campaign Spending*, *supra* note 18, at 21; *see also* Citizens United v. FEC, 130 S. Ct. 876, 914 (2010) (upholding disclosure requirements); WHITAKER, *supra* note 13, at 5. For a discussion supporting increased disclosure requirements, see Francis Bingham, Note, *Show Me the Money: Public Access and Accountability After* Citizens United, 52 B.C. L. REV. 1027, 1061-64 (2011). However, one commentator has argued that many disclosure regimes, including the DISCLOSE Act, may not be constitutional under *Citizens United* due to the Court's concern about the complexity of campaign finance regulation. *See* Briffault, *supra* note 68, at 645-46, 668-70.

[127] As the author of the Brennan Center Proposal has stated, "disclosure of past political expenditures empowers the shareholder to anticipate whether future political spending is likely to conform with his or her political views." Torres-Spelliscy, *Corporate Political Spending*, *supra* note 23, (manuscript at 66); *see also* WHITAKER, *supra* note 13, at 7.

[128] This portion of the proposal would amend section 14 of the Securities Exchange Act of 1934. *See* Torres-Spelliscy, *Corporate Political Spending*, *supra* note 23, (manuscript at 73).

[129] *Id*. This proposal would cover "[a]ny corporation where proxies are solicited in respect of any security registered under section 12 of the Exchange Act occurring on or after the date . . . on which final rules are issued . . . ." *Id*.

[130] *Id*. at 72. This proposal expressly excludes "activities defined as lobbying under any local, state or federal law." *Id*.

explicitly to include institutional investors.[131] In addition, the Brennan Center Proposal includes a provision that would require institutional investment managers to publicly disclose how they voted on such political spending authorizations.[132] By contrast, neither of the proposed bills addresses institutional investment managers—such as the managers of mutual, pension, or hedge funds—that often play crucial roles in securing shareholder majorities.[133]

IV. FIRST AMENDMENT ANALYSIS OF MANDATORY SHAREHOLDER-APPROVAL PROPOSALS

After these proposals were put forth, the Congressional Research Service[134] raised the question of whether lawmakers could draft a mandatory shareholder-approval law in a way that would not "violat[e] the corporation's free speech rights as described by *Citizens United*."[135] In order to pass constitutional muster and comply with *Citizens United*, the law or regulation must not infringe upon the corporation's right to free speech as guaranteed by the First Amendment.[136]

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[131] *Id.* at 74. "Majority of all shareholders" is defined as "a vote of shareholders that combined own 50 percent plus one of all outstanding shares. Shareholders not casting votes shall not count toward affirmative authorization under this [proposal]." *Id.* at 72.

[132] *Id.* at 74 (proposing that "[e]very institutional investment manager subject to section 13(f) of the Exchange Act shall report at least annually how it voted on any shareholder vote . . . unless such vote is otherwise required to be reported publicly by rule or regulation of the Securities and Exchange Commission.").

[133] As of 2002, 58 percent of U.S. equities were owned by institutional investors, a percentage that has risen nearly every year. Murat Binay, *Performance Attribution of US Institutional Investors*, FIN. MGMT., Summer 2005, at 127, 128. For further discussion of institutional shareholders in light of *Citizens United*, see Melone, *supra* note 15, at 85; Osterlind, *supra* note 16, at 281.

[134] *Congressional Research Service*, LIBRARY OF CONGRESS (Nov. 2, 2010), http://www.loc.gov/crsinfo/ ("The Congressional Research Service (CRS) works exclusively for the United States Congress, providing policy and legal analysis to committees and Members of both the House and Senate, regardless of party affiliation. As a legislative branch agency within the Library of Congress, CRS has been a valued and respected resource on Capitol Hill for nearly a century.").

[135] WHITAKER, *supra* note 13, at 8; *see also* GARRETT, *supra* note 13, at 6 (stating that this proposal "could raise questions about whether the requirements were essentially stifling corporate political speech"). The Congressional Research Service also notes that "[t]he practicalities of . . . enforcement of this kind of legislation may need to be carefully considered in order not to run afoul of corporate freedom of speech rights defined by the Supreme Court in *Citizens United*." WHITAKER, *supra* note 13, at 8.

[136] Although the "Constitution's Commerce Clause may arguably provide Congress with authority to enact legislation of the type in question," the First Amendment must also be satisfied. WHITAKER, *supra* note 13, at 7 (citing U.S. CONST. art. I, § 8, cl. 3).

The First Amendment states, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[137] All three proposals would create significant barriers, constitutional or not, to corporate political speech on multiple levels. When a law has the potential to burden political speech, it is subject to strict scrutiny.[138] To survive this test, the government must show that the regulation advances a compelling governmental interest and is narrowly tailored to further that interest.[139] Therefore, the proposals must meet this exacting standard to pass muster.[140] In order to overcome this burden, three interests have been set forth to justify the proposals—anticorruption, anticorrosion, and shareholder protection.

A. Anticorruption

The restrictions on speech embodied in the three proposals must advance a compelling governmental interest in order to survive strict scrutiny. The first potential compelling governmental interest is anticorruption. In *Austin*, Justice Marshall, writing for the majority, found that independent expenditures had the potential to cause "real or apparent corruption."[141] Although the *Austin* Court acknowledged that direct contributions more naturally raised a concern about "'financial quid pro quo'"[142] than independent expenditures, it recognized that the prevention of this type of corruption provided a "'compelling governmental interest . . . [for] the restriction of the influence of political war chests funneled through the corporate form.'"[143] Accordingly, the *Austin* Court held that corporations had no constitutional right to make independent campaign expenditures out of their general treasuries.[144]

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[137] U.S. CONST. amend. I.

[138] Citizens United v. FEC, 130 S. Ct. 876, 898 (2010).

[139] *Id*.

[140] In addition to a constitutional law analysis, corporate law considerations must be considered when evaluating the proposals discussed in this note. For arguments against the proposals on corporate law grounds, see Stephen A. Yoder, *Legislative Intervention in Corporate Governance Is Not a Necessary Response to* Citizens United v. Federal Election Commission, 29 J.L. & COM. 1, 15-21 (2010).

[141] Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 659 (1990) (citing First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 788 (1978)).

[142] *Id*. (quoting FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 497 (1985)) (emphasis omitted).

[143] *Id*. (quoting *Nat'l Conservative Political Action Comm.*, 470 U.S. at 500-01).

[144] *Id*. at 655.

In *McConnell*, Justices Stevens and O'Connor, writing for the majority, expanded the breadth of anticorruption as a compelling governmental interest. The *McConnell* Court stated that Congress had a legitimate interest in stopping corruption, or the appearance thereof, well beyond eliminating mere "cash-for-votes" schemes.[145] The Court held that this rationale extended to preventing "'improper influence'" and "'opportunities for abuse,'" including those that arose from elected officials who were "'too compliant with the wishes of large contributors.'"[146] In their decision, Justices Stevens and O'Connor also dug deeper than the *Austin* Court to uncover what they essentially cast as the "real world" of political campaign financing. For example, they quoted many former lobbyists and members of Congress when they discussed the high-level influence and access gained through large independent corporate expenditures.[147] The majority's emphasis on the practical effect of the campaign-financing scheme reflected the Court's concern with current political realities rather than with the theoretical implications of such regulations.

Unlike the majority opinions of the *Austin* and *McConnell* Courts, the anticorruption rationale as a compelling governmental interest found popularity only with the dissent in *Citizens United*. Justice Stevens, writing in dissent, argued that the *Citizens United* Court construed the anticorruption interest too narrowly and that it actually encompasses more than just quid pro quo corruption.[148] Rather, he argued that the compelling governmental interest also included the prevention of independent expenditures from having an "undue influence on an office holder's judgment" or from generating an "appearance of such influence."[149]

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[145] McConnell v. FEC, 540 U.S. 93, 150 (2003).

[146] *Id*. at 143 (quoting Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 389 (2000)). One commentator has noted that "Justice Kennedy distinguished corruption from 'favoritism and influence,' which were 'not . . . avoidable in representative politics.'" Eliza P. Nagel, Note, *For the People or Despite the People: The Threat of Corporations' Growing Power Through* Citizens United *and the Demise of the Honest Services Law*, 63 RUTGERS L. REV. 725, 760 (2011) (quoting Citizens United v. FEC, 130 S. Ct. 876, 910 (2010))

[147] *McConnell*, 540 U.S. at 150-52.

[148] Citizens United v. FEC, 130 S. Ct. 876, 961 (2010) (Stevens, J., dissenting).

[149] *Id*. (citations omitted). Justice Stevens elaborated that

> [c]orruption can take many forms. Bribery may be the paradigm case. But the difference between selling a vote and selling access is a matter of degree, not kind. And selling access is not qualitatively different from giving special preference to those who spent money on one's behalf. Corruption operates along a spectrum, and the majority's apparent belief that *quid pro quo*

Justice Kennedy's view of the anticorruption rationale was far narrower in *Citizens United*.[150] As expressed in the majority opinion, Justice Kennedy defined the anticorruption rationale as only applying to quid pro quo corruption—essentially only bribery—and not as encompassing the broader definition that Justice Stevens advocated.[151] In addition, Justice Kennedy articulated what appeared to be a different conception of democracy than that held by Justice Stevens. Rather than viewing politicians' reactions to corporate expenditures as a sign of corruption, Justice Kennedy viewed the give-and-take between politicians and corporations as the relationship that should exist between representatives and their constituents.[152] Instead of perceiving responsiveness to corporate interests as corruption, Justice Kennedy found such responsiveness to be of a democratic nature—which should be enjoyed by all constituents.[153] Most importantly, the *Citizens United* Court, through Justice Kennedy, concluded that independent expenditures by corporations, by their nature, "do not give rise to corruption or the appearance of corruption."[154]

There is a plausible argument that mandatory shareholder approval would further the anticorruption interest, as broadly defined by Justice Stevens in his dissent. The premise of the proposals is that they will likely reduce the amount of money that corporations, in the aggregate, spend on political causes. However, no plausible argument exists that

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> arrangements can be neatly demarcated from other improper influences does not accord with the theory or reality of politics.

Id.

[150] For a critical view of Justice Kennedy's definition of corruption in *Citizens United*, see Andrew T. Newcomer, Comment, *The "Crabbed View of Corruption": How the U.S. Supreme Court Has Given Corporations the Green Light to Gain Influence over Politicians by Spending on Their Behalf*, 50 WASHBURN L.J. 235, 267-71 (2010).

[151] *See* Kang, *supra* note 9, at 250 ("Justice Kennedy's view of corruption may limit campaign finance restrictions to not much beyond the regulation of contributions to candidates and officeholders."); Peterman, *supra* note 12, at 1175-78.

[152] Citizens United v. FEC, 130 S. Ct. 876, 910 (2010) ("The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt.").

[153] *Id.* ("It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies . . . . Democracy is founded on responsiveness." (quoting McConnell v. FEC, 540 U.S. 93, 297 (2003) (Kennedy, J., concurring in part))).

[154] *Id.* at 909. "By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate. The fact that a corporation, or any other speaker, is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials." *Id.* at 910 (citation omitted).

these proposals would further the narrower definition of anticorruption stated in *Citizens United* by Justice Kennedy's majority opinion. The inferential connection between shareholder approval of independent political expenditures and the prevention of quid pro quo corruption is tenuous. As the *Citizens United* Court expressly stated, the independent character of the expenditures makes them—by the expenditures' very nature—incapable of creating a quid pro quo relationship, because, by definition, it is unlawful for those who make independent expenditures to coordinate with a candidate for federal office.[155] Therefore, the anticorruption rationale cannot serve as a compelling governmental interest for the mandatory shareholder-approval proposals.

B. Anticorrosion

The second potentially compelling governmental interest is anticorrosion. In *Austin*, Justice Marshall, writing for the majority, found that in addition to the government's interest in preventing real or apparent corruption, the government had a compelling interest in preventing corporations from unfairly influencing elections through independent expenditures.[156] The *Austin* Court differentiated between independent expenditures by individuals and those by corporations on the ground that corporations benefited from "the unique state-conferred corporate structure that facilitates the amassing of large treasuries."[157] Based on this finding, the Court held that corporations' "immense aggregations of wealth" had the potential to be "corrosive" in the political arena because the independent expenditures funded by that wealth "have little or no correlation to the public's support for the corporation's political ideas."[158]

Justice Scalia rejected the Court's categorization of anticorrosion as a compelling governmental interest in a dissenting opinion in *Austin*. Instead, Justice Scalia called corrosion the "New Corruption" and argued that the attempt to fight so-called corrosion was actually an effort by the Court to

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[155] *Id*. at 909-11.

[156] Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 660 (1990).

[157] *Id*.

[158] *Id*. The Court further stated that the legislation in question "does not attempt to equalize the relative influence of speakers on elections, rather, it ensures that expenditures reflect actual public support for the political ideas espoused by corporations." *Id*. (internal quotation marks and citations omitted).

mandate that "[e]xpenditures must reflect actual public support for the political ideas espoused."[159] The Court could use this type of equalization rationale, Justice Scalia argued, to restrict "virtually anything [it] deems politically undesirable."[160] Relying on the Court's holding in *Buckley v. Valeo*[161] that independent expenditures raise little risk of corruption, Justice Scalia concluded that the Court's reasoning cannot be reconciled "unless one thinks it would be lawful to prohibit men and women whose net worth is above a certain figure from endorsing political candidates."[162]

In *Citizens United*, the Court rejected *Austin*'s anticorrosion interest on the basis that it was essentially an interest in equalizing speech.[163] Echoing Justice Scalia's dissent in *Austin*, the Court noted that any interest in equalizing speech in the political realm had been rejected as early as *Buckley*.[164] Chief Justice Roberts, writing in concurrence, argued that *Austin*'s reasoning was in conflict "with *Buckley*'s explicit repudiation of any government interest in equalizing the relative ability of individuals and groups to influence the outcome of elections."[165] The Court restored the clear distinction between independent expenditures and contributions with the potential for corruption or corrosion and noted that independent expenditures simply create little or no risk of either problem.

In the context of the mandatory shareholder-approval proposals, a plausible argument exists that the proposals will serve the anticorrosion interest, as explained by Justice Marshall in *Austin*. The premise of the proposals is that they will likely reduce the amount of money that corporations, in the aggregate, spend on political causes. After *Citizens United*, however, there is little possibility that the Court will recognize an anticorrosion interest, much less one that would justify restrictions on independent expenditures. Justice Kennedy, writing for the

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[159] *Id.* at 684 (Scalia, J., dissenting) (citation omitted).

[160] *Id.*

[161] 424 U.S. 1 (1976). *Buckley* involved a constitutional challenge to the Federal Election Campaign Act by various candidates for federal office, political parties, and organizations. The Court upheld provisions limiting individual contributions to campaigns but invalidated provisions that limited the amount a candidate could spend on his own election and the total expenditures for particular campaigns. *Id.* at 58-59.

[162] Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 680 (1990) (Scalia, J., dissenting).

[163] Citizens United v. FEC, 130 S. Ct. 876, 903-04 (2010).

[164] *Id.* at 904.

[165] *Id.* at 921 (Roberts, C.J., concurring) (internal quotation marks and citation omitted).

majority, made it clear that the Court has found the anticorrosion interest as the equivalent of speech equalization, and *Buckley* strongly prohibits speech equalization as a compelling government interest.[166] Therefore, the anticorrosion rationale cannot serve as a compelling governmental interest for the mandatory shareholder-approval proposals.

C. Shareholder Protection

In the wake of *Citizens United*, it is unlikely that the Court will uphold a mandatory shareholder-approval law, or any restriction on corporate independent expenditures, on the basis of the anticorruption or anticorrosion rationales.[167] The *Citizens United* Court construed the anticorruption rationale narrowly and dismissed the anticorrosion rationale entirely. Because neither of these interests has the potential to function as the compelling governmental interest needed to justify the mandatory shareholder-approval proposals, another potential interest must exist for the proposals to pass constitutional muster. Those in favor of limits on corporate expenditures, the supporters of the BCRA and lamenters of *Citizens United*, have now focused their attention on the one rationale left standing after *Citizens United*: the shareholder-protection interest.[168]

The mandatory shareholder-approval proposals are based on the premise that shareholders need new regulations to protect them in light of the rights afforded to corporations under *Citizens United*. In particular, the concern is that publicly traded companies will spend money invested by shareholders in a way that may overlook the interests of the shareholders and instead support the managers' personal

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[166] *Id*. at 904 (majority opinion).

[167] *See* Kang, *supra* note 9, at 245 (noting "the fact that a government restriction makes shareholder speech more difficult is obviously insufficient by itself to justify a constitutional prohibition of that restriction").

[168] *See* Torres-Spelliscy, *Corporate Political Spending*, *supra* note 23, (manuscript at 69). However, one commentator has argued that in the *Citizen United* Court's "majority opinion, Justice Kennedy reject[ed] the shareholder protection interest as a reason for restricting corporate speech" and "that corporate democracy mechanisms should be even more effective today than they would have been at the time the [BCRA] was passed . . . ." Yoder, *supra* note 140, at 11. For a policy-based criticism of the shareholder-protection rationale, see David G. Yosifon, *The Public Choice Problem in Corporate Law: Corporate Social Responsibility After* Citizens United, 89 N.C. L. REV. 1197, 1228-30 (2011).

political agendas or otherwise damage the corporation.[169] The proponents of mandating shareholder approval of such expenditures hope to curb "unfettered corporate political spending" and eliminate the risk of corporate "managers' potentially profligate spending on politics."[170]

The Court first identified shareholder protection as a governmental interest in *Bellotti*,[171] the same case that recognized the political speech rights of corporations.[172] In *Bellotti*, the Court struck down a state statute that banned corporate political expenditures on referenda unrelated to that corporation's proprietary interests.[173] Similar to the method for examining a statute for narrow tailoring, the *Bellotti* Court's "fit" analysis essentially saw the potential for shareholder democracy as a less burdensome alternative to regulation and assessed whether the statute was over- or underinclusive.[174] Because the Court based its holding on the statute's failure under the "fit" analysis, the Court did not reach the issue of whether shareholder protection can serve as a compelling governmental interest.[175]

The shareholder-protection issue was also raised but not addressed conclusively in *MCFL*.[176] Unlike the for-profit corporation and referendum-campaign context in *Bellotti*, the *MCFL* Court had to resolve a First Amendment challenge in a situation that involved a nonprofit corporation and an election for political office.[177] Because the entity at issue was a nonprofit corporation, which by nature does not have shareholders, no potential existed for board members to spend shareholder

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[169] Torres-Spelliscy, *Corporate Campaign Spending*, *supra* note 18, at 9-10; *see also* Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83, 90-94 (2010).

[170] Torres-Spelliscy, *Corporate Campaign Spending*, *supra* note 18, at 8-9. However, "[s]imply making independent speakers jump through more regulatory hoops may not create any curbing effect in the real world . . . ." Note, *Restoring Electoral Equilibrium in the Wake of Constitutionalized Campaign Finance*, 124 HARV. L. REV. 1528, 1546 (2011). Furthermore, one commentator has argued that "reformers who insist on limiting the political arena of corporate speech greatly exaggerate the effect that such speech has on political outcomes." Melone, *supra* note 15, at 94; *see also* Bingham, *supra* note 126, at 1047 ("[I]t is questionable whether the U.S. Supreme Court's 2010 decision in *Citizens United v. FEC* will alter the way corporations spend money on federal elections at all.").

[171] First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 792, 795 (1978) (The protection of "corporate shareholders [is] an interest that is . . . legitimate.").

[172] *Id.* at 780.

[173] *Id.* at 791-92; *see also* Lambert, *supra* note 29, at 21.

[174] *Bellotti*, 435 U.S. at 793-94.

[175] *Id.* at 795.

[176] 479 U.S. 238, 264 (1986).

[177] *Id.* at 241-42.

investments on political expenditures without their consent.[178] Instead, the members of MCFL joined the organization because they agreed with its political or ideological purpose.[179] On that basis, the Court held that ideological nonprofits that do not take corporate or union donations could not be banned from spending their treasury funds on explicit political advocacy.[180]

The *Austin* Court built on the shareholder-protection rationale discussed in *Bellotti* and *MCFL* and held that corporations had no constitutional right to make independent campaign expenditures out of their general treasuries,[181] although they could support issue advocacy that mentioned specific candidates.[182] In upholding a state law that banned nonmedia corporations from using corporate funds from their general treasuries to make independent expenditures on behalf of, or against, state electoral candidates,[183] the Court found that the shareholders' ability to withdraw from corporate association as a result of political expenditures would not sufficiently protect them.[184] Thus, the *Austin* Court concluded there was a compelling governmental interest in "preventing a corporation . . . from exploiting those who do not wish to contribute to [its] political message."[185]

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178 *Id.* at 241 ("MCFL was incorporated . . . as a nonprofit, nonstock corporation under Massachusetts law.").

179 *Id.* at 242. MCFL's "resources come from voluntary donations from 'members,' and from various fundraising activities such as garage sales, bake sales, dances, raffles, and picnics. The corporation considers its 'members' those persons who have either contributed to the organization in the past or indicated support for its activities." *Id.* (footnote omitted).

180 *Id.* at 262-64. The shareholder-protection interest was not a basis for the decision because, as a nonprofit corporation, MCFL had "members," not "shareholders."

181 Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 655 (1990).

182 Bopp & Coleson, *supra* note 38, at 32.

183 *Austin*, 494 U.S. at 654.

184 *See id.* at 663. The Court did point out that similar to *MCFL*,

> the Chamber also lacks shareholders, [but] many of its members may be . . . reluctant to withdraw as members even if they disagree with the Chamber's political expression, because they wish to benefit from the Chamber's nonpolitical programs and to establish contacts with other members of the business community. The Chamber's political agenda is sufficiently distinct from its educational and outreach programs that members who disagree with the former may continue to pay dues to participate in the latter . . . . Thus, we are persuaded that the Chamber's members are more similar to shareholders of a business corporation than to the members of MCFL.

Id. (footnote omitted).

185 *Id.* at 675. On a practical level, the Court voiced concern that "shareholders in a large business corporation may find it prohibitively expensive to monitor the activities of the corporation to determine whether it is making expenditures to which they object." *Id.* at 674 n.5.

In *Citizens United*, the Court returned to essentially the same shareholder-protection analysis set forth in *Bellotti*—a three-part "fit" inquiry that examined (1) whether corporate democracy can adequately protect shareholders, (2) whether the statute purportedly protecting shareholders is overinclusive, and (3) whether the statute purportedly protecting shareholders is underinclusive.[186] If corporate democracy, as a less restrictive means, can adequately protect shareholders or if the statute is either over- or underinclusive, then the statute is constitutionally invalid. The *Citizens United* Court found that the relevant portion of the BCRA failed on all three parts of the inquiry because voluntary corporate democracy protected shareholders' interests adequately in this situation, and the statute was both over- and underinclusive.[187] The Court found the BCRA overinclusive in its coverage of all corporations—including those with merely one shareholder—and underinclusive in its ban on electioneering communications taking effect only during specific time periods.[188]

In overruling *Austin*, the *Citizens United* Court also cast aside the *Austin* Court's formulation of shareholder protection as a compelling governmental interest.[189] Justice Kennedy stated that the current structure of corporate democracy is able to adequately protect shareholders' interests.[190] The Court did not suggest that legislation was needed to strengthen or mandate those procedures, nor did it suggest that the voluntary nature of corporate democracy created an independent issue.[191]

The Shareholder Funds Act, the Shareholder Protection Act, and the Brennan Center Proposal are all aimed ostensibly at the protection of shareholders. Beyond the suggestion in *Citizens United* that the current structure of corporate democracy can serve to protect this interest without further legislation, the next barrier that the proposals must overcome is whether they are narrowly tailored to the interest of

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186 *See* Citizens United v. FEC, 130 S. Ct. 876, 911 (2010); First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 794 (1978).

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

188 *Id.*

189 *Id.*; *see also* John C. Coates, *Corporate Governance and Corporate Political Activity: What Effect Will* Citizens United *Have on Shareholder Wealth?* 16 (Harvard L. & Econ., Discussion Paper No. 684, 2010), *available at* http://ssrn.com/abstract=1680861 ("In *Citizens United*, the Supreme Court relaxed the ability of corporations to spend money on elections, and in so doing, the Court rejected a shareholder-protection rationale for restrictions on spending.").

190 *Citizens United*, 130 S. Ct. at 911 ("There is . . . little evidence of abuse that cannot be corrected by shareholders through the procedures of corporate democracy." (quotation marks and citation omitted)).

191 *See id.*

shareholder protection.[192] In order to reach this analysis, this note assumes for the sake of argument that the Court could find shareholder protection to be a compelling governmental interest for this type of legislation.

1. End the Hijacking of Shareholder Funds Act

The Shareholder Funds Act will likely fail a "narrowly tailored" analysis because it contains three aspects that render it overinclusive. First, the Act covers a far broader scope of political spending than just independent political expenditures, which is the narrow class of speech that *Citizens United* suggested that shareholders may have an interest in voluntarily restricting.[193] Instead, this bill would sweepingly cover all expenditures to influence public opinion in a way that only indirectly relates to that corporation's products or services.[194] This overbreadth has the potential to restrict speech well beyond the political realm and include environmentally supportive speech and many general goodwill advertising campaigns that do not actually "relate" to products or services.[195] There is little basis to suggest that the government can restrict these types of speech properly under the First Amendment.[196]

[192] Some commentators have argued that rather than creating a new burden for corporate political speech, the mandatory shareholder approval proposals simply legislate the "corporate democracy" that Justice Kennedy referenced in his opinion. *See* Bebchuk & Jackson, *supra* note 160, at 90-94. However, Justice Kennedy's opinion put strong emphasis on using the least restrictive means possible to ameliorate any issues that could potentially provide a compelling governmental interest. *See Citizens United*, 130 S. Ct. at 911. Justice Kennedy clearly stated that shareholder protection could not justify the BCRA regulations at issue in *Citizens United* because of the options *already available* through corporate democracy. *See id*. Rather than "enhance" or "enable" corporate democracy, the mandatory voting proposals would likely be viewed as an additional, and unconstitutional, burden by the Court.

[193] *See Citizens United*, 130 S. Ct. at 911.

[194] End the Hijacking of Shareholder Funds Act, H.R. 4487, 111th Cong. § 2 (2010) ("Any expenditure by a public company to influence public opinion on matters not related to the company's products or services that has not been approved by a majority of the votes cast by shareholders to approve or disapprove such expenditure shall be considered a breach of a fiduciary duty of the officers and directors who authorized such an expenditure.").

[195] Corporations often run general "Happy Holidays" or other types of advertisements that are "not related" to their products or services. For example, Kmart paid for an advertisement in the *New York Times* shortly after September 11, 2001 that was simply a full-page American flag. *See* N.Y. TIMES, Sept. 16, 2001, at 24.

[196] *But see Citizens United*, 130 S. Ct. at 977-79 (Stevens, J., dissenting).

Second, the Act would cover media corporations because it provides no exemption for such entities.[197] The *Citizens United* Court cautioned that any bill that hinders the ability of a media corporation to engage in political speech will almost certainly fail the Court's strict scrutiny analysis.[198] This proposal runs afoul of that principle by defining "public company" in a manner that would encompass any media organization that is owned by a publicly traded corporation.[199]

Third, the Act would likely cover some independent expenditures made for the purpose of lobbying.[200] The *Citizens United* Court stated that although mandating disclosure of lobbying expenditures is constitutional, the Constitution does not tolerate other restrictions on lobbying.[201] Many corporations have in-house employees, consultants, and lawyers that lobby federal, state, and local governments on a range of regulatory and appropriations-related issues. In addition, corporations often contribute funds to trade associations, such as the Recording Industry Association of America or the Pharmaceutical Research Manufacturers of America, in order to support lobbying efforts on behalf of their industry. The Court would likely find a barrier of mandatory shareholder approval between a corporation and policymakers or regulators impermissible.

Therefore, the Act is overinclusive in that it encompasses media corporations and covers vastly more speech than independent political expenditures, including goodwill advertising campaigns and lobbying activities. Due to this overinclusiveness, the Shareholder Funds Act fails the "fit" analysis set forth in *Citizens United* and is not "narrowly tailored" to the shareholder-protection interest.

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[197] *See* Jones, *supra* note 2, at 305-08. For a discussion of the media/non-media corporation divide in campaign finance jurisprudence, see Joel M. Gora, *The First Amendment . . . United*, 27 GA. ST. U. L. REV. 935, 955-57 (2011).

[198] *See Citizens United*, 130 S. Ct. at 906 ("There is simply no support for the view that the First Amendment, as originally understood, would permit the suppression of political speech by media corporations.").

[199] *See id.* For example, the *New York Times*, the *Wall Street Journal*, and all major American television news networks are owned by publicly traded corporations. The bill defines a "public company" as "any issuer that is required to submit periodical or other reports under section 13 of the Securities Exchange Act of 1934 (15 U.S.C. 78m)." H.R. 4487 § 3(1).

[200] It is likely that courts would interpret the bill to cover some lobbying expenses since support of a tax-related bill, immigration reform, or healthcare legislation would presumably be "not related to the company's products or services." H.R. 4487 § 2.

[201] *See Citizens United*, 130 S. Ct. at 915.

2. Shareholder Protection Act

Similar to the Shareholder Funds Act, the Shareholder Protection Act will likely fail the "narrowly tailored" analysis, because it contains two aspects that render it overinclusive.[202] First, the exemption for media corporations is extremely narrow.[203] While the New York Times Company's "sole business" is the publication of news (and so it would be exempted from the Act), the companies that own and operate ABC News or *The Colbert Report*, for example, would not be exempted, because they operate businesses that are not dedicated to publication of news or related purposes.[204] Therefore, the Shareholder Protection Act would impermissibly subject many significant media outlets in the United States to rigorous shareholder-approval procedures. As noted above, the *Citizens United* Court made it clear that even the potential for regulation of political speech or expenditures of media corporations would almost certainly fail the Court's strict scrutiny analysis.[205]

Second, the Shareholder Protection Act is overinclusive because it would apply not only to independent expenditures in federal elections, but also to independent expenditures made with regard to state or local elections.[206] This broad and explicit application reaches far beyond the expenditures that the BCRA sought to restrict and raises serious federalism concerns.[207] The Court, under *Citizens United* or other Supreme Court precedent, would likely invalidate this provision because it exceeds the power granted to Congress.[208] The BCRA did not venture to regulate corporate expenditures made with regard

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[202] *See* Larry E. Ribstein, *The First Amendment and Corporate Governance*, 27 GA. ST. U. L. REV. 1019, 1041-45 (2011).

[203] Shareholder Protection Act of 2010, H.R. 4537, 111th Cong. § 3(d) (2010).

[204] The New York Times Company is the owner of the *New York Times* and several other newspapers. ABC News is owned by The Walt Disney Company and *The Colbert Report* is aired on Comedy Central, which is owned by Viacom. The Walt Disney Company and Viacom both have divisions or subsidiaries that would not be considered publishers or broadcasters of "news, commentary, literature, music, entertainment, artistic expression, scientific, historical or academic works, or other forms of information." *Id*. For example, The Walt Disney Company owns and operates theme parks and Viacom owns video-gaming websites. Neither of these examples constitutes publishing or broadcasting of any kind.

[205] *See Citizens United*, 130 S. Ct. at 906; *see also supra* Part IV.C.1.

[206] H.R. 4537 § 3(e)(4)(A)(i).

[207] *But see* Torres-Spelliscy, *Corporate Political Spending*, *supra* note 23, (manuscript at 66-69).

[208] Burdick v. Takushi, 504 U.S. 428, 433 (1992) (holding that the power to regulate state elections is vested in the states, not Congress, pursuant to the Elections Clause); *see also* U.S. CONST. art. I, § 4, cl. 1.

to state or local elections, and the broad sweep of this proposal crosses the line between what Congress can and cannot regulate.[209]

Therefore, the Shareholder Protection Act is overinclusive because it would not exempt many media corporations and would unprecedentedly expand federal campaign-finance law to regulate corporate expenditures in state and local elections. As a result of this overinclusiveness, the Shareholder Protection Act fails the "fit" analysis set forth in *Citizens United*, and the Court will likely find it not "narrowly tailored" to the shareholder-protection interest.

3. Brennan Center for Justice Proposal

The Brennan Center Proposal has the same core element as the Shareholder Funds Act and the Shareholder Protection Act—it would require "corporations [to] obtain the consent of shareholders before making political expenditures."[210] The proposal defines "political activity" as "any contributions or expenditures made directly or indirectly to, or in support of or opposition to, any candidate, political party, committee, electioneering communication, ballot measure campaign, or an issue advocacy campaign."[211] While the Brennan Center Proposal does exempt expenditures on lobbying from coverage, it makes no exception for media corporations.[212] Although it is the best crafted of the three proposals, the Brennan Center Proposal is still likely to fail the "narrowly tailored" analysis because it contains elements that render it both over- and underinclusive.

Two aspects of the Brennan Center Proposal are overinclusive. First, the proposal would apply equally to publicly owned nonmedia and media corporations alike.[213] In *Citizens United*, the Court found that even the mere possibility of restricting media corporations would ensure constitutional

[209] BCRA prohibited corporations from expending general treasury funds for "electioneering communications," which were defined as broadcast advertisements that "refer to" a *federal* candidate for a period of time directly before a primary or general election. L. PAIGE WHITAKER, CONG. RESEARCH SERV., IB98025, CAMPAIGN FINANCE: CONSTITUTIONAL AND LEGAL ISSUES OF SOFT MONEY 1 (2003), *available at* http://fpc.state.gov/documents/organization/28106.pdf. It is likely that it is beyond the enumerated powers granted to Congress by the U.S. Constitution to regulate campaign financing with regard to state or local elections. *See* U.S. CONST. art. I, § 4, cl. 1; *Burdick*, 504 U.S. at 433.

[210] Torres-Spelliscy, *Corporate Campaign Spending*, *supra* note 18, at 21.

[211] Torres-Spelliscy, *Corporate Political Spending*, *supra* note 23, (manuscript at 72).

[212] *See id.*

[213] *See id.* at 71-77.

invalidation of any campaign-finance legislation.[214] The proposal does not attempt to exempt media corporations nor does it address this point of overinclusiveness as a known shortcoming. This aspect of the proposal casts too wide a net and would encompass every major media corporation in a way that the Court likely will find impermissible under the First Amendment.

Second, the Brennan Center Proposal would restrict a corporation's ability to conduct an "issue advocacy campaign" which, as defined, is overly broad because it could potentially include activity from which shareholders need no protection.[215] The proposal would define "issue advocacy campaign" as "contributions or expenditures for any communication to the general public intended to encourage the public to contact a government official regarding pending legislation, public policy or a government rule or regulation."[216] Although corporations and free speech advocates may raise issues based on the straightforward result of this definition, the potentially unintended—but nonetheless likely—results are of greatest concern.

For example, the Brennan Center Proposal would not allow the host of *The Colbert Report* to spend time on his show to discuss the "Don't Ask, Don't Tell" law in a way that might be reasonably interpreted as encouraging the viewing public to contact their government representatives.[217] Certainly, the host of the show is well-compensated, and Comedy Central along with its corporate parent, Viacom, has spent more than $10,000 to produce and air the show. Therefore, in a fair reading of the proposal's text, it would seem that this expenditure would need shareholder approval.

Another example of this likely result could involve a situation where a corporate leader speaks out on behalf of (or in opposition to) proposed legislation. On March 27, 2009, chief executive officers (CEOs) of the nation's several major banks met with President Obama at the White House.[218] If there had

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[214] *See* Citizens United v. FEC, 130 S. Ct. 876, 906 (2010).

[215] *See* Torres-Spelliscy, *Corporate Political Spending*, *supra* note 23, (manuscript at 72). This may also be a problem with the other two proposals, although their definitions are not clear enough for a proper analysis. This definitional problem may also raise an issue of potential constitutional vagueness.

[216] *Id*.

[217] *See The Colbert Report* (Comedy Central Television broadcast Dec. 7, 2010), *available at* http://www.colbertnation.com/the-colbert-report-videos/367669/december-07-2010/poll-to-repeal-don-t-ask--don-t-tell.

[218] Eamon Javers, *Inside Obama's Bank CEOs Meeting*, POLITICO (Apr. 3, 2009), http://www.politico.com/news/stories/0409/20871.html.

been a press conference afterward and one or more of the CEOs had spoken in support of a regulation or proposed legislation, such speech may have constituted a violation of the proposal. Although news networks may broadcast the message free of charge, the CEO likely flew, at the company's cost, on a very expensive private plane to the White House and spent corporate time and money preparing for the meeting and the press conference. As long as the CEO speaks in his or her official corporate role, the corporation pays him or her to deliver that message. Again, a literal and straightforward reading of the proposal yields results that go well beyond addressing independent expenditures and are far broader than requirements intended to protect the interest of the shareholders.

In addition to the Brennan Center Proposal's overinclusiveness, another aspect of the proposal is underinclusive. The proposal does not cover charitable contributions, independent charitable expenditures,[219] or speech supporting a charitable cause, all of which share many of the same characteristics as independent political expenditures and contain a similar risk of contravening shareholder interests. Like independent political expenditures, charitable expenditures are an activity in which "managers of publicly-traded companies spend . . . using other people's money—in part, money invested by shareholders."[220] In addition, charitable expenditures are similar to political expenditures, because they are unlikely directly related to the products or services offered by the corporation. At a high level, the aims of charitable and political expenditures are similar—they impact arenas outside of the market in which the corporation operates.[221] If the Brennan Center Proposal covered political expenditures while not regulating charitable expenditures, then it would specifically single out political expenditures for disfavor. Further, it would limit the scope of this regulation so that it would not be broad enough and therefore inappropriately tailored to the shareholder-protection interest.

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[219] The non-inclusion of independent charitable expenditures is potentially an exception that could swallow the rule. Many political expenditures could be cast as charitable expenditures, as can be seen in the complicated relationship (and overlap) between 501(c)(3) and 501(c)(4) nonprofit organizations.

[220] Torres-Spelliscy, *Corporate Campaign Spending*, *supra* note 18, at 9 (citation omitted).

[221] *See* Gilson & Klausner, *supra* note 24 ("Typically [charitable contributions] are uncontroversial, providing support to schools, art museums, United Way and the like in communities where the corporation does business. A willful chief executive can use corporate funds to make contributions to pet causes, but this type of behavior is rare and, like other self-interested dealing, constrained by ordinary board oversight.").

Thus, the proposal is overinclusive because it would not exempt media corporations and it would inhibit corporations from undertaking typical public-policy advocacy. In addition, the proposal is underinclusive because it would not regulate charitable speech, contributions, or expenditures. As a result of this over- and underinclusiveness, the Brennan Center Proposal fails the "fit" analysis set forth in *Citizens United*, and the Court is unlikely to find it "narrowly tailored" to the shareholder-protection interest.

D. Content-Neutrality Analysis

The "fit" analysis under *Citizens United*'s conception of shareholder protection as a compelling governmental interest is the most pertinent analytical tool available to critique the mandatory shareholder-approval proposals. However, a secondary constitutional argument may be made with regard to the proposals; namely, they violate the content-neutrality principle, a fundamental tenet of the First Amendment.[222] The seminal case *Police Department of Chicago v. Mosley*[223] articulated the content-neutrality principle. In *Mosley*, a protester challenged an ordinance that disallowed nonlabor picketing, but allowed labor-related picketing, in front of schools.[224] The Court held the ordinance to be unconstitutional because it made an impermissible distinction between labor-related picketing and other peaceful picketing.[225] Further, the Court stated that "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[226]

The mandatory shareholder-approval proposals violate *Mosley*'s content-neutrality principle because they restrict only certain speech based on content. For example, the proposals do nothing to inhibit charitable speech or other types of speech that may be unrelated to the products and services of the company. These proposals would not require shareholder approval for corporate management to spend money on contributions to

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[222] *See* Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn't Bark*, 1994 SUP. CT. REV. 1, 20 (1994).

[223] *See* Police Dep't of Chi. v. Mosley, 408 U.S. 92 (1972). Although *Mosley* is a seminal case exemplifying the Court's treatment of the content-neutrality principle, it has been repeatedly enshrined by the Court as a central tenet of the First Amendment. *See* Fallon, *supra* note 222, at 20.

[224] *Mosley*, 408 U.S. at 92-93.

[225] *Id.* at 94.

[226] *Id.* at 95.

charitable organizations, encourage the public to donate or volunteer for charitable organizations, or even run advertisements supporting corporate management's favorite sports teams.[227] Still, when it comes to political speech, under these proposals, corporate management would be required to seek shareholder approval and follow very specific regulations. The *Mosley* Court prohibited "[s]elective exclusions from a public form . . . based on content alone,"[228] such as the prohibition on running advertisements about political issues without shareholder approval but allowing advertisements about charitable or other pet causes without restriction of any kind.

Although the content-neutrality analysis would vary slightly between the three mandatory shareholder-approval proposals, the main thrust of the proposals is identical. Because "[a]ny restriction on expressive activity because of its content . . . completely undercut[s] the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,'"[229] any significant restriction of a corporation's ability to make independent political expenditures is impermissible under the content-neutrality principle of the First Amendment. Because *Citizens United* placed political speech at the core of the First Amendment's protection and *Mosley* identified the content-neutrality principle as fundamental, these proposals are ripe for invalidation by the Court.

CONCLUSION

Many legislative and regulatory responses to *Citizens United* have been proposed and the three mandatory shareholder proposals discussed in this note are certainly among the most well-intentioned and carefully constructed. Although they would have the potential to ameliorate the effects of *Citizens United* regarding independent political expenditures by corporations, they run afoul of that very decision's interpretation of the First Amendment.

Even if the Court finds shareholder protection to be a compelling governmental interest, none of the three proposals is narrowly tailored to that interest. The shareholder democracy

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[227] While there may be limitations on such activities from corporate law, they are immaterial for this note's constitutional analysis.

[228] *Id.* at 96.

[229] *Id.* (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

and "fit" analysis, articulated with regard to the shareholder-protection interest in *Citizens United*, does not permit any of the three mandatory shareholder-approval proposals to exist within current First Amendment jurisprudence. In addition, the proposals likely violate the content-neutrality rule by placing significant burdens on corporations wishing to exercise their political rights while failing to place similar restrictions on other forms of corporate speech.

As a result of these constitutionally doomed proposals, PepsiCo may uninhibitedly support a potential campaign by Mr. Colbert for President in 2012 and similarly, Viacom will not have to seek shareholder approval before airing an episode of *The Colbert Report* that features Mr. Colbert's candidacy.[230] In the new legal and constitutional landscape of *Citizens United*, corporations have unprecedented constitutional protection for political activities. Although scholars and legislators may continue to craft creative responses, the barriers to restricting corporate political speech remain stronger than ever.

Robert B. Sobelman[†]

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[230] Although a candidacy by Mr. Colbert in 2012 looks increasingly unlikely, he has remained active in presidential politics and devoted himself to pushing the boundaries of campaign-finance law and the First Amendment. *See* David Carr, *Comic's PAC Is More Than a Gag*, N.Y. TIMES, Aug. 22, 2011, at B1.

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