

FOREIGN NATIONALS, ELECTORAL SPENDING, AND THE FIRST AMENDMENT

TONI M. MASSARO*

“[I]t is inherent in the nature of the political process that voters must be free to obtain information from diverse sources in order to determine how to cast their votes.”

—Justice Anthony Kennedy, *Citizens United v. FEC*, 130 S. Ct. 876, 899 (2010).

In January 2010, the United States Supreme Court ruled in *Citizens United v. FEC* that corporations and unions may use their general treasury funds to purchase advertising that explicitly calls for the defeat or election of federal or state candidates.¹ The decision opened the door to unlimited express advocacy advertisements by corporations and unions, provided that the ads are “independent expenditures”—that is, not coordinated with a campaign or candidate.² Before the decision, corporations and unions could fund express advocacy advertisements only through use of separate, segregated funds, called Political Action Committees (PACs), created with voluntary contributions.³

The Court also eased restrictions on so-called “electioneering communications” by corporations and unions—that is, broadcast advertisements that clearly mention a federal candidate and that air within sixty days of a general election or thirty days of a primary election.⁴ Although such advertisements were allowed

* Regents’ Professor, Milton O. Riepe Chair in Constitutional Law, and Dean Emerita, University of Arizona James E. Rogers College of Law. Thanks go to Tom Grey, Nina Rabin, David Gantz, and Genevieve Leavitt for their feedback on an earlier version of the manuscript. I also thank the editors of the *Harvard Journal of Law & Public Policy*.

1. 130 S. Ct. 876, 897 (2010).

2. *See id.* at 910.

3. *See* Federal Election Campaign Act (FECA) of 1971, 2 U.S.C. §§ 431–432 (2006).

4. *See* Bipartisan Campaign Reform Act (BCRA) of 2002, 2 U.S.C. § 441b (2006).

before *Citizens United*, they could only be funded by PACs, and had to comply with other federal restrictions.⁵

The decision unleashed a torrent of commentary—some of it scathing⁶—and immediately led to calls for new legislation and even a constitutional amendment.⁷ The debate over the decision is hardly over, and its practical implications likely cannot be fully or accurately assessed until several election cycles have passed.

One of the ideas raised by critics of *Citizens United* is that Congress might further limit the ability of foreign corporations to make campaign expenditures.⁸ Existing laws already limit foreign speakers (both individual and corporate) from making campaign contributions to candidates for state or federal office, or contributions to American political parties,⁹ though the laws exempt permanent resident aliens and American subsidiaries of foreign corporations. Existing laws also prohibit foreign nationals—which include individuals who are not lawful permanent residents, foreign governments, corporations, residents, and political parties “organized under the laws of or having [their] principal place of business in a foreign country”¹⁰—from funding the operation of a PAC.¹¹ Post-*Citizens United*, because the law exempts American subsidiaries of foreign corporations from these restrictions, these subsidiaries need not use a PAC to expend funds on a domestic election.

Extending the existing restrictions on foreign national electoral spending, some argue, is a way to cabin the influence of many

5. *Citizens United*, 130 S. Ct. at 897–98.

6. See, e.g., Ronald Dworkin, *The Decision That Threatens Democracy*, N.Y. REV. BOOKS, May 13, 2010, at 63.

7. See Democracy is Strengthened by Casting Light on Spending in Elections Act (DISCLOSE Act), S. 3295, 111th Cong. (2010); H.R.J. Res. 68, 111th Cong. (2010); H.R.J. Res. 13, 111th Cong. (2009); see also Eric Zimmerman, *Dodd Introduces Constitutional Amendment To Reverse SCOTUS on Campaign Spending*, THE HILL'S BLOG BRIEFING ROOM (Feb. 24, 2010, 3:33 PM), <http://thehill.com/blogs/blog-briefing-room>.

8. See, e.g., Alex DeMots, *How To Address Corporate Political Spending*, CTR. FOR AM. PROGRESS (Feb. 3 2010), http://www.americanprogress.org/issues/2010/02/citizens_united.html.

9. See 2 U.S.C. § 441e (2006), which prohibits “foreign nationals” from making campaign contributions or expenditures, and defines them as any “foreign principal” under 22 U.S.C. § 611(b) (2006), as well as individuals who are not United States citizens or lawful permanent residents. Federal law defines a “foreign principal” as a foreign government, corporation, or political party organized or “having its principal place of business in a foreign country.” 22 U.S.C. § 661(b)(1), (3).

10. See 2 U.S.C. § 441e(b); 22 U.S.C. § 611(b)(1), (3).

11. See 2 U.S.C. § 441e(a); 11 C.F.R. § 110.4(a)(3).

large corporations over elections, given the degree to which many of them have extensive foreign connections.¹² For example, Congress may seek to expand the definition of a “foreign corporation” to include corporations that are more than twenty-percent foreign-owned.¹³ Alternatively, Congress may seek to regulate corporations that are incorporated in the United States, but that might be described as subject to substantial foreign influence.¹⁴

Would such restrictions be constitutional?

The majority in *Citizens United* expressly declined to rule on whether existing legislation based on a corporate speaker’s foreign status is constitutional,¹⁵ though Justice Stevens warned in his dissent that the opinion weakened the support for such speaker-based distinctions.¹⁶ If Justice Stevens is correct that *Citizens United* casts doubt on the constitutionality of this existing legislation, then expansions of restrictions on campaign spending by foreign nationals almost certainly would be unconstitutional.

This Article analyzes whether foreign speakers can be restricted from making political campaign contributions or expenditures in ways that nonforeign speakers cannot. It outlines the strong constitutional arguments against this assumption,¹⁷ arguments that were fortified not only by *Citizens United*, but also by *McDonald v. City of Chicago*,¹⁸ the Court’s most recent Second

12. DeMots, *supra* note 8.

13. *See, e.g.*, DISCLOSE Act, S. 3295 § 102(a)(3), 111th Cong. (2010) (proposing a twenty-percent limit); *cf.* S. 2 § 504(a)(2), 100th Cong. (1987) (proposing a fifty-percent limit).

14. *See* S. 3295 § 102(a)(3)(B)–(D).

15. *See* *Citizens United v. FEC*, 130 S. Ct. 876, 911 (2010) (“We need not reach the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation’s political process. Section 441b is not limited to corporations or associations that were created in foreign countries or funded predominately by foreign shareholders. Section 441b therefore would be overbroad even if we assumed, *arguendo*, that the Government has a compelling interest in limiting foreign influence over our political process.” (citations omitted)).

16. *Id.* at 947–48 (Stevens, J., concurring in part and dissenting in part) (observing that the majority “would appear to afford the same protection to multinational corporations controlled by foreigners as to individual Americans”).

17. The arguments against such restrictions were underlined by other commentators well over a decade ago, though have gone unheeded. *See, e.g.*, Note, “Foreign” Campaign Contributions and the First Amendment, 110 HARV. L. REV. 1886 (1997). As this Essay explains, *Citizens United* and *McDonald* strengthen these arguments considerably.

18. 130 S. Ct. 3020 (2010).

Amendment decision. The logic of both decisions, coupled with basic First Amendment methodology in political speech cases, suggests that campaign spending restrictions based on the citizenship status of the political speaker cannot survive the exacting scrutiny that the Court now imposes on such legislation.

The constitutional case against such restrictions is not, however, a conclusive one, and the Court likely would uphold such legislation despite the many sound arguments against them. A majority of the Court almost certainly would be loath to reach an outcome that significantly limits congressional power to ward off “foreign influence” over American elections, given how unpopular such a ruling would be in so many corridors, and given past and recent evidence of the Court’s willingness to subordinate traditional First Amendment methods and values to national security interests.¹⁹ It likely can, and will, find a way to uphold congressionally imposed restrictions on campaign expenditures and contributions.

Yet to rule in favor of such restrictions, the Court will have to ignore the internal logic of *Citizens United*, the structural implications of *McDonald*, and the Court’s soaring rhetoric about the sophistication of American voters and the value of robust political expression fueled by unlimited private expenditures. Whether, and how, the Court navigates these newly fortified, self-constructed shoals will be interesting to observe.

Even if the Court does uphold restrictions on foreign national electoral spending, this will not prevent foreign speakers from influencing the American electorate. The rapid development of global technologies for communication, including electoral communications, affords extraterritorial foreign nationals multiple ways of reaching American voters that vault the legal barriers. Efforts to territorialize electioneering rights are already practically infeasible.

Legislative energy thus might be better spent on demanding greater transparency and content accuracy in campaign communications, rather than on speaker-based restrictions on spending. These efforts too may be of limited effectiveness, however, given constitutional protection of anonymous political speech, the un-

19. See, e.g., *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010); see also discussion *infra* Part II.G.3.

certain effects of disclosure on voter behavior, and the many ways in which even constitutional restrictions can be circumvented.

Whatever campaign reform efforts Congress may adopt, they should be premised on facts about how the modern world of electioneering actually works. Likewise, judicial analysis of the measures should rest on plausible, not romantic, notions about how voters, candidates, and officials actually think and act.

The issue of whether foreign nationals can be limited in electoral spending forces to the foreground our darker notions about speaker autonomy, voter perspicuity, and official integrity. The First Amendment is, and ever has been, a balance between sunny confidence in the “marketplace of ideas” and grim skepticism about marketplace failures. This is no less true in the realm of political speech simply because it is “core value” speech; on the contrary, in no other arena does it matter so much whether theoretical commitments match the world to which they apply, or whether judicial methods for effecting the constitutional balance are effective in preserving First Amendment values. The Court may see this most clearly when its gaze turns away from the impact that domestic corporate electoral spending has on electoral integrity and turns to the impact that global electoral spending in American elections has on electoral integrity. In both contexts, it does—or should—matter whether facts and theory line up in ways that respect or undermine constitutional values.

I. ELECTORAL EXPRESSION RIGHTS OF DOMESTIC CORPORATIONS

In 1976, the Court in *Buckley v. Valeo* held that campaign contributions to political candidates could be limited to prevent corruption or the appearance of corruption, but that expenditures on their behalf could not be so limited, because no evidence supports the assumption that independent expenditures raise comparable risks of candidate corruption.²⁰ Spending limits, the Court insisted, triggered strict scrutiny,²¹ and equalizing the strength of voices by setting a cap on campaign expenditures was not a compelling reason for such limits.²²

20. 424 U.S. 1 (1976) (per curiam).

21. See *id.* at 20–21, 44–45.

22. See *id.* at 48–49.

In 1978, the Court extended this reasoning to corporations, and struck down spending limits imposed on corporations in ballot measure elections.²³ The opinion was narrowly drawn, and suggested in a footnote that limits on independent expenditures by corporations to influence candidate elections might be justified by an anticorruption rationale.²⁴

The Court later returned to the question of corporate independent expenditures in *Austin v. Michigan Chamber of Commerce*, and upheld spending limits imposed on for-profit corporations in candidate elections.²⁵ The Court did so, however, on an “anti-distortion” rationale, rather than an anticorruption justification. Specifically, it noted that “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” were a sound basis for regulations of corporate independent expenditures.²⁶ This antidistortion argument stood in obvious tension with the Court’s earlier rejection of an equality-based justification for spending limits in *Buckley*.

In *Citizens United*, the Court struck down major provisions of the Federal Election Campaign Act (FECA) of 1971²⁷ and the Bipartisan Campaign Reform Act (BCRA) of 2002²⁸ on First Amendment grounds. *Citizens United*, a conservative non-profit 501(c)(4) organization that accepts contributions from corporations, produced a film entitled *Hillary: The Movie*.²⁹ It sought to air the movie on cable video-on-demand and to broadcast commercials about the movie, but was concerned that the FEC might deem the ads and film impermissible campaign communications.³⁰ The film was highly critical of Clinton, who was then a candidate for the Democratic presidential nomination, and thus arguably was express advocacy for or against a candidate by a corporation. The timing of the proposed airing of the film—within thirty days of the Democratic primaries—also

23. See *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765 (1978).

24. *Id.* at 788 n.26.

25. See 494 U.S. 652, 654, 668–69 (1990).

26. *Id.* at 660.

27. 2 U.S.C. § 441b (2006).

28. 2 U.S.C. § 441b(b)(2).

29. *Citizens United v. FEC*, 130 S. Ct. 876, 886–87 (2010).

30. *Id.* at 888.

triggered the prohibitions on electioneering communications. Citizens United sought an injunction to prevent the FEC from prohibiting it from airing the ads and the film.

The case was argued twice before the Supreme Court. During the first argument on March 24, 2009, then-Deputy Solicitor General Malcolm Stewart argued that *Austin* gave the government power to ban books that contained even one sentence expressly advocating the election or defeat of a candidate, so long as the books were published by a corporation or union.³¹

On June 29, 2009, the Court issued an order directing the parties to reargue the case, and to submit briefing on whether the Court should “overrule either or both *Austin v. Michigan Chamber of Commerce* and the part of *McConnell v. FEC* that addresses the facial validity of Section 203 of the Bipartisan Campaign Reform Act of 2002.”³² This extraordinary procedural move and explicit briefing request led nearly all observers to predict that the Court would rule against the government, predictions that proved to be correct.

FECA prohibited corporations and unions from using their general treasury funds to make expenditures influencing federal elections.³³ This included advertisements known as “express advocacy” (for example, “Defeat Kelly!”), even if the expenditures were independent of a candidate’s campaign. The organizations could engage in this form of electoral communication, and could make contributions to candidates, through other means—that is, by establishing PACs funded by voluntary contributions.³⁴

BCRA prohibited corporations and unions from using general treasury funds to broadcast electioneering communications—that is, messages that clearly identify a candidate, even if they do not call for the candidate’s defeat or election—during certain blackout periods close to a general (sixty days) or primary (thirty days) election.³⁵ The effect of both regulations was that corporations and unions could not engage in electioneering communications or express advocacy unless they established a PAC.

31. See Transcript of Oral Argument at 26–31, *Citizens United v. FEC*, 130 S. Ct. 876 (2010) (No. 08-205).

32. *Citizens United v. FEC*, 129 S. Ct. 2893 (2009) (citations omitted).

33. 2 U.S.C. § 441b.

34. *Citizens United*, 130 S. Ct. at 887–88.

35. *Id.* at 887.

Writing for the majority in *Citizens United*, Justice Kennedy concluded that independent expenditures—as opposed to direct contributions to candidates—could not be prohibited based upon corporate or union status.³⁶ He noted the tension between the analysis of distortion in *Buckley* and in *Austin* and sought to resolve it by overruling *Austin*.³⁷ *Austin*, he said, was the outlier case,³⁸ and prohibitions on corporate independent expenditures dated back to 1947, not to the early 1900s when the more established restrictions on corporate electoral contributions were adopted.³⁹

The Court deployed an especially rigorous version of strict scrutiny analysis, as it has done in other recent free speech cases,⁴⁰ knocking down each of the government's proffered justifications for the campaign finance restrictions. It rejected the antidistortion rationale for independent expenditure limits on the ground that it would allow Congress to "ban political speech of media corporations,"⁴¹ a plainly untenable result. The spending prohibition, as written, was fatally overbroad because it reached large and small entities alike, which undermined the "immense aggregations of wealth" argument for imposing such restrictions.⁴² In any event, the Court held political speech cannot be rationed based upon a speaker's wealth, and a speech-equalizing objective is an inappropriate basis for restrictions on such expression.⁴³

Nor was the prohibition on independent expenditures justified by an anticorruption rationale. According to the majority, "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of cor-

36. *See id.* at 900–11.

37. *See id.* at 903, 907.

38. *Id.* at 907. Chief Justice Roberts wrote a concurring opinion, joined by Justice Alito, in which he emphasized this point attempting to deflect criticism that the case was defying a century of precedent or was otherwise activist. *Id.* at 917, 920–21 (Roberts, C.J., concurring).

39. *See id.* at 900 (majority opinion).

40. *See, e.g.,* *Republican Party of Minn. v. White*, 536 U.S. 765, 781 (2002) (striking down the "announce" clause for judicial candidates on the ground that it was content-specific and that the measure did not satisfy strict scrutiny).

41. *Citizens United*, 130 S. Ct. at 905.

42. *Id.* at 907 (quoting *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 660 (1990)).

43. *See id.* at 904–05.

ruption.”⁴⁴ Only direct or “quid pro quo” contributions in candidate elections raise this specter.

That corporations and unions could use a PAC alternative to engage in election-related expression did not save the statute; PACs are burdensome and difficult to administer in ways that render them a nigh on prior restraint, and thus an unsatisfactory alternative to use of general treasury funds for the same expressive purpose.⁴⁵

Moreover, dissenting shareholders’ interests and concern about deception of the public could be dealt with through other means. As to the former concern, the Court noted that shareholders could correct for any abuse through corporate democracy or “other regulatory mechanisms.”⁴⁶ As for the latter concern, disclaimer and disclosure provisions are a less restrictive alternative to banning the expenditures and may suffice to prevent deception.⁴⁷ As applied to the film and ads at issue in the case, these disclaimer and disclosure provisions were valid.⁴⁸

The key analytical steps in the majority’s analysis were as follows. First, differential treatment of corporate and union speakers is a speaker-based distinction, which can be tantamount to a content-based⁴⁹ (if not viewpoint-based)⁵⁰ distinction. Second, content-based distinctions must satisfy strict scrutiny, and are very rarely upheld in the context of core political speech.⁵¹

The central theoretical drivers of the opinion were that corporations and unions have expressive rights,⁵² that “the First Amendment does not allow political speech restrictions based on a speaker’s corporate identity,”⁵³ that the electorate has the wisdom

44. *Id.* at 909.

45. *See id.* at 897–98.

46. *Id.* at 911.

47. *Id.* at 914.

48. Justice Thomas was the sole Justice who would have struck down these provisions. *See id.* at 980–82 (Thomas, J., concurring in part and dissenting in part).

49. *See id.* at 899 (majority opinion) (“Speech restrictions based on the identity of the speaker are all too often simply a means to control content.”).

50. *See* Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 *LOY. L.A. L. REV.* 67, 123–25 (2007).

51. *Citizens United*, 130 S. Ct. at 898–99.

52. *See id.* at 899–900.

53. *Id.* at 903 (citing *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 784–85 (1978)).

to evaluate election-related expression,⁵⁴ and that “[f]actions should be checked by permitting them all to speak.”⁵⁵ Moreover, “[t]he First Amendment’s protections do not depend on the speaker’s ‘financial ability to engage in public discussion.’”⁵⁶

More generally and abstractly, the majority utterly renounced a “state as parliamentarian” theory of the First Amendment, under which it might legitimately act to correct for capture problems and marketplace failures.⁵⁷ Instead, the majority celebrated a democratic theory of free speech that envisions “We the People” as rational, autonomous actors who can make sense of the sea of information, including campaign communications, free from paternalistic interventions by the government. Put simply, “[t]he First Amendment confirms the freedom to think for ourselves.”⁵⁸

But of course the First Amendment does not allow all speech. First Amendment doctrine is notoriously complex, riddled with categorical and contextual exceptions to full-on open discourse on the so-called “street corner.” Thus, the Court’s own “[r]hetoric ought not obscure reality.”⁵⁹ *Citizens United* may be the new high-water mark of pro-speech enthusiasm, but a more complete account of our First Amendment doctrine also includes the ways in which government restrictions on political expression may be allowed to advance traditional and evolving notions of compelling interests.⁶⁰ Nevertheless, the case is a ringing endorsement of the marketplace of ideas theory in the particular context of electoral communications and should be a significant obstacle to future government efforts to regulate such communications on the

54. *Id.* at 899 (“Government may not . . . deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration.”).

55. *Id.* at 907 (citing THE FEDERALIST NO. 10 (James Madison)).

56. *Id.* at 904 (quoting *Buckley v. Valeo*, 424 U.S. 1, 49 (1976) (per curiam)).

57. See, e.g., Owen M. Fiss, *State Activism and State Censorship*, 100 YALE L.J. 2087, 2100 (1991) (arguing that only through regulation can we assure that all positions are heard); see also Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 267 (1992). For a critique of such collectivist theories of the First Amendment, see Robert Post, *Meiklejohn’s Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109 (1993).

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

59. *Id.* at 907.

60. See, e.g., *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2712 (2010). See discussion *infra* Part II.G.3; see also *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (holding that political speech can be restricted when it is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”).

ground that the playing field is not level or that the public cannot sort out the information itself.

A final theoretical premise of the case was that a corporation is a “real entity,” distinct from its owners and the sovereign that gives it life. As Professor Reuven Avi-Yonah explains, three theories of the corporation perpetually vie for dominance and have implications for how one conceptualizes corporations’ First Amendment rights:

Those theories are the aggregate theory, which views the corporation as an aggregate of its members or shareholders; the artificial entity theory, which views the corporation as a creature of the State; and the real entity theory, which views the corporation as neither the sum of its owners nor an extension of the state, but as a separate entity controlled by its managers.⁶¹

The more one gravitates to the aggregate theory of the corporation, the weaker the corporation’s freedom of speech rights tend to appear. As the Court itself once stated pre-*Citizens United*, “corporate contributions are furthest from the core of political expression, since corporations’ First Amendment speech and association interests are derived largely from those of their members, and of the public in receiving information.”⁶²

In other cases,⁶³ however, and in *Citizens United* in particular,⁶⁴ the Court has embraced the real entity theory, which more strongly supports treating corporations as rights holders equiva-

61. Reuven S. Avi-Yonah, *To Be or Not to Be? Citizens United and the Corporate Form* 1–2 (Empirical Legal Studies Ctr., Working Paper No. 10-005, 2010), available at <http://www.law.umich.edu/centersandprograms/elsc/abstracts/2010/Documents/10-005aviyonah.pdf>.

62. *FEC v. Beaumont*, 539 U.S. 146, 161 n.8 (2003) (citations omitted). The free speech rights of workers, for example, limit a collective bargaining representative’s right to use union dues to support political or ideological causes unrelated to employee representation duties. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235–36 (1977); *see also Keller v. State Bar of Cal.*, 496 U.S. 1, 14 (1990) (holding that compulsory bar dues may not be used for ideological or political purposes unrelated to regulation of the legal profession or improving the quality of legal services available to the public); *cf. Bd. of Regents of the Univ. of Wis. v. Southworth*, 529 U.S. 217, 233 (2000) (holding mandatory student activity fees could be used to support student organizations engaged in political and ideological activities at a public university).

63. *See, e.g., First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 777 (1978). As Professor Avi-Yonah notes, to see corporations as real entities that can express views that differ from the shareholders enables them to engage in a range of worthy activities, such as contributing to charitable causes. *See Avi-Yonah, supra* note 61, at 27.

64. *Citizens United*, 130 S. Ct. at 899–901.

lent to individuals. Indeed, even the dissent in *Citizens United* emphasized the differences between natural persons and corporate entities in terms that hinge on the nature of the corporation itself, rather than its relationship to the state or its shareholders.⁶⁵

The Justices obviously disagreed—vigorously—about the implications of this real entity theory of the corporation. The majority in *Citizens United* thought it pointed toward equivalence between individual and corporate speakers, whereas the dissent viewed the special characteristics of corporations as a sound basis for restrictions on their freedom of political expression, including campaign contributions and expenditures.⁶⁶ But the opinions converged on the notion of the corporation as neither the sum of its shareholder parts, nor a mere creature of the state. In other words, the Court's internal division was over whether this particular real entity has characteristics that differ significantly from the characteristics of real people, and that pose unique perils to electoral integrity; it was not a debate about whether the corporation is a real entity.

By implication, a foreign corporate entity likewise exists apart from its foreign components and despite any foreign sovereign's regulatory control over the entity. As such, it now makes doctrinal sense to treat a foreign corporation as equivalent to a foreign individual for purposes of the First Amendment. Proposals that would determine a foreign corporation's speech rights based on the degree of foreign ownership or control run afoul of the "real entity" theory of the corporation that prevailed in *Citizens United*.

The Court conceivably could apply an aggregate theory to foreign corporations and a real entity theory to domestic ones, but it would be difficult to reconcile such divergent approaches within the same narrow area of constitutional law. For both types of business organizations, one would think, the identity of the owners should be given the same constitutional mean-

65. *Id.* at 972 n.72 (Stevens, J., concurring in part and dissenting in part) ("It is not necessary to agree on a precise theory of the corporation to agree that corporations differ from natural persons in fundamental ways, and that a legislature might therefore need to regulate them differently if it is human welfare that is the object of its concern."); see also Avi-Yonah, *supra* note 61, at 32. Professor Avi-Yonah notes that although Justice Stevens "does mention briefly the artificial entity rationale for *Austin*, [he] does not emphasize it in comparison with corporate power." *Id.* at 33.

66. See Avi-Yonah, *supra* note 61, at 33.

ing. The constitutional question thus should not hinge on corporate status *per se*: rather, it should turn on whether foreign individuals have characteristics that pose unique perils to electoral integrity such that the government can make speaker-based restrictions on their independent expenditures. That they choose to speak through a corporate or other collective form should not, following the logic of *Citizens United*, matter.

The following arguments for restrictions on electoral expression therefore should not satisfy the Court's test, if the forgoing analytical, theoretical, and rhetorical moves of *Citizens United* are taken seriously: arguments that corporate speakers should be treated differently from individual speakers, arguments that foreign nationals may possess vast wealth that may skew political debates, arguments that PACs or other complicated or burdensome alternatives to use of general treasury funds for electoral expression eliminate any First Amendment concerns, arguments that independent expenditures (in contrast to *quid pro quo* contributions) may corrupt American officials, or arguments that the American public may be misled by foreign national electoral expression in ways that justify governmental intervention. Nothing about the foreign source of independent expenditures logically should revive any of these rejected bases for government restrictions on such expenditures.

Consequently, if restrictions on foreign nationals' electoral expression pass constitutional muster, then these restrictions must rest on other justifications. Is there something else that explains why restrictions on foreign-based electoral communications are constitutional despite the evident loss of information available to discerning American voters?

Part II explores the possible reasons for treating foreign nationals differently than American citizens with respect to campaign expenditures.

II. ELECTORAL EXPRESSION RIGHTS OF FOREIGN NATIONALS, INCLUDING FOREIGN CORPORATIONS

In the wake of *Citizens United*, numerous proposals for revisions in federal campaign finance laws have emerged.⁶⁷ They

67. See R. SAM GARRETT, CONG. RESEARCH SERV., R 41054, CAMPAIGN FINANCE POLICY AFTER *CITIZENS UNITED V. FEDERAL ELECTION COMMISSION*: ISSUES AND OPTIONS FOR CONGRESS 2-7 (2010) (outlining some of the pending proposals).

range from proposals to condition government grants on foregoing political speech⁶⁸ to increasing public financing for congressional campaigns.⁶⁹ Among these proposals are expanded restrictions on laws that currently limit robust restrictions on foreign national electoral spending. As noted above,⁷⁰ federal law currently restricts foreign electoral spending in the following ways:

- foreign nationals may not contribute, donate, or spend funds in connection with any federal, state, or local election in the United States, either directly or indirectly;⁷¹
- foreign nationals may not fund the operation of a PAC;⁷²
- foreign nationals may not “directly dictate, control, or directly or indirectly participate in the decision making process of any political action committee”;⁷³
- foreign nationals under current law include foreign governments, foreign political parties, foreign corporations, foreign associations, foreign partnerships, individuals with foreign citizenship, and immigrants who do not have a “green card”;⁷⁴
- lawful permanent residents are exempted from the restrictions on “foreign nationals”;⁷⁵
- American subsidiaries of foreign corporations are exempted from the restrictions on “foreign nationals” and may participate in electoral spending subject to federal conditions.⁷⁶

68. *Id.* at 6.

69. *Id.* at 3–4. The public finance or so-called “Clean Elections” reforms may be difficult to defend, however, given *Davis v. FEC*, 554 U.S. 724 (2008), which struck down the so-called “Millionaire’s Amendment” to BCRA. Whether matching funds provisions (such as Ariz. Rev. Stat. 16-952) are constitutional post-*Davis* and *Citizens United* is an issue on which the Supreme Court recently granted certiorari. See *McComish v. Bennett*, 611 F.3d 510, 513–14 (9th Cir. 2010), *cert. granted*, 79 U.S.L.W. 3109 (U.S. Nov. 29, 2010) (No. 10-239) (appealing the Arizona Clean Elections law matching funds provision). See generally Richard M. Esenberg, *The Lonely Death of Public Campaign Financing*, 33 HARV. J.L. & PUB. POL’Y 283, 300–32 (2010).

70. See *supra* notes 9–11 and accompanying text.

71. 2 U.S.C. § 441e(a)(1) (2006).

72. *Id.*

73. See *supra* notes 9–11.

74. *Id.*

75. 2 U.S.C. § 441e(b)(2).

76. *Id.*

Various proposals would modify these provisions as follows:

- to redefine foreign national to include a corporation with five-percent foreign ownership of the voting shares;⁷⁷
- to redefine foreign national to include a corporation with twenty-percent foreign ownership of the voting shares;⁷⁸
- to redefine foreign national to include a corporation with fifty-percent or more foreign ownership of the voting shares;⁷⁹
- to redefine foreign national to include a corporation where a majority of the Board are foreign nationals;⁸⁰
- to redefine foreign national to include a United States subsidiary run by a foreign national;⁸¹
- to ban electioneering by corporations that fall under any of the above revised definitions of foreign national.⁸²

For example, the Democracy is Strengthened by Casting Light on Spending in Elections Act (DISCLOSE Act) would have banned electioneering by corporations with twenty percent of voting shares controlled by foreign nationals, with a majority of board directors who are foreign nationals, or whose United States subsidiary is controlled by a foreign national.⁸³

In its section on “findings related to foreign corporations,” DISCLOSE listed the following justifications for its restrictions on such entities:

1. The Supreme Court’s decision in the *Citizens United* case has provided the means by which United States corporations controlled by foreign entities can freely spend money to influence United States elections.
2. Foreign corporations commonly own U.S. corporations in whole or in part, and U.S. corporate equity and debt are also held by foreign individuals, sover-

77. H.R. 4517, 111th Cong. § 2(a)(3) (2010).

78. S. 3295, 111th Cong. § 102(a)(3) (2010).

79. H.R. 4550, 111th Cong. § 2(3) (2010).

80. S. 3295, § 102(a)(3).

81. *Id.*

82. *Id.* § 102(a).

83. S. 3295, § 102.

- eign wealth funds, and even foreign nations at levels which permit effective control over these U.S. entities.
3. As recognized in many areas of the law, foreign ownership interests and influences are exerted in a perceptible way even when the entity is not majority-foreign-owned.
 4. The Federal Government has broad constitutional power to protect American interests and sovereignty from foreign interference and intrusion.
 5. Congress has a clear interest in minimizing foreign intervention, and the perception of foreign intervention, in United States elections.⁸⁴

DISCLOSE failed, in a partisan vote of fifty-seven to forty-one—three votes short of the three-fifths majority needed to break a Republican filibuster.⁸⁵ The legislation was opposed by some in the international business community, such as the Organization for International Investment, on the ground that the redefinition of foreign national would have discriminatory consequences for U.S. subsidiaries of foreign corporations and their American employees.⁸⁶

The notion that undergirded DISCLOSE was that the United States government has a strong interest in banning political contributions and expenditures by foreign nationals because such aid constitutes foreign interference and intrusion into elections, or the appearance thereof. Legislative restrictions based on this assumption trace back to 1966, when Congress passed amendments to the Foreign Agents Registration Act (FARA), an internal security act. As described by the Federal Election Commission, FARA was designed to “minimize foreign intervention in U.S. elections.”⁸⁷

But as Professor Zephyr Teachout has noted, the roots of American fear of foreign influence over American government

84. *Id.* § 2(c)1–5.

85. See David M. Herszenhorn, *Campaign Finance Bill Grinds to Halt in Senate*, N.Y. TIMES, July 28, 2010, at A14.

86. See Press Release, Org. for Int’l Inv., “Foreign” Influence in the U.S. Political System? (Nov. 20, 2010), available at <http://www.ofii.org/news-room/ofii-press-releases/859-ofii-responds-to-senate-letter-to-fec.html>.

87. FEC, FOREIGN NATIONALS (2003), available at <http://www.fec.gov/pages/brochures/foreign.shtml>.

extend back to the eighteenth century.⁸⁸ For example, the Constitution forbids federal officials from receiving gifts from a “King, Prince or foreign State.”⁸⁹

The assumption that gifts may corrupt elected officials is thus hardly new—and apprehension about the risk of this and other forms of official corruption endures. Yet simply raising an anti-corruption or antidistortion flag no longer suffices to prove the risk is substantial enough to outweigh countervailing First Amendment interests. The restrictions against foreign campaign contributions or expenditures premised on such concerns must be justified by some evidence and must be furthered by narrowly tailored measures, despite their historical pedigree.⁹⁰ They also must be weighed against the competing historical and constitutional emphasis on openness to ideas, including foreign ideas. The latter interest was given substantial new force in *Citizens United*, to the extent that the case celebrates voter agency and elected officials’ ability to ignore the siren call of electioneering on their behalf or on behalf of calls for particular action on matters of policy that may come before them.

Moreover, if electoral speech restrictions based on speaker identity are tantamount to impermissible content-based discrimination, then restrictions on foreign nationals’, including foreign corporations’, electoral expression stand on shaky constitutional ground. Again, this is particularly true given the Court’s central theoretical assumptions about what should not count as a compelling government purpose for restricting such speech.

A. *Corporations Are Persons; Expenditures of Money Are Speech*

The majority in *Citizens United* took great pains to describe corporate or union status as essentially irrelevant to a speaker’s First Amendment protection as it applies to campaign expenditures. These organizations receive the same freedom of speech

88. Zephyr Teachout, *Extraterritorial Electioneering and the Globalization of American Elections*, 27 BERKELEY J. INT’L L. 162, 167–69 (2009).

89. U.S. CONST. art. I, § 9, cl. 8.

90. The thoughtful work of Professor Lori Damrosch thus requires recalibration post-*Citizens United*. She argues that extraterritorial influence over elections can cause “distortion through covert or corrupt payments” that compromise state sovereignty interests. Lori Fisler Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence Over Domestic Affairs*, 83 AM. J. INT’L L. 1, 44 (1989).

rights as natural persons, at least in this context.⁹¹ The Court also held in *Buckley v. Valeo* that campaign contributions and expenditures are a form of political expression, and that restrictions on them trigger First Amendment scrutiny.⁹²

Again, the logic of these cases suggests that foreign corporations should receive the same freedom of speech rights as foreign natural persons—at least insofar as they are “present” within the United States or otherwise under its jurisdiction.⁹³ It further suggests that a foreign corporation’s campaign contributions and expenditures are a protected form of political expression.

The syllogism goes as follows: Restrictions on contributions and expenditures for political purposes constitute restrictions on political speech;⁹⁴ restrictions on political speech based on speaker identity are, in essence, a form of content discrimination that typically triggers strict scrutiny;⁹⁵ restrictions that distinguish between natural and corporate speakers are based on speaker identity, and thus trigger strict scrutiny;⁹⁶ foreign corporate speakers thus should be treated the same as foreign natural person speakers, in the context of political contributions or expenditures, unless there is a compelling reason to do otherwise and the restrictions are necessary to advance that compelling purpose.

Thus the most basic constitutional question becomes: what are the First Amendment rights of foreign natural persons to engage in political speech?

B. *Foreign Nationals, Including Foreign Corporations, are “Persons” Under the First and Fourteenth Amendments; Expenditures of Their Money Are “Speech”*

A threshold step to the analysis is whether First Amendment rights extend to foreign nationals. The Constitution in several

91. *Citizens United v. FEC*, 130 S. Ct. 876, 899–901 (2010).

92. *Buckley v. Valeo*, 424 U.S. 1, 47–48 (1976) (per curiam)

93. See, e.g., *Boumediene v. Bush*, 553 U.S. 723, 768 (2008) (Scalia, J., dissenting) (arguing that the reach of the Constitution extends to territories under the jurisdiction and control of the United States); see also *infra* notes 140–43 and accompanying text.

94. See *Buckley*, 424 U.S. at 47–48.

95. See *Citizens United*, 130 S. Ct. at 898–99. In a limited public forum, however, the Court allows speaker-based distinctions, provided they are not smokescreens for viewpoint discrimination. See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995).

96. *Citizens United*, 130 S. Ct. at 900–01, 903.

places distinguishes between rights and privileges—such as eligibility for office—that flow solely to citizens and those that flow more generally to persons.⁹⁷ Freedom of expression clearly falls under the latter category.

The Court underscored this emphatically last Term in *McDonald v. City of Chicago*,⁹⁸ in which the plurality explicitly rejected the argument that the Privileges or Immunities Clause of the Fourteenth Amendment was the proper font of incorporated constitutional rights vis-à-vis state and local governments.⁹⁹ This clause only applies to citizens¹⁰⁰ and does not extend to aliens or corporations.¹⁰¹ The Due Process Clause, in contrast, like the First Amendment itself, protects “persons” regardless of citizenship.¹⁰² *McDonald* shows that the current Court well understands the difference between individual rights that flow to citizens and rights that flow to persons. All of the Justices except Justice Thomas¹⁰³ would place freedom of expression—like the newly construed “right to bear arms” and other Bill-of-Rights-derived freedoms—under the latter category.

Although the constitutional rights of noncitizens are not co-extensive with citizens, any restrictions on noncitizens’ rights must be based on legitimate and relevant differences. The better view is that restrictions on aliens’ political speech are unconstitutional when premised solely on the speaker’s noncitizen status.

No law currently restricts a foreign national natural person from engaging in political expression in a public forum any more than it restricts a domestic speaker in the same public forum. For example, if a foreign national wishes to broadcast his or her political views on the sidewalk in front of the White House, no police officer may remove the speaker simply because he or she is not a United States citizen or a lawful permanent resi-

97. See, e.g., U.S. CONST. art. I, § 2, cl. 2; *id.* art. I, § 3, cl. 3; *id.* art. II, § 1, cl. 5; *id.* art. IV, § 2, cl. 1; *id.* amend. XIV, § 1.

98. 130 S. Ct. 3020 (2010).

99. See *id.* at 3030–31.

100. See U.S. CONST. amend. XIV, § 1, cl. 2.

101. See, e.g., *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 n.5 (1953).

102. See U.S. CONST. amend. XIV, § 1, cl. 3.

103. See *McDonald*, 130 S. Ct. at 3059 (Thomas, J., concurring in part and concurring in the judgment).

dent.¹⁰⁴ Such speech may well be aimed at influencing an election, but it cannot be restricted for this reason alone.

And, if the theoretical premises of *Citizens United* hold, no sound or sufficient reason exists to distinguish between a sidewalk speech promoting or condemning an electoral candidate and an independent expenditure of funds to promote or condemn the same candidate.

C. “Right To Receive (Foreign) Ideas” — Access to (Foreign) Funds for Political Expression

In *Lamont v. Postmaster General*,¹⁰⁵ the Court struck down a federal law that prevented the United States Post Office from delivering communist political propaganda to any recipient who did not request to receive such material, in writing.¹⁰⁶ Although the materials originated overseas, the Court did not rely on this distinction in its analysis of the statute. In no freedom of speech case, in fact, has the Court seized on the foreign origin of an idea as a valid reason to suppress it: To do so would be utterly inconsistent with basic principles of the First Amendment and the marketplace of ideas. Imagine, for example, a law that imposed barriers to the distribution of foreign films or books that did not apply equally to domestic films or books. The content of such materials might be subject to scrutiny—if, for example, they constituted obscenity, true threats, or otherwise satisfied content-based rules that apply to domestic materials. But the foreign origin of the expression would not, by itself, be a legitimate basis for suppression of material, even if the material fell within a category of speech that could be suppressed.¹⁰⁷

On the contrary, given the cosmopolitan nature of the political and intellectual debates among the Founders, banning foreign viewpoints from modern politics would be inconsistent with American traditions.¹⁰⁸ The study of other cultures in-

104. See Note, *supra* note 17, at 1900.

105. 381 U.S. 301 (1965).

106. *Id.* at 307.

107. Cf. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386–88 (1992).

108. See, e.g., BERNARD BAILYN, *IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 5 (1967); see also JACK RAKOVE, *REVOLUTIONARIES: A NEW HISTORY OF THE INVENTION OF AMERICA* 297 (2010) (noting that for Thomas Jefferson, “[t]he best case for the notions of political and social equality he wished Americans to pursue lay in the evidence of all the evils aristocratic dominance imposed on Europe” but

formed these eighteenth century and early nineteenth century political leaders' ideas, even when they were repugnant to their own. To take three notable examples, Benjamin Franklin, Thomas Jefferson, and John Adams all were famously worldly thinkers.¹⁰⁹ James Madison was schooled at Princeton, "a major outpost of the eighteenth-century Scottish Enlightenment" where students "read widely in the works of David Hume, Adam Smith, Adam Ferguson, Francis Hutcheson, Thomas Reid, and Lord Kames."¹¹⁰ The notion of imposing a barrier to foreign political thought would have been unfamiliar to these influential early leaders, if not bizarre.

Moreover, receipt of money from a foreign source may buoy an American citizen's ability to express her own political ideas. As applied to corporations, if a company is deemed to be a foreign national based upon some percentage of foreign ownership—say, forty—and is for this reason barred from contributing to a PAC, then the majority, nonforeign shareholders of the corporation, as well as the "real entity" itself, lose this electoral expression right.¹¹¹

Indeed, to make the foreign origin of an idea the sole basis for its suppression or regulation would be wildly out of step with the modern world, as well as the traditional American theater or library. The Internet has globalized the marketplace of ideas in unprecedented ways, and the architecture of contemporary fora now is inherently open structured, cosmopolitan, international, and radically democratic.¹¹² The majority opinion in *Citizens United* anticipated this very point, when it noted that "[t]oday, 30-second television ads may be the most

he felt "[w]ays had to be found . . . for his countrymen to benefit from Europe's manifest superiority in architecture, painting, sculpture, music, cuisine").

109. RAKOVE, *supra* note 108, at 293–95 (describing their interest in foreign inventions such as the hot air balloon, and its implications for domestic matters, such as national defense).

110. *Id.* at 346, 365 (describing how Madison also studied history—"ancient and modern confederacies"—in shaping his own ideas about government).

111. *Cf. Mendelsohn v. Meese*, 695 F. Supp. 1474 (S.D.N.Y. 1988) (rejecting U.S. citizens' claims that the Anti-Terrorism Act infringed upon their First Amendment rights because it barred them from accepting speaking engagements funded by the Palestine Liberation Organization).

112. For a fascinating account of the relationship between the Internet architecture and innovation, and discussion of how the architecture of the Internet can limit or expand its political communication potential, see BARBARA VAN SCHEWICK, *INTERNET ARCHITECTURE AND INNOVATION* 360–65, 387–92 (2010).

effective way to convey a political message. Soon, however, it may be that Internet sources, such as blogs and social networking Web sites, will provide citizens with significant information about political candidates and issues."¹¹³

The only problem with this passage is that it is already hopelessly dated. The global nature of American politics has been true from the Founding. The Internet did not create this phenomenon, but it has brought the point, as well as the information itself, home in amazingly accessible and pervasive ways.¹¹⁴ Attempts to erect impenetrable walls to cordon off foreign-sourced information thus are doomed from the onset—both as a practical, and as a constitutional, matter.

Finally, like corporations, foreign nationals “do not have monolithic views.”¹¹⁵ Like corporations, foreign nationals may have “valuable expertise, leaving them the best equipped to point out errors or fallacies in speech of all sorts, including the speech of candidates and elected officials.”¹¹⁶ At nearly every turn, the proinformation rationale of *Citizens United* points against regulation of foreign electoral expression.

And yet the notion that the government may restrict foreign nationals’ right to contribute to political candidates and campaigns persists. Why? How is a foreign national’s expenditure of money on a political candidate materially different than his or her speaking in favor of the same candidate on a public sidewalk? Moreover, how is it materially different from an American citizen’s expenditure of money? Current federal law does restrict a foreign national who is not a lawful permanent resident from making campaign contributions or expenditures,¹¹⁷ but the constitutionality of this law is far from clear, post-*Citizens United*, because it draws a highly questionable distinction between political speech in a public forum and independent expenditures on behalf of an electoral candidate. Is

113. *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010) (citations omitted).

114. For an account of how foreign sources already are affecting domestic elections, see Teachout, *supra* note 88, at 164 (“Given the global impact of United States policy, twenty years from now massive efforts to influence United States elections—from outside its borders—will be routine.”).

115. *Citizens United*, 130 S. Ct. at 912.

116. *Id.*

117. See 2 U.S.C. § 441e(a) (2006).

the distinction between a foreign national's speech and an American citizen's speech now likewise indefensible?

D. Foreign Influence over Elections

One commonly intoned justification for regulation of foreign political expression is that the United States has a legitimate interest in preventing undue foreign influence over elections. A subset of this concern is the government's interest in restricting political propaganda from other nations. The government likely can regulate speech on these grounds, despite *Citizens United*. For example, in *Meese v. Keene*,¹¹⁸ the Court upheld a provision of the Foreign Agents Registration Act of 1938 (FARA)¹¹⁹ that required registration, reporting and disclosure by persons engaging in "political propaganda" on behalf of foreign powers, on the ground that the Act "place[d] no burden on protected expression."¹²⁰ The Court regarded the label as *information relevant to the public* in evaluating its import; the decision in no way turned on a notion that foreign speech was unprotected or not part of the marketplace of ideas. The statute did apply exclusively to a person "within the United States who is an agent of a foreign principal,"¹²¹ and it clearly was content-specific. But the Act required registration and disclosure, not censorship per se, and was based on a concern for national security and public interest in identifying activity that was inherently linked to a foreign source—that is, activity "for or on behalf of foreign governments, foreign political parties, and other foreign principals."¹²² Moreover, the Act "require[d] all agents of foreign principals to file detailed registration statements, describing the nature of their business and their political activities. The registration requirement [was] comprehensive, applying equally to agents of friendly, neutral, and unfriendly governments."¹²³

Requiring a foreign principal to register with the United States and to make disclosures are common conditions of doing

118. 481 U.S. 465 (1987).

119. 22 U.S.C. §§ 611–621 (1982).

120. *Keene*, 481 U.S. at 480 (reviewing FARA). The case involved the labeling by the U.S. Department of Justice of three Canadian films as political propaganda. The films dealt with the subject of acid rain and nuclear war. *See id.* at 467–68.

121. 22 U.S.C. § 614(b).

122. 22 U.S.C. § 611.

123. *Keene*, 481 U.S. at 469–70.

business in the United States, or otherwise gaining access to the United States market, soil, or peoples. Where the foreign person or entity seeks access in order to engage in political expression, the Court has allowed the government to examine the speech to determine whether the government has a compelling interest in suppressing the speech or barring the speech's entry into the United States;¹²⁴ but it has not allowed the government to suppress an idea merely because it has foreign origins. Access conditions, including immigration regulations, that apply solely to foreign concerns or individuals obviously may chill foreign voices, but they cannot freeze them out. Again, this was true before *Citizens United*. Post-*Citizens United*, even a chill on such protected expression through high access barriers may raise First Amendment concerns, given the Court's rejection of PAC alternatives on the ground that they are unduly burdensome.

Case law since *Meese v. Keene* casts further doubt on speaker-based conditions on protected expression by foreign nationals. The Court in *R.A.V. v. City of St. Paul* made clear that content-based distinctions, even within a category of unprotected speech, are presumptively unconstitutional.¹²⁵ The presumption is overcome when "the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable" because then "no significant danger of idea or viewpoint discrimination exists."¹²⁶

In other words, only if a foreign national as such represents a risk to national security or a threat to another legitimate government basis for content-specific regulation of speech,¹²⁷ are regulations that use this status as the basis for restrictions on expression specific to foreign nationals constitutional.¹²⁸ Absent a compelling reason for this speaker-based regulation, the public's interest in receiving ideas should trump any government interest in suppression of ideas that derive from foreign national sources.

124. The government may, for example, deny a visa based on concerns about a speaker's terrorist connections or other risk to domestic interests. See 8 U.S.C. § 1182(a)(3)(B) (2006).

125. See 505 U.S. 377, 386 (1992).

126. *Id.* at 388.

127. See, e.g., *Harisiades v. Shaughnessy*, 342 U.S. 580, 592 (1952) (allowing deportation based on political speech where it constituted an incitement to violence).

128. See, e.g., *Kleindienst v. Mandel*, 408 U.S. 753, 768–69 (1972) (upholding exclusion of Marxist journalist); *Harisiades*, 342 U.S. at 591–92 (allowing deportation of resident alien member of Communist Party).

In at least one lower court case decided after *R.A.V.*, however, the court upheld a federal law that authorized denial of applications to construct and operate cellular systems where the applicants were more than twenty-percent foreign owned.¹²⁹ According to the court, “[t]hese alien ownership restrictions [governing mobile radio services] reflect a long-standing determination to ‘safeguard the United States from foreign influence’ in broadcasting.”¹³⁰ But the case is of doubtful provenance post-*Citizens United* and in any event dealt with foreign control of an organ of communication rather than the communications themselves. The latter distinction remains an important one throughout communications law. For example, although broadcast media are privately owned, and as such enjoy First Amendment protection, they also have special duties that are derived from their (at least historically) zero-sum nature.¹³¹ That is, concerns about capture of certain communications vehicles in general, not just by foreign nationals, already is a feature of the First Amendment that modifies speakers’ rights in order to protect the public’s interest in receiving ideas.¹³²

Regulation of foreign nationals in communications industries may be based on additional justifications—national security, antidistortion, and preventing foreign influence over elections—but each justification must be analyzed independently, post-*Citizens United*, rather than conflated or accepted uncritically, especially when they have an impact on the free flow of information in elections. Likewise, each communications medium should be analyzed separately, to determine whether special rules already exist that limit the medium and, if so, whether they make modern sense. Finally, as this Article will explain,¹³³ “foreign national” and “national security risk” are

129. See *Moving Phones P’ship v. FCC*, 998 F.2d 1051 (D.C. Cir. 1993).

130. *Id.* at 1055 (quoting *Kan. City Broad. Co.*, 5 P & F Radio Reg. 1057, 1093 (1952)).

131. See *Nat’l Broad. Corp. v. United States*, 319 U.S. 190, 213 (1943) (accepting the scarcity rationale for regulation of broadcast media in the “public interest, convenience, or necessity” under the Communications Act of 1934, 47 U.S.C. § 309(a) (1938)).

132. But the Court has noted that “[s]ubstantial questions would arise if courts were to begin saying what *means* of speech should be preferred or disfavored. And, in all events, those differentiations might soon prove to be irrelevant or outdated by technologies that are in rapid flux.” *Citizens United v. FEC*, 130 S. Ct. 876, 890 (2010) (emphasis added) (citing *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 639 (1994)).

133. See discussion *infra* Part II.G.3.

not coterminous. In fact, the law allows for individuals and corporations to achieve American citizenship fairly easily.¹³⁴

The courts must assess whether the government's assumption in a given context that particular foreign nationals present a distinctive risk is warranted. This is especially true in the context of the freedom of political expression, where strict scrutiny is applied in its most exacting form. Restrictions based on preventing foreign influence over elections are, in essence, restrictions based on anticorruption or antidistortion concerns. *Citizens United* cautions against measures that invoke these interests without evidence that these problems exist, or that police the interests in ways that are not narrowly tailored.

E. *Relaxed Equal Protection Rights for Aliens*

Equal protection law holds that state and local government classifications based on alienage trigger elevated scrutiny,¹³⁵ unless they fall within the so-called political functions exception.¹³⁶ Federal government alienage classifications, however, trigger only rational basis scrutiny,¹³⁷ given the federal government's plenary power over immigration, naturalization, and deportation, as well as its extensive power over international affairs, and national security.¹³⁸ Federal, state, and local government distinctions based on undocumented status—so-called illegal immigrant status—trigger only rational basis.¹³⁹

But when the citizenship status is linked to a fundamental right—here, freedom of expression—the relevant level of scrutiny is determined by that fundamental right, not by equal pro-

134. As Professor Teachout notes, Rupert Murdoch famously became a U.S. citizen in 1985 to avoid Federal Communications Commission restrictions on foreign ownership of major news organizations. See Teachout, *supra* note 88, at 189. Corporate or business “anchor babies” in this respect surely dwarf the significance of anchor babies in the context of undocumented persons who allegedly come to the United States to obtain the benefits of American citizenship for their offspring.

135. See, e.g., *Graham v. Richardson*, 403 U.S. 365, 372 (1971).

136. See, e.g., *Foley v. Connelie*, 435 U.S. 291 (1978) (holding that police officer position falls within the “political function” exception). But see *In re Griffiths*, 413 U.S. 717 (1973) (finding political functions exception inapplicable and thus state cannot bar aliens from becoming members of the bar).

137. See *Mathews v. Diaz*, 426 U.S. 67, 81–82 (1976).

138. See, e.g., *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875).

139. See, e.g., *Plyler v. Doe*, 457 U.S. 202 (1982).

tection alone. For example, distinctions based on disability¹⁴⁰ or socioeconomic status¹⁴¹ likewise trigger only rational basis scrutiny under equal protection. The free speech rights of disabled persons or the poor, however, are no less robust than those enjoyed by nondisabled or wealthy persons. Put another way, the government cannot restrict the speech of disabled or poor persons simply because of this status, absent important reasons to do so. So it is with alienage: the government must establish that alienage is at least relevant to the decision to burden a fundamental right. At most, it must establish that it has a compelling reason to hinge the fundamental right on citizenship status.

In fact, even unlawful presence in the United States does not strip a person of First Amendment rights. Arizona recently captured national and international attention when it passed an extraordinary measure designed to achieve “attrition through enforcement” via criminal and civil laws based on undocumented presence in the state.¹⁴² But for all of the intense debate about the Arizona measure, no serious observer has suggested that undocumented persons enjoy no constitutional protection while in the United States. Rather, the central issues raised by the Arizona law are whether the law invades federal power over immigration and naturalization, and whether aspects of the law violate citizens’ or noncitizens’ constitutional rights.¹⁴³ An undocumented person who took to the streets—as many did—to protest the law could not be arrested or prosecuted differently for such speech than could a citizen protester. He or she might be apprehended because of his or her illegal entry, but not for peaceful political expression.

Unlike other opportunities or benefits that can reasonably and constitutionally be linked to lawful citizenship status—such as eligibility for work or welfare—freedom of expression bears no comparable citizens-only or dues-paid inherent characteristic. On the contrary, the nation’s history of repression of

140. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 435 (1985) (holding that disability classifications are not suspect classifications that trigger strict scrutiny under Equal Protection Clause).

141. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (finding that poverty is not a suspect classification for purposes of Equal Protection Clause).

142. For an analysis of the bill, see Gabriel J. Chin et al., *A Legal Labyrinth: Issues Raised by Arizona Senate Bill 1070*, 25 *GEO. IMMIGR. L.J.* 47 (2010), available at <http://ssrn.com/abstract=1617440>.

143. See *id.*

political outsider speech, reflected in sedition acts and other measures that exceeded constitutional boundaries,¹⁴⁴ counsels against measures that make citizenship a per se condition to First Amendment protection.

F. Federal Control over Immigration

For similar reasons to those noted in the foregoing section, the federal government's very significant power over immigration¹⁴⁵ does not by itself justify bans on political expression, including electoral expression, by noncitizens. The short answer to an argument that cites this power as a basis for congressional bans on foreign national political speech is that such bans in no way address immigration or naturalization per se.

Although bans on foreign input into elections obviously do bear a relationship to international relations and international commerce—speech and money cross American boundaries, and American domestic policies surely are matters of significance in international affairs—the federal government could not cite this blanket justification to support any and all campaign finance regulations imposed on foreign nationals. It must demonstrate how and why a particular regulation advances national interests.

Indeed, when a fundamental right is at stake, it may need to also show that the measure is narrowly tailored to advance the national interests that underlie federal power in the international arena. A flat ban on PAC contributions or independent expenditures made by foreign nationals would scoop up a very broad spectrum of speakers and deprive citizens of access to significant foreign support for their own political expression. Again, that the source is a foreign one does not obviously justify such a burden on core expression. Rather, the government needs to tie the foreign roots of the funds to a harm peculiar to foreign sources; it should not be allowed to rely solely on the fact that the funds travel across international boundaries or are

144. See generally AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 103–04 (2005); ZECHARIAH CHAFEE JR., *FREE SPEECH IN THE UNITED STATES* (1941); David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205 (1983).

145. See *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101, n.21 (1976) (“[T]he authority to control immigration is . . . vested solely in the Federal Government”); see also *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875) (“The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States.”).

expended here by persons or entities that are not permanent, lawful residents or even citizens of the United States. Without more, such restrictions should fail—unless there is a reason peculiar to candidate elections why foreign nationals should be so restricted when citizens are not.

G. *Other Justifications for Prohibiting Foreign Nationals from Making Campaign Contributions or Expenditures*

We now have narrowed the question to its finest point: Why not allow foreign influence over American elections—in the form of independent expenditures, PAC donations, or otherwise—given the importance of speech and the elimination of all of the foregoing possible reasons for such restrictions? What possible justifications remain?

There are colorable reasons why citizenship may be relevant to electoral expression in particular, though some of them are not strong enough to support a blanket ban on campaign expenditures or contributions to PACs. Despite their frailty, however, they are likely to convince the Court and a vast majority of the American people.

1. *Ineligibility To Vote*

Perhaps the most obvious point one can make that distinguishes foreign nationals from citizens is that foreign nationals cannot vote and thus are entitled to weaker First Amendment protection than speakers who can vote. But this argument is flatly inconsistent with the same argument, which was made and rejected, in *Citizens United*: corporations and unions too cannot vote.

Likewise, a citizen below the voting age cannot be restricted from engaging in political speech simply because he or she cannot vote. Nor can federal law prohibit minors from making campaign contributions, despite the risk that their parents may use the children to make an end-run around monetary limits on campaign contributions.¹⁴⁶ Even incarcerated felons have constitutional rights, however constrained;¹⁴⁷ convicted mur-

146. See *McConnell v. FEC*, 540 U.S. 93, 231–232 (2003) (invalidating ban on campaign contributions by minors).

147. See, e.g., *Turner v. Safley*, 482 U.S. 78, 81 (1987); *Procunier v. Martinez*, 416 U.S. 396, 419 (1974).

derers cannot be prevented from receiving royalties on books that describe their crimes.¹⁴⁸

2. *Lawful and Permanent Presence*

The most convincing reason to distinguish between at least some foreign nationals and citizens is that fewer of the former reside in the United States and thus have less of a stake in the outcomes of domestic elections. They are not being fenced out of the process because they are foreign, but because they are not here. All who have a legitimate, presence-based interest in the process are included, and American generosity on this point is apparent insofar as the law does allow some foreign participation. Indeed, the premise of many of the post-*Citizens United* proposals is that foreign corporations already have too much potential say in American elections; they need only establish an American subsidiary to engage in unlimited independent expenditures.

That is, physical presence in, or contacts with, the jurisdiction is doing the work here, not nationality, and even this is hardly doing much heavy lifting.¹⁴⁹ Congress exempted lawful, permanent resident aliens and American subsidiaries of foreign corporations from existing laws that limit foreign speakers from making campaign contributions to candidates for state or federal office, or from making campaign contributions to American political parties.¹⁵⁰ The government therefore can argue that all who logically should be included are included, and wide-open communication from all within the community¹⁵¹ is promoted, not chilled. Moreover, constitutional rights only flow to persons who are physically located in a place that is within the sovereign

148. *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991).

149. Assigning “citizenship” and other rights and duties to corporations has long been based on a notion of contact within a physical location. *See, e.g.*, *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1186 (2010) (discussing past practices and holding that a corporation’s citizenship for purposes of federal subject matter jurisdiction hinges on where it is incorporated and where its nerve center—usually its headquarters—is located); *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (holding an out-of-state corporation amenable to jurisdiction when it has minimum contacts with the state).

150. *See supra* note 9 and accompanying text.

151. *Cf. United States v. UAW-CIO*, 352 U.S. 567, 593 (1957) (Douglas, J., dissenting) (“It is therefore important . . . that the people have access to the views of every group *in the community*.” (emphasis added)).

control of the United States.¹⁵² To the extent that a foreign corporation is not within the jurisdiction, it makes sense to argue that the corporation lacks First Amendment rights.

But even a residence or presence-based distinction rests on a questionable premise. Within the United States, nothing prevents an Arizonan from contributing to the campaign of a candidate for office in Alaska, even if she never sets foot in the state. Outsiders often take an interest in elections of states and countries beyond their own, because they understand the multiple ways in which the outcomes can affect their interests in the short or long term. For example, a wealthy Wyoming man recently donated \$1.5 million to the litigation war chest established by Arizona Governor Jan Brewer to defray the steep costs of defending the constitutionality of Arizona's controversial immigration law.¹⁵³ Likewise, a student who attends the University of Arizona but is a nonresident can contribute to Arizona's federal and state candidates for office. Why should a nonresident citizen of Canada, or a student here on a J-1 Visa, not be permitted to donate to the campaign of an American candidate? Why, by extension, should an American business engaged in international business not be permitted to support a pro-American business candidate for office in Mauritius or Shanghai?

The porous nature of modern global architecture and the diminishing significance of corporeal presence to economic, artistic, scientific, political, environmental, and other forms of interconnectedness make residence-based arguments seem quaint, at best. When the issue concerns core political speech and the marketplace of ideas—which is how the Court in *Citizens United* characterizes campaign finance issues—then an emphasis on physical borders seems worse than quaint; it appears constitutionally pernicious.

152. See *Boumediene v. Bush*, 553 U.S. 723, 753–64 (2008) (holding that the Naval Station at Guantanamo Bay was within the control of the United States, such that the privilege of habeas corpus extended to this location).

153. Some of these fees have been spent on frequent contact with a non-Arizonan activist immigration lawyer, Kris Kobach, who helped draft the Arizona measure and in November 2010 was elected Secretary of State in Kansas. See *Wyo. Man Donates \$1.5 Million To Defend Ariz. Law*, AZCAPITOLTIMES.COM, Sept. 3, 2010, <http://azcapitoltimes.com/news/2010/09/03/wyo-man-donates-15-million-to-defend-ariz-law>. In other words, the Arizona law as well as its financial support derive in substantial part from extra-jurisdictional sources.

Borders still matter, of course, and may have profound political and constitutional implications. They also may give rise to allegiances, loyalties, a sense of duty, as well as a sense of political and personal identity.¹⁵⁴ But when it comes to ideas, exaggerated notions of sovereign interests or of national identity as a carrier of particular ideological commitments or fidelity should not trump the interest in a free flow of information, at least not in a constitutional democracy like this one. This is especially so if one focuses on the voter's interest in receiving this speech, not just the foreign national's right to engage in it.

One still might reply that the United States does have an interest—indeed, a compelling one—in preventing foreign powers from infiltrating American domestic electoral processes, just as the United States has a powerful interest in preventing foreign government captures of major media outlets. For example, the government could prevent the People's Republic of China from purchasing NBC, MSNBC, CNN, and the *New York Times*.¹⁵⁵ In fact, as discussed above,¹⁵⁶ the government's interest in preventing capture of the media industry would be stronger than the government's interest in preventing foreign capture of any other domestic industry because of the First Amendment, not just despite the First Amendment. Moreover, if the foreign national is a foreign government, it makes considerable sense to treat it differently than a private foreign individual or corporation.¹⁵⁷

Nevertheless, to allow the government to prevent infiltration of domestic elections by foreign actors—even by foreign governments—requires one to accept a point that the majority in *Citizens United* explicitly denied—that is, that aggregations of wealth and power can skew the free flow of ideas in intolerable ways. Why is it more corrupting or distorting for a foreign na-

154. Cf. Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 393 n.245 (2009) (arguing that the legal loyalties of corporations, like those of foreign powers, do not include patriotism, which may justify restrictions on their expenditures and contributions).

155. Foreign ownership of media is prohibited by the Federal Communications Act where it would not be in the public interest. 47 U.S.C. § 310(b)(4) (2000).

156. See *supra* notes 129–34 and accompanying text.

157. See Lee M. Caplan, *The Constitution and Jurisdiction over Foreign States: The 1996 Amendment to the Foreign Sovereign Immunities Act in Perspective*, 41 VA. J. INT'L L. 369, 399 (2001) (“By nature, the foreign state can never shirk the essential attributes of sovereignty.”).

tion to seize control of the media than for a domestic corporation or wealthy individual to do so?¹⁵⁸ The public's interest in ideas would be implicated in both scenarios. Why would the American people be any less able to sort out the information that comes from a monopolistic foreign source than from a monopolistic domestic one?

3. *National Interests and Security*

So it may really boil down to this: the government may believe that foreign sources are inherently likely to advance ideas or other strategies—financial, political, military, commercial—that pose a threat to national interests, and thus can be fenced out of electoral expression in blunt, speaker-specific ways that domestic sources cannot.

This is the weakest argument of all, of course, from a First Amendment perspective. Unmodified, it surely should not survive strict scrutiny of the sort applied to the campaign finance restrictions at issue in *Citizens United*. This would be a speaker-based restriction on speech justified by a viewpoint-specific desire to suppress that speech, which is a First Amendment worst-case scenario. It likewise would be a wildly over- and under-inclusive method of advancing the admittedly compelling interest in national security. A bald statement that foreign equals dangerous is simply untenable, and no thoughtful Justice could, or should, accept it.

This likely is why the Court stressed the narrowness of its holding in *Holder v. Humanitarian Law Project*.¹⁵⁹ The Court ruled in a six-to-three opinion that the government could prohibit speech and other forms of advocacy that support a foreign or-

158. As Justice Stevens put it in his opinion:

If taken seriously, our colleagues' assumption that the identity of the speaker has *no* relevance to the Government's ability to regulate political speech would lead to some remarkable conclusions. Such an assumption would have accorded the propaganda broadcasts to our troops by "Tokyo Rose" during World War II the same protection as a speech by Allied commanders. More pertinently, it would appear to afford the same protection to multinational corporations controlled by foreigners as to individual Americans: To do otherwise, after all, could "enhance the relative voice" of some (i.e. humans) over others (i.e. nonhumans).

Citizens United v. FEC, 130 S. Ct. 876, 947–48 (2010) (Stevens, J., concurring in part and dissenting in part) (quoting *id.* at 904 (majority opinion)).

159. 130 S. Ct. 2705 (2010).

ganization that has been labeled a terrorist organization under federal law, even if aimed at advancing the organization's peaceful or humanitarian goals.¹⁶⁰ The Court allowed such bans on speech only if coordinated with or controlled by the overseas terrorist group.¹⁶¹ Although the opinion also stressed the importance of deference to Congress and the Executive Branch in matters involving national security,¹⁶² the Court was at least mindful of the powerful First Amendment arguments made by the Humanitarian Law Project and the need to cabin the case. The majority thus pointed out that those seeking to support humanitarian objectives of such foreign groups "may speak and write freely about . . . human rights, and international law. They may advocate before the United Nations."¹⁶³ Although the federal law prohibiting material support was a content-specific regulation of speech as well as conduct and was based on the status of the recipients of the speech and their past activities, the legislation was a permissible restriction on aid because it was "carefully drawn to cover only a narrow category of speech to, under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations."¹⁶⁴

In other words, although the Court defers to government assertions of national security, the measures must be linked to a threat that is more narrowly defined than that the organization or source is foreign. Consequently, in the context of foreign electoral expression, the Court should examine carefully government restrictions lest the Court undermine its most passionate argument: that election law reforms should not be based on a lack of confidence in American voters.

Yet there are plausible reasons to worry about the foreign infiltration of elections, and they should be given proper weight even if they do conflict with the core, albeit gauzy, First Amendment aspirations expressed in *Citizens United*. To see this, one need only consider the following chain of economic

160. *See id.* at 2712–13. The statute prohibits the knowing provision of "any . . . service, . . . training, expert advice or assistance," to a "designated foreign terrorist organization." 18 U.S.C. § 2339A(b)(1) (2006); *id.* § 2339B(a)(1), (g)(4).

161. *Humanitarian Law Project*, 130 S. Ct. at 2723.

162. *Id.* at 2728 ("Congress and the Executive are uniquely positioned to make principled distinctions between activities that will further terrorist conduct and undermine United States foreign policy, and those that will not.").

163. *Id.* at 2723.

164. *Id.*

events. The domestic economy is inextricably linked to national security: a financially unstable country is a vulnerable country. If foreign nationals purchase United States treasuries, this could suppress domestic interest rates. This in turn could suppress savings and buoy American currency, which could suppress exports and reward consumer spending on imports. If this scenario makes sense, and if it is something American regulators may consider in setting financial policy,¹⁶⁵ then foreign influence over elections designed to affect domestic financial policy in similar ways is something to fear.

But again, it is something to fear for reasons that parallel the rejected reasons to fear corporate influence. As Justice Stevens observed:

In the context of election to public office, the distinction between corporate and human speakers is significant. Although they make enormous contributions to our society, corporations *are not actually members of it*. They cannot vote or run for office. Because they may be *managed and controlled by nonresidents*, their interests may conflict in fundamental respects with the interests of eligible voters. The *financial resources, legal structure, and instrumental orientation of corporations raise legitimate concerns* about their role in the electoral process.¹⁶⁶

All of these characteristics of corporations are shared by foreign corporations, and some of them are shared by foreign national individuals as well. It thus should be very difficult, as an analytical matter, for the Court to hold fast to the most open-ended passages of *Citizens United* and to also uphold restrictions on electoral spending by foreign nationals.

H. *Will It Matter?*

In the introduction, this Article suggested that the Court may well uphold restrictions on foreign nationals' ability to make campaign contributions or expenditures, despite the many

165. For a discussion of restrictions on foreign investment in the United States, see MICHAEL V. SEITZINGER, CONG. RESEARCH SERV., RL 33103, FOREIGN INVESTMENTS IN THE UNITED STATES: MAJOR FEDERAL STATUTORY RESTRICTIONS (2009), available at <http://openers.com/document/RL33102/2009-01-26/download/1013>.

166. *Citizens United v. FEC*, 130 S. Ct. 876, 930 (2010) (Stevens, J., concurring in part and dissenting in part) (emphasis added).

powerful arguments against such restrictions.¹⁶⁷ As Professor Richard Hasen has noted, “coherence” was hardly a hallmark of past campaign finance jurisprudence. Nor is it likely to be achieved going forward. His view, which this Article shares, is that the Court is likely to “sustain a law imposing foreign spending limits without overturning *Citizens United* . . . through doctrinal incoherence.”¹⁶⁸ He anticipates two possible arguments the government may make to support the limits, neither of which he thinks should succeed:

[T]he Court could state that the threat from foreign spending influencing U.S. elections is one different in kind than that posed by domestic corporate spending, and that when it comes to protecting the country from foreign influence, the First Amendment must give way. Or the Court could state that barring foreign influence is supported by the same interest “in allowing governmental entities to perform their functions” that justifies limitations on some political activities of government employees under the Hatch Act, an interest the Court reaffirmed in *Citizens United*. . . . [N]either of these arguments would be convincing under a literal application of the principles of *Citizens United*, because the arguments at bottom are premised on corruption, appearance of corruption, or distortion. . . . [But] there is no reason we should expect a consistent application of *Citizens United* in the context of foreign election spending.¹⁶⁹

The other possible arguments, outlined above, too should be difficult to square with the reasoning and especially the most soaring marketplace of ideas rhetoric of *Citizens United*.

That the Court might ignore all of these arguments and embrace doctrinal incoherence instead is hardly a far-fetched notion. Constitutional law in practice often is internally difficult to reconcile with its stated theoretical objectives, and First Amendment doctrine is no exception.¹⁷⁰ This is especially true

167. Election law expert Professor Hasen agrees, in a recent article on the many implications of *Citizens United*. See Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 610 (2011).

168. *Id.* at 610.

169. *Id.* (citations omitted).

170. This is a well recognized feature of the First Amendment. See, e.g., Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CALIF. L. REV. 2353, 2355 (2000) (“The free speech jurisprudence of the First Amendment is notorious for its flagrantly proliferating and contradictory rules, its profoundly chaotic collection of methods and theories.”).

when, as here, so many of the underlying theoretical and analytical moves are deeply controversial—for example, a corporation is a real entity, independent expenditures do not give rise to the appearance of corruption, equalizing voices to reduce distortions is not a proper First Amendment objective, or more speech is always better.

Three tendencies on the current Court also point toward a ruling upholding restrictions on foreign election spending. First is the Court's general tendency to defer to Congress and the Executive in situations that arguably implicate national security.¹⁷¹ Second is that at least three Justices are deeply skeptical about constitutional limits on campaign finance regulation more generally (those being Justices Breyer, Ginsburg, and Sotomayor). All of the reasons they give for rejecting the majority's view that corporate spending is indistinguishable from individual spending apply equally to foreign corporate spending. Third is that some of the Court's more conservative Justices seem deeply skeptical of foreign influence over American constitutional law more generally (that is, Justices Scalia, Thomas, and Alito).¹⁷² Thus, despite *Citizens United*, when foreign ownership is added to the mix, at least six Justices (if not all nine) almost surely would tilt in favor of upholding existing—and perhaps expanded—federal restrictions on electoral spending. Last but not least, the negativism the American public likely would express toward an argument in favor of allowing greater foreign influence over American elections might incline the Court to reject even very strong constitutional arguments against such restrictions.

There may be another, more circumspect way for opponents of foreign national electoral spending restrictions to attack the restrictions. They might argue that the existing and proposed regulations are not narrowly tailored, rather than attacking the indefensible but seductive notion that foreign voices are a *per se* legitimate threat to electoral integrity.

171. See, e.g., *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2727 (2010) (explaining that “[t]he evaluation of the facts by the Executive . . . is entitled to deference [because t]his litigation implicates sensitive and weighty interests of national security and foreign affairs”).

172. Perhaps anticipating this point, Justice Scalia, in his concurring opinion, noted that his concern was with “the speech of many individual *Americans*, who have associated in a common cause.” *Citizens United v. FEC*, 130 S. Ct. 876, 928 (2010) (Scalia, J., concurring) (emphasis added).

But again, if the strict scrutiny of *Citizens United* holds, and the high rhetoric of the case is taken seriously, then even more narrowly tailored regulations should encounter tough constitutional sledding. Consequently, there is no doctrinal reason for opponents of restrictions on foreign spending in domestic elections not to swing for the fences.

Moreover, the Court will be concerned if the gaps in the doctrinal logic grow too large, and the analytical fissures within the cases become too obvious. Even the strongest arguments in favor of existing speaker-based restrictions on foreign electoral spending seem to violate this standard. This is because the majority opinion is so capacious—almost unguarded—in its full-on embrace of the marketplace of ideas theory of the First Amendment. The opinion also is dewy-eyed in its willingness to assume the perspicuity of voters and the fortitude of legislators. More sober and calibrated assessments of both would have made better political, practical, and constitutional sense.

In a future case, one hopes, the Court will consider the weight of these concerns and craft an opinion that better matches the real terrain. Perhaps the best fact pattern to draw the Court's attention to the potential limits of its marketplace of ideas enthusiasm would be one in which the political speaker is foreign and the message is, or has the appearance of being, capable of distorting or corrupting American electoral processes. All of the Justices likely would resonate more sympathetically to arguments in favor of less speech. If electioneering can skew discourse in one context, of course, it may do it in others. At the very least, one should be aware of the danger and of the constitutionality of congressional measures designed to prevent it. An opinion articulating and relying on such concerns would be in tension with *Citizens United*, a tension the Court likely could not ignore.

III. DOES THE CONSTITUTIONAL CASE MATTER?

Yet a still bigger question looms over all of this—one that may make the constitutional arguments, no less than the assumptions about making a foreign source the basis for restrictions on an idea, seem quaint. Even the dissent in *Citizens United* conceded that the real issue in the case was not whether corporations and unions

could engage in political spending, but how they could do so.¹⁷³ The barriers are not bans, and despite the cumbersome nature of PACs and other hurdles, they can be mounted or evaded. The same is true of the existing disclosure rules, which can (and are) outflanked by donors who seek anonymity.¹⁷⁴ So it is with barriers on foreign national electoral speech. As we have seen, foreign nationals who are interested in expending resources to influence American elections already have multiple ways of achieving this result under existing federal regulations.¹⁷⁵

At a practical level, none of this legislative and constitutional flurry thus may matter as much as opponents or proponents of restrictions believe. Indeed, in the very near future preventing external influence over American elections may be technologically infeasible. Activist communities external to an electoral district, including foreign-based communities, already are engaging in electioneering indirectly through online newspapers, email, texting, Skype, web sites, and other vehicles that are easily accessed globally.¹⁷⁶ Enforcement of laws designed to prevent extraterritorial electioneering is likely to be increasingly difficult, particularly given the limited enforcement resources of the FEC.¹⁷⁷

173. *Id.* at 929 (Stevens, J., concurring in part and dissenting in part).

174. See Griff Palmer, *Decision Could Allow Anonymous Political Contributions by Businesses*, N.Y. TIMES, Feb. 28, 2010, at A25 (noting loophole that makes it possible for corporations and unions to donate anonymously to nonprofit civic leagues and trade associations like the Chamber of Commerce). The likely practical impact of *Citizens United* might also be analyzed from a comparative law perspective. The states already vary among themselves with respect to election law regulation, as do democratic nations. Useful information might be gleaned from comparative analysis of these differing regulatory regimes, with respect to whether the alternative regimes produce less corruption or distortion.

175. See *supra* notes 9–11, 75 and accompanying text.

176. See Teachout, *supra* note 88, at 173–80 (describing impact of new technologies on electioneering). This is not to say that connection to the Internet means that meaningful control over its content is impossible. The information revolution led some to predict that it would lead inevitably to democratization of authoritarian regimes. Some thought the only choices were to connect and democratize, or refuse to connect and face certain economic decline. More nuanced work invokes China and Saudi Arabia as notable examples that belie this prediction. See generally Taylor C. Boas, *Weaving the Authoritarian Web: The Control of Internet Use in Nondemocratic Regimes*, in HOW REVOLUTIONARY WAS THE DIGITAL REVOLUTION? NATIONAL RESPONSES, MARKET TRANSITIONS, AND GLOBAL TECHNOLOGY (John Zysman & Abraham Newman eds., 2004), available at <http://pages.sbcglobal.net/tboas/authoritarianweb.pdf>.

177. See Teachout, *supra* note 88, at 182–83.

Perhaps the only available course for federal regulators, then, is to emphasize better means of assuring transparency, rather than focusing on access barriers. That is, the government might develop more sophisticated means of determining who is speaking and of demanding meaningful disclosure of campaign donor identities. It also could be more forthright in communications to American voters about the limits of their ability to do both and might engage in wider civic education about how electoral spending actually works.

Of course, this means the hottest constitutional issue in the campaign finance realm is likely to be whether federal regulations can demand wider donor disclosure, rather than whether it can impose speaker-based restrictions on campaign spending. The conflict between the constitutional right to engage in anonymous political speech (think Publius),¹⁷⁸ and the right to know who is speaking when it is directly relevant to enlightened voting is not easily resolved.¹⁷⁹ This constitutional balance in turn involves complex factual questions about whether and how having more information actually affects voters, whether and how disclosure of giving might chill such “speech,” and whether and how candidates and officials actually respond to all of this. This all remains to be seen, of course, and should be assessed after more data emerge.

CONCLUSION

Citizens United rocked the country in early 2010, and it continues to provoke powerful reactions. This Article has outlined one of the many serious questions the opinion raised—whether restrictions on foreign election spending can be reconciled with the logic of the majority opinion. A central conclusion of the case was that “[t]he Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech alto-

178. See, e.g., *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 342 (1995); *Brown v. Socialist Workers ’74 Campaign Comm.*, 459 U.S. 87, 98 (1982). Justice Thomas has weighed in quite emphatically on the side of anonymity. See, e.g., *Citizens United*, 130 S. Ct. at 980 (Thomas, J., concurring in part and dissenting in part).

179. See, e.g., *Doe v. Reed*, 130 S. Ct. 2811, 2815 (2010) (upholding, against a facial challenge, a Washington law that allowed private parties to obtain copies of government documents that would include the names of persons who signed a petition to place a referendum on the ballot).

gether.”¹⁸⁰ The weight of the evidence suggests a restatement of this conclusion as: The Government may regulate foreign political speech, but it may not suppress that speech altogether. In short, restrictions on foreign national electoral spending cannot be easily squared with the decision, if at all, or with the nature of our global society.

The Court nevertheless is likely to uphold the restrictions to prevent undue foreign influence over elections. To do so, however, will require the Court to blink its own First Amendment theory and its professed constitutional faith.

Whether the constitutional case against such restrictions will matter in the long run is unclear. Technological penetration of territorial and speaker-based barriers on electioneering is already happening. Caged voters thus should be aware that electoral messages today may come from diverse sources, some of which may be foreign voices far from the local arena where the winners of elections actually govern.

Perhaps the next steps in electoral reform should be to assure that voters understand how electoral spending actually works and to determine whether fuller disclosure of donor identity or an alternate strategy would promote First Amendment interests more than it burdens them. However campaign finance reform efforts now proceed, they ought to be grounded in global reality rather than in dated or romantic notions about how modern campaigns actually function, or about how voters, candidates, and officials actually behave.

One thing is clear: Getting this right matters in ways that plainly justify the highly charged reactions that *Citizens United* elicited. Who speaks, in what ways, for what ends, and to whose ears all can affect how “We the People” are governed. And if that does not warrant concern about whether our constitutional theory matches the facts, or whether the Court observes its own logic, then nothing does.

180. *Citizens United*, 130 S. Ct. at 886 (majority opinion).