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Buying the Electorate: An Empirical Study of the Current Campaign Finance Landscape and How the Supreme Court Erred in Not Revisiting Citizens United

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BUYING THE ELECTORATE: AN EMPIRICAL STUDY OF THE CURRENT CAMPAIGN FINANCE LANDSCAPE AND HOW THE SUPREME COURT ERRED IN NOT REVISITING *CITIZENS UNITED*

WILLIAM ALAN NELSON II*

ABSTRACT

The Article discusses how the Supreme Court erred by summarily reversing the Montana Supreme Court’s decision in *Western Tradition Partnership v. AG* and not revisiting its holding in *Citizens United v. FEC*. The Article begins by discussing the holding in the *Western Tradition Partnership* case and analyzing both the majority and dissenting opinions. The Article then analyzes how the Montana Supreme Court distinguished *Citizens United*, with the Court specifically looking at the “unique” political history in Montana and finding that Montana’s ban on corporate independent political spending served a compelling state interest and was narrowly tailored to that interest.

The Article then transitions into an empirical study of the current campaign finance landscape by specifically looking at states’ unique histories of corruption, the lack of transparency with regard to corporate political expenditures, the public perception of corruption in corporate political spending practices, the independence of super Political Action Committees (PACS), the influence of political dark money, and 501(c)(4) organizations and shell corporations being used to circumvent campaign finance disclosure rules and Federal tax laws.

The Article concludes by listing additional arguments in favor of the Supreme Court revisiting *Citizens United* including the breadth of the First Amendment, the idea of corporations being “creatures of the state,” the ability of PACs to allow corporate political participation, the issue of a state’s power to exclude foreign corporations from participation in its democratic political institutions, shareholder protection, the treatment of public unions, and the Supreme Court’s long-standing history of altering constitutional doctrine when its understanding of the doctrine’s factual underpinnings no longer appear to be accurate.

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I. INTRODUCTION

“A petition for certiorari will give the Court an opportunity to consider whether, in light of the huge sums currently deployed to buy candidates' allegiance, *Citizens United* should continue to hold sway.”¹

The Article discusses how the Supreme Court erred by summarily reversing the Montana Supreme Court's decision in *Western Tradition Partnership v. AG*² and not revisiting its holding in *Citizens United v. FEC*.³ The Supreme Court's decision in

¹ *Am. Tradition P'ship v. Bullock*, 132 S. Ct. 1307 (2012) (Ginsburg, J., concurring).

² *W. Tradition P'ship, Inc. v. Att'y Gen.*, 271 P.3d 1 (Mont. 2011).

³ *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010).

*Citizens United v. Federal Election Commission (FEC)*⁴ removed the prohibition on corporate independent political expenditures, and allows companies to spend unlimited sums from corporate treasuries to expressly advocate the election or defeat of a political candidate.⁵ The *Citizens United* decision effectively held that no “sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.”⁶ The *Citizens United* decision not only struck down the Federal prohibition on independent political spending, it also effectively struck down laws in twenty-four states that had long banned or restricted independent corporate expenditures.⁷

A recent case from the Montana Supreme Court, *Western Tradition Partnership, Inc. v. AG*,⁸ challenged that assertion and distinguished *Citizens United* by stating that “[*Citizens United*] considered the constitutionality of Federal statutes and regulations that prohibited corporations from ‘electioneering’ (making a communication that refers to a clearly identified candidate for Federal office) within 30 days of a primary election or 60 days of a general election,” and further stated that “*Citizens United* was a case decided upon its facts, and involved ‘unique and complex’ rules that affected . . . different types of speech in Federal elections.”⁹

This Article is timely, especially since the Supreme Court recently granted certiorari and summarily reversed the Montana Supreme Court in *American Tradition Partnership v. Bullock*.¹⁰ The Supreme Court held that “Montana’s arguments in support of the judgment [in *Western Tradition Partnership*] either were already rejected in *Citizens United*, or fail to meaningfully distinguish that case.”¹¹ The Article discusses why the Supreme Court should not have summarily reversed the Montana Supreme Court’s decision

⁴ *Id.* The Court held that “that the Government may not suppress political speech on the basis of the speaker’s corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.” *Id.* at 798-99. It is important to note that the *Citizens United* decision did not alter the Congressional prohibitions on direct corporate or union contributions to candidates as upheld by *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam).

⁵ See *Citizens United*, 130 S. Ct. at 913. Independent Political Expenditures are defined as “an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate.” 2 U.S.C.A. § 431(17) (West 2013).

⁶ See *Citizens United*, 130 S. Ct. at 913.

⁷ See *Life After Citizens United*, NAT’L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/default.aspx?tabid=19607#laws> (last updated Jan. 4, 2011) (noting that while *Citizens United* did not directly strike down state laws, “[m]any of these states are looking at repealing or re-writing these laws to avoid legal challenges”).

⁸ *W. Tradition P’ship, Inc. v. Att’y Gen.*, 271 P.3d 1 (Mont. 2011).

⁹ *Id.* at 6.

¹⁰ *Am. Tradition P’ship v. Bullock*, 132 S. Ct. 2490 (2012).

¹¹ *Id.*

The Article begins by discussing the holding in the *Western Tradition Partnership* case and analyzing both the majority and dissenting opinions. The Article then transitions into an empirical study of the current campaign finance landscape by specifically looking at: states' unique histories of corruption, the lack of transparency with regard to corporate political expenditures, the public perception of corruption in corporate political spending practices, the independence of super PACs, the influence of political dark money, and 501(c)(4) organizations and shell corporations being used to circumvent campaign finance disclosure rules and Federal tax laws.

The Article concludes by listing additional arguments in favor of the Supreme Court revisiting *Citizens United* including: the breadth of the First Amendment, the idea of corporations being "creatures of the state," the ability of PACs to allow corporate political participation, the issue of a state's power to exclude foreign corporations from participation in their democratic political institutions, shareholder protection, the treatment of public unions, and the Supreme Court's long-standing history of altering constitutional doctrine when its understanding of the doctrine's factual underpinnings no longer appear to be accurate.

II. WESTERN TRADITION PARTNERSHIP DECISION

Western Tradition Partnership, Inc. (WTP),¹² Champion Painting, Inc. (CPI),¹³ and Montana Shooting Sports Foundation (MSSF)¹⁴ sued the Montana Attorney General, specifically seeking a declaration that Montana Code § 13-35-227(1) (Montana Statute) violated their freedom of speech protected by the United States and Montana Constitutions by prohibiting political expenditures by corporations on behalf of or opposing candidates for public office.¹⁵

The Montana Statute states that "[a] corporation may not make a contribution or an expenditure in connection with a candidate or a political committee that supports or opposes a candidate or a political party."¹⁶ This section does not "prohibit the establishment or administration of a separate, segregated fund to be used for making political contributions or expenditures if the fund consists only of voluntary contributions solicited from an individual who is a shareholder, employee, or member of the corporation."¹⁷

¹² WTP is an entity incorporated in Colorado in 2008 and registered to do business in Montana. *Western Tradition P'ship, Inc.*, 271 P.3d at 4. According to the Montana Supreme Court, "its purpose is to act as a conduit of funds for persons and entities including corporations who want to spend money anonymously to influence Montana elections." *Id.*

¹³ CPI is incorporated under the laws of Montana. *Id.* "It is a single proprietor painting and drywall business with no employees or members, and its sole shareholder is Kenneth Champion." *Id.*

¹⁴ "MSSF is a voluntary association of persons who support and promote firearm safety, shooting sports, education, shooting facilities and Second Amendment rights." *Id.* It was incorporated in 1990. *Id.* "It has no employees or shareholders and its funding comes primarily from member dues and donations from other organizations." *Id.*

¹⁵ *Id.* at 3.

¹⁶ MONT. CODE ANN. § 13-35-227(1) (2011).

¹⁷ MONT. CODE ANN. § 13-35-227(3) (2011). These are known as political action committees or "PACs."

At the district court level, the court considered whether the Montana Statute violated the First Amendment to the U.S. Constitution to the extent that it restricted corporations from making independent corporate expenditures on behalf of candidates.¹⁸ The district court applied *Citizens United*, and determined that the Montana Statute impacted corporations' political speech protected by the United States Constitution.¹⁹ The district court then considered whether the government had demonstrated a compelling interest for the restriction on speech, and whether the restriction was narrowly tailored to achieve that interest.²⁰

The district court answered both questions in the negative and held that "*Citizens United* is unequivocal: the government may not prohibit independent and indirect corporate expenditures on political speech."²¹ The district court declared the statute unconstitutional and granted summary judgment for the plaintiffs.²² The defendants appealed the district Court's order. It is important to note that under Montana law, corporations are allowed to make independent expenditures on ballot issues.²³ That issue was not challenged and, therefore, was not before the court.

A. Majority Opinion

The Montana Supreme Court (Montana Court) stated that the lower district court "erroneously construed and applied the *Citizens United* case" and that "*Citizens United* was decided under its facts or lack of facts."²⁴ The Montana Court held that the U.S. Supreme Court (Supreme Court) had applied the rule that restrictions upon speech "are not per se unlawful, but rather may be upheld if the government demonstrates a sufficiently strong interest."²⁵ The Montana Court also held that the U.S. Supreme Court applied the highest level of scrutiny to the law restricting political speech, requiring the government to prove that the law furthers a compelling state interest and is narrowly tailored to that interest, and that the "factual record before a court is critical to determining the validity of a governmental provision restricting speech."²⁶ The Montana Court emphasized that the case before

¹⁸ See *W. Tradition P'ship, Inc. v. Att'y Gen.*, No. BDV-2010-238, 2010 Mont. Dist. LEXIS 412, at *1 (1st Dist. Mont. Oct. 18, 2010).

¹⁹ *Id.* at *9.

²⁰ *Id.* at *13.

²¹ *Id.* at *18 (quoting *Minn. Chamber of Commerce v. Gaertner*, 710 F. Supp. 2d 868, 873 (D. Minn. 2010))

²² *W. Tradition P'ship, Inc.*, 271 P.3d at 3.

²³ *Mont. Chamber of Commerce v. Argenbright*, 226 F.3d 1049 (9th Cir. 2000).

²⁴ *W. Tradition P'ship, Inc.*, 271 P.3d at 12, 13.

²⁵ *Id.* at 6 (citing *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 898 (2010)). This test derives from the Supreme Court's equal protection jurisprudence. See, e.g., *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 273-274 (1986); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

²⁶ *W. Tradition P'ship, Inc.*, 271 P.3d at 6.

them was distinguishable from *Citizens United* because it concerned Montana law and political elections, and it arose from Montana history.²⁷

The first issue the Montana Court analyzed was the effect that the Montana Statute had on the political activity and speech of WTP, CPI, and MSSF.²⁸ The Montana Court found that none of the organizations could demonstrate any way in which Montana law hindered or censored their political activity or speech.²⁹ Conversely, based upon affidavits and depositions submitted, all three organizations were actively involved in Montana politics.³⁰

MSSF contended that that even though Montana law allowed MSSF to obtain and spend donations from other organizations on political activities, it did not allow MSSF to use dues paid by its members for the same purpose.³¹ The Montana Court found that no such distinction appeared in Montana law and that MSSF failed to demonstrate that its speech was impaired by the statute.³² CPI's owner, Kenneth Champion, contended that a candidate endorsement by CPI would be more persuasive than his personal endorsement.³³ The Montana Court did not find this argument persuasive; the court stated that Champion is the sole shareholder of CPI and while Montana law forbids the expenditure of CPI's corporate funds to support or oppose candidates, the burden upon Champion, as sole shareholder, to establish a PAC to advocate for CPI's interests and expend funds were minimal.³⁴ With regard to WTP, the Montana Court found that WTP was not a business corporation and was not forthcoming about its business practices.³⁵ The Montana Court held that "[o]rganizations like WTP that act as conduits for anonymous spending by others represent a threat to the 'political marketplace'" and that "[b]ecause WTP has not disclosed its operation, it is difficult to determine how it might be impacted by the Montana Statute, but given the evidence presented below we will assume there is a direct impact."³⁶

The next issue the Montana Court analyzed was the regulatory burden imposed by the Montana Statute. The court held that there was a "material factual distinction between the present case and *Citizens United*," with regard to the regulatory burden imposed.³⁷ In *Citizens United*, the U.S. Supreme Court found that PACs are "burdensome alternatives; they are expensive to administer and subject to extensive

²⁷ *Id.* This idea of Montana's unique political history was a theme throughout the Montana Court's decision. *Id.*

²⁸ *Id.* at 4.

²⁹ *Id.*

³⁰ *Id.* at 6.

³¹ *Id.* at 4.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 7.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

regulations.”³⁸ The U.S. Supreme Court further held that PACs have to comply with onerous regulations just to speak and that fewer than 2,000 corporations in the United States have PACs.³⁹

In Montana, the regulations governing the formation and maintenance of PACs can be found in Montana Code sections 13-37-201 and 13-35-402.⁴⁰ The Montana Court found that unlike the federal rules for PACs, Montana law reflects that PACs can “be formed and maintained by filing simple and straight-forward forms or reports.”⁴¹ MSSF, by its own admission, had established its own PACs and used them to actively participate in the Montana political process.⁴² The Montana Court further found that the evidence submitted by the government demonstrated that corporations, through their PACs, have been active participants in Montana politics.⁴³

The next issue that the Montana Court analyzed was whether the law at issue could “be understood outside the context of the time and place it was enacted.”⁴⁴ The court described how at the time the Montana Statute was enacted, Montana political contests “were marked by rough contests for political and economic domination . . . between mining and industrial enterprises controlled by foreign trusts or corporations.”⁴⁵ The Montana Court discussed fights for mineral rights between companies and corruption throughout the Montana political system in the early twentieth century.⁴⁶

The Montana Court focused on the story of W. A. Clark, who had amassed a fortune from industrial operations in Montana.⁴⁷ In 1899, the Montana Legislature elected Clark to the U.S. Senate. However, subsequent to his election, Clark admitted to spending \$272,000 dollars in the effort and the estimated expense was over \$400,000 dollars.⁴⁸ Complaints of Clark's bribery of the Montana Legislature led to an investigation by the U.S. Senate in 1900. The Senate investigating committee “concluded that Clark had won his seat through bribery and unseated him. The Senate committee ‘expressed horror at the amount of money which had been poured into politics in Montana elections . . . and expressed its concern with respect to the general aura of corruption in Montana.’”⁴⁹ Clark testified in the U.S. Senate

³⁸ *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 897 (2010).

³⁹ *Id.* (citing Brief for Seven Former Chairmen of Fed. Election Comm'n et al., as Amici Curiae 11).

⁴⁰ *Western Tradition P'ship, Inc.*, 271 P.3d at 7.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 8.

⁴⁵ *Id.*

⁴⁶ *Id.* at 8-9.

⁴⁷ *Id.* at 8.

⁴⁸ *Id.*

⁴⁹ *Id.* (citing K. ROSS TOOLE, MONTANA, AN UNCOMMON LAND 186-94 (1959)).

that “[m]any people [had] become so indifferent to voting’ in Montana as a result of the ‘large sums of money that [had] been expended in the state.’”⁵⁰

The Montana Court also relied upon an affidavit from history professor Dr. Harry Fritz. Dr. Fritz reported that the “‘dangers of corporate influence remain in Montana’ because the resources upon which its economy depends in turn depend upon distant markets. He affirmed: ‘What was true a century ago is as true today: distant corporate interests mean that corporate dominated campaigns will only work in the essential interest of outsiders with local interests a very secondary consideration.’”⁵¹ Bob Brown, a former long-time Montana legislator, submitted an affidavit attesting that “Montana politics are more susceptible to corruption than Federal campaigns, and that infusions of large amounts of corporate independent expenditure on just media coverage ‘could accomplish the same type of corruption of Montana politics as that which led to the enactment of’ [the Montana Statute].”⁵² Edwin Bender, Executive Director of the National Institute on Money in State Politics, affirmed that “the low cost of political races in Montana, in comparison to other states,” makes it possible for direct political spending by corporations to significantly affect the outcome of elections.⁵³

The Montana Court found that based upon the history of the Montana Statute, Montana citizens had a compelling interest to enact the challenged statute in 1912.⁵⁴ The court questioned if or when did Montana lose the power or interest sufficient to support the Montana Statute.⁵⁵ The court used a clever analogy by asking whether a state would “have to repeal or invalidate its murder prohibition if the homicide rate decline[d]?”⁵⁶

The Montana Court also found that “[w]hile Montana has a clear interest in preserving the integrity of its electoral process, it also has an interest in encouraging the full participation of the Montana electorate.”⁵⁷ The court discussed the affidavit submitted by Edwin Bender which “demonstrate[d] that individual voter contributions are diminished from 48 percent of the total raised by candidates in states where a corporate spending ban has been in place to 23 percent of the total raised by candidates in states that permit unlimited corporate spending.”⁵⁸ Based upon this evidence, the Montana Court found that “the impact of unlimited corporate donations creates a dominating impact on the political process and inevitably minimizes the impact of individual citizens.”⁵⁹

⁵⁰ *Id.* at 7 (citing K. ROSS TOOLE, MONTANA, AN UNCOMMON LAND 184-85 (1959)).

⁵¹ *Id.* at 9.

⁵² *Id.* at 10.

⁵³ *Id.*

⁵⁴ *Id.* at 11.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 12.

The Montana Court concluded that the Montana Statute was constitutional because it demonstrated a compelling interest for the restriction on speech, and the restriction was narrowly tailored to achieve that interest.⁶⁰ The court held that “*Citizens United* does not compel a conclusion that Montana’s law prohibiting independent political expenditures by a corporation related to a candidate is unconstitutional. Rather, applying the principles enunciated in *Citizens United*, it is clear that Montana has a compelling interest to impose the challenged rationally-tailored statutory restrictions.”⁶¹

B. Dissenting Opinion

The dissent argued that corporations have broad rights under the First Amendment and even though the Montana Attorney General identified compelling reasons for limiting corporate expenditures, the Supreme Court, in *Citizens United*, had already rebuffed each reason.⁶² It is interesting to note that in the dissent, Justice Nelson went to great lengths to show that he disagreed with the rationale used in *Citizens United*, but believed that the Montana Court was bound to enforce the Supreme Court’s decision.⁶³

The dissent briefly discussed the *Citizens United* decision and provided a detailed comparison of the rationales provided by the majority and the Supreme Court. First, the dissent discussed the majority’s argument that PACs in Montana are easy to create and maintain.⁶⁴ The Supreme Court in *Citizens United* rejected PACs, in part, because they were subject to burdensome and expensive start-up costs and filing fees under Federal regulations.⁶⁵ However, the dissent noted that the Supreme Court specifically stated that “[a] PAC is a separate association from the corporation. So the PAC exemption from the [law’s] expenditure ban does not allow corporations to speak.”⁶⁶ The dissent contended that even though PACs are easier to create and maintain under Montana law, the Supreme Court explicitly found that PACs were separate entities and could not speak for the corporation.⁶⁷

Second, the dissent discussed the majority’s anti-corruption rationale.⁶⁸ The dissent discussed the majority’s view of corporate domination and corrupt influence throughout the history of Montana politics.⁶⁹ The dissent found this argument unpersuasive and argued that “The [U.S.] Supreme Court unequivocally repudiated

⁶⁰ *Id.* at 13.

⁶¹ *Id.*

⁶² *Id.* at 14 (Nelson, J., dissenting).

⁶³ *Id.* at 18 (“I agree, at least in principle, with much of the Court’s discussion and with the arguments of the Attorney General.”).

⁶⁴ *Id.* at 88.

⁶⁵ *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 897 (2010).

⁶⁶ *W. Tradition P’ship, Inc.*, 271 P.3d at 21 (Nelson, J., dissenting) (citing *Citizens United*, 130 S. Ct. at 897).

⁶⁷ *Id.*

⁶⁸ *Id.* at 89.

⁶⁹ *Id.* at 90.

the notion that corporate political speech can be restricted ‘as a means to prevent corporations from obtaining an unfair advantage in the political marketplace by using resources amassed in the economic marketplace.’”⁷⁰ The dissent also argued that the U.S. Supreme Court specifically found that “independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption” and that a “sufficiently important governmental interest in preventing corruption or the appearance of corruption . . . was limited to *quid pro quo* corruption.”⁷¹

The dissent also rejected the majority’s argument that *Citizens United* was decided upon a “unique” set of facts and only applied to federal elections. The dissent stated that “*Bellotti*⁷² did not address the constitutionality of the State’s ban on corporate independent expenditures to support candidates. In our view, however, that restriction would have been unconstitutional.”⁷³ The dissent argued that this language reflects that the prohibition on corporate independent political expenditures would not pass constitutional muster, regardless of whether it is a federal or state law.⁷⁴

Third, the dissent discussed the majority’s citizen protection (anti-distortion) rationale. The dissent discussed the majority’s view that allowing corporations to spend an unlimited amount of money in Montana political elections would leave average citizens unable to compete and would create the perception that their support did not matter.⁷⁵ The dissent found this argument unpersuasive and stated that “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”⁷⁶ The dissent further stated that “[t]he rule that political speech cannot be limited based on a speaker’s wealth is a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on the speaker’s identity.”⁷⁷ Based upon these statements, the dissent found the majority’s anti-distortion theory to be invalid under *Citizens United*.⁷⁸

Fourth, the dissent discussed the majority’s interest in protecting its system of elected judges. The dissent discussed the majority’s view that Montana judicial elections were particularly vulnerable to large levels of corporate spending and would affect the public’s perception of judicial impartiality.⁷⁹ The dissent argued that the majority’s reliance on the Supreme Court’s decision in *Caperton v. A.T.*

⁷⁰ *Id.* at 27-28 (quoting *Citizens United*, 130 S. Ct. at 904).

⁷¹ *Id.* at 28 (citing *Citizens United*, 130 S. Ct. at 909).

⁷² *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

⁷³ *W. Tradition P’ship, Inc.*, 271 P.3d at 28 (Nelson, J., dissenting) (quoting *Citizens United*, 130 S. Ct. at 903).

⁷⁴ *Id.* at 33 (Nelson, J., dissenting).

⁷⁵ *Id.* at 35 (Nelson, J., dissenting).

⁷⁶ *Id.* at 22 (Nelson, J., dissenting) (quoting *Citizens United*, 130 S. Ct. at 904).

⁷⁷ *Id.* at 30 (Nelson, J., dissenting) (quoting *Citizens United*, 130 S. Ct. at 905).

⁷⁸ *Id.* at 29-30 (Nelson, J., dissenting).

⁷⁹ *Id.* at 30 (Nelson, J., dissenting).

*Massey Coal*⁸⁰ was misguided. The dissent stated that “*Caperton* held that a judge was required to recuse himself ‘when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent.’”⁸¹ The dissent further argued that the Supreme Court stated in *Citizens United* that “*Caperton*’s holding was limited to the rule that the judge must be recused, not that the litigant’s political speech could be banned” and that recusal was the remedy for protecting the due process rights of litigants, not banning corporate speech.⁸² The dissent also relied on the Supreme Court’s rationale in *Republican Party of Minnesota v. White*,⁸³ which stated that “the Minnesota Supreme Court’s canon of judicial conduct (the “announce clause”) prohibiting candidates for judicial election from announcing their views on disputed legal and political issues violated the First Amendment.”⁸⁴

The dissent concluded by stating that the majority was misguided in its attempt to craft a theory of Montana being a unique situation and *Citizens United* only applying to federal elections.⁸⁵ The dissent found that the Montana Statute was facially unconstitutional under the Supreme Court’s holding in *Citizens United*.⁸⁶

III. WHAT WE HAVE LEARNED

It is instructive to look at the Montana Court’s holding in *Western Tradition Partnership* and see how they distinguished it from the Supreme Court’s holding in *Citizens United*. As noted above, the Montana Court emphasized that the case before them was distinguishable from *Citizens United* because it concerned Montana law and political elections and it arose from Montana history.⁸⁷ The Montana Court focused on three issues where Montana’s political climate and laws are distinguishable from *Citizens United*. The first issue is that forming a PAC under Montana law is not as burdensome as the formation of a PAC under federal law. The second issue is that, unlike the federal government in *Citizens United*, the Montana government was able to demonstrate a compelling state interest for the prohibition on corporate independent political spending, including anti-corruption and anti-distortion interests. The third issue is that the Montana Court relied on the Supreme Court’s decision in *Caperton*, and held that the interest in protecting the independence of the Montana judiciary was paramount.

⁸⁰ *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009).

⁸¹ *W. Tradition P’ship, Inc.*, 271 P.3d at 30 (Nelson, J., dissenting) (quoting *Caperton*, 129 S. Ct. at 2263-64).

⁸² *Id.* (Nelson, J., dissenting) (quoting *Citizens United*, 130 S. Ct. at 910).

⁸³ *Republican Party of Minn. v. White*, 122 S. Ct. 2528 (2002).

⁸⁴ *W. Tradition P’ship, Inc.*, 271 P.3d at 31 (Nelson, J., dissenting) (citing *White*, 536 U.S. at 788).

⁸⁵ *Id.* at 110.

⁸⁶ *Id.*

⁸⁷ *Id.* at 15; see *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984) (plurality opinion) (“[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.”); see also *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 289 (1921) (a “statute may be invalid as applied to one state of facts and yet valid as applied to another.”).

A. Distinguishing Citizens United

The Montana Court held that *Citizens United* was decided upon its facts and involved “unique and complex” rules that govern speech in Federal elections.⁸⁸ The court also made the important point that restrictions upon speech are not per se unlawful and may be upheld if the government can demonstrate a sufficiently strong interest.⁸⁹ The Montana Court relied on the Supreme Court’s endorsement of *FEC v. Wisconsin Right to Life*,⁹⁰ which “clearly endorsed an analysis of restrictions on speech, placing the burden upon the government to establish a compelling interest.”⁹¹

1. Ease of Creating a PAC

The first distinction the Montana Court made was that the regulatory burden in Montana for creation of a PAC is far less burdensome than the federal regulatory burden. Under federal law, PACs must “appoint a treasurer, forward donations to the treasurer promptly, keep detailed records of the identities of the persons making donations, preserve receipts for three years, and file an organization statement and report changes to this information within 10 days.”⁹² In contrast, under Montana law, a PAC can be formed and maintained by filing simple and straight-forward forms and reports.⁹³ The Montana Court also relied on evidence that MSSF had established multiple PACs and used them to participate in the Montana political process and that Kenneth Champion, as sole shareholder of CPI, could easily establish a PAC to advocate for the corporation’s interests.⁹⁴

The dissent emphasizes that even though the Supreme Court relied in part on the regulatory burden imposed by federal law, they went further to say that a “PAC is a separate association from the corporation” and “the option to form PACs does not alleviate the First Amendment problems.”⁹⁵ Even though the Supreme Court specifically states that PACs do not allow a corporation to speak,⁹⁶ the language cited by the Montana Court seems to indicate that if the regulatory burden to establish a PAC under federal law was not so onerous, a prohibition on corporate political expenditures may not violate the First Amendment. The ability of PACs to speak for corporations is discussed later in this Article.⁹⁷

⁸⁸ *W. Tradition P’Ship, Inc.*, 271 P.3d at 5.

⁸⁹ *Id.* at 6 (citing *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 898 (2010); *Fed. Election Comm’n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 251-52 (1986)).

⁹⁰ *Fed. Election Comm’n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007).

⁹¹ *W. Tradition P’ship, Inc.*, 271 P.3d at 6 (citing *Citizens United*, 130 S. Ct. at 898).

⁹² *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 330-32 (2003) (quoting *Mass. Citizens for Life, Inc.*, 479 U.S. at 253-54).

⁹³ *Western Tradition P’ship, Inc.*, 271 P.3d at 19.

⁹⁴ *Id.* at 20.

⁹⁵ *Citizens United*, 130 S. Ct. at 897.

⁹⁶ *Id.*

⁹⁷ See *infra* Part V.B.

2. Compelling State Interests

In *Citizens United*, the Supreme Court applied the rule that restrictions upon speech “are not per se unlawful, but rather may be upheld if the government demonstrates a sufficiently strong interest.”⁹⁸ This requires the government to prove that the law furthers a compelling state interest and is narrowly tailored to that interest. The Montana Court found that the “factual record before a court is critical to determining the validity of a governmental provision restricting speech.”⁹⁹ The court concluded that the Montana Statute was constitutional because the government had demonstrated a compelling interest for the restriction on speech, and the restriction was narrowly tailored to achieve that interest.¹⁰⁰ The Montana Court relied on two rationales for their conclusion: an anti-corruption rationale and an anti-distortion rationale.

a. Anti-Corruption Rationale

The Montana Court spent considerable time discussing how the Montana Statute could not “be understood outside the context of the time and place it was enacted.”¹⁰¹ The court described how at the time the Montana Statute was enacted, Montana political contests “were marked by rough contests for political and economic domination . . . between mining and industrial enterprises controlled by foreign trusts or corporations.”¹⁰² The court relied on affidavits reflecting that corporate dominated campaigns will only work in the essential interest of outsiders with local interests a very secondary consideration, and that Montana politics are more susceptible to corruption than federal campaigns.¹⁰³

In *Citizens United*, the Supreme Court made a blanket statement that “independent expenditures do not lead to, or create the appearance of, *quid pro quo* corruption.”¹⁰⁴ They relied on the record in *McConnell* to show that there were no direct examples of votes being exchanged for candidate-centered issue advocacy expenditures.¹⁰⁵ This issue will be discussed in greater detail later in this Article.¹⁰⁶

b. Anti-Distortion Rationale

The Montana Court also discussed the distorting effect that would be created by allowing unlimited corporate expenditures. The court found that “[w]hile Montana has a clear interest in preserving the integrity of its electoral process, it also has an

⁹⁸ *Citizens United*, 130 S. Ct. at 898.

⁹⁹ *W. Tradition P’ship, Inc.*, 271 P.3d at 6.

¹⁰⁰ *Id.* at 40.

¹⁰¹ *Id.*

¹⁰² *Id.* at 8.

¹⁰³ *Id.* at 20.

¹⁰⁴ *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 910 (2010). (emphasis in original).

¹⁰⁵ *Id.* (citing *McConnell v. Fed. Election Comm’n*, 251 F. Supp. 2d 176, 560 (D.D.C. 2003)).

¹⁰⁶ See *infra* Part IV.E.

interest in encouraging the full participation of the Montana electorate.”¹⁰⁷ The court relied upon data showing that “individual voter contributions are diminished from 48 percent of the total raised by candidates in states where a corporate spending ban has been in place to 23 percent of the total raised by candidates in states that permit unlimited corporate spending.”¹⁰⁸

In *Citizens United*, the Supreme Court found that “[i]f the anti-distortion rationale were to be accepted, however, it would permit Government to ban political speech simply because the speaker is an association that has taken on the corporate form.”¹⁰⁹ The Supreme Court further held that the government does not have “an interest ‘in equalizing the relative ability of individuals and groups to influence the outcome of elections.’”¹¹⁰

3. Reliance on *Caperton*

The Montana Court relied on the Supreme Court’s reasoning in *Caperton* and held that Montana had a compelling interest in protecting its system of elected judges. The court found that Montana judicial elections were particularly vulnerable to large levels of corporate spending and would affect the public’s perception of judicial impartiality.¹¹¹ The court further found that “the free speech rights of the corporations are no more important than the due process rights of litigants in Montana courts to a fair and independent judiciary, and both are constitutionally protected.”¹¹²

In *Caperton*, the Supreme Court found that a judge was required to recuse himself “when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent.”¹¹³ In *Citizens United*, the Supreme Court held that “*Caperton*’s holding was limited to the rule that the judge must be recused, not that the litigant’s political speech could be banned” and that recusal was the remedy for protecting the due process rights of litigants, not banning corporate speech.¹¹⁴ However, the Supreme Court in *Caperton* stated that large independent expenditures in support of a judicial candidate could create a serious, objective risk of actual bias that violated an opposing litigant’s due process rights and that even though there was no allegation of a quid pro quo agreement, Justice Benjamin would nevertheless feel a debt of gratitude to Blankenship for the extraordinary efforts to get him elected.¹¹⁵

¹⁰⁷ *W. Tradition P’ship, Inc.*, 271 P.3d at 11.

¹⁰⁸ *Id.*

¹⁰⁹ *Citizens United*, 130 S. Ct. at 904.

¹¹⁰ *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 48 (1976) (per curiam)).

¹¹¹ *W. Tradition P’ship, Inc.*, 271 P.3d at 12.

¹¹² *Id.* at 12.

¹¹³ *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2263-64 (2009).

¹¹⁴ *Citizens United*, 130 S. Ct. at 910.

¹¹⁵ *Caperton*, 129 S. Ct. at 2262.

IV. CAMPAIGN FINANCE EMPIRICAL CASE STUDY

In *Citizens United*, the Supreme Court made blanket statements concerning corporate independent expenditures. The Supreme Court stated that “independent expenditures do not lead to, or create the appearance of, *quid pro quo* corruption” and “[t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent . . . alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.”¹¹⁶ The Supreme Court also held that “[n]o sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.”¹¹⁷ This part analyzes the current available data to see whether these statements made by the Supreme Court are supported by the evidence.

A. States’ “Unique” Histories

The Montana Court emphasized that the case before them was distinguishable from *Citizens United*, because it concerned Montana law and political elections, and it arose from Montana history.¹¹⁸ The court held that Montana political elections are different because of the history of corruption and corporate domination.¹¹⁹ As of January 2010, twenty-four states had laws that prohibited or restricted independent corporate political expenditures.¹²⁰

For example, Arizona enacted the Clean Elections Act¹²¹ in 1998 after a political scandal that saw ten percent of the Arizona state legislature indicted on corruption-related charges.¹²² In 1991, the political scandal “rocked the state as a grand jury charged seven legislators, five lobbyists and five others with felonies including bribery, money laundering and filing false campaign statements.”¹²³

In 1996, the Alaska legislature “enacted sweeping reforms to its campaign finance system. Corruption and the appearance of corruption had led to low voter turnout and widespread disillusionment with the electoral system.”¹²⁴ The

¹¹⁶ *Citizens United*, 130 S. Ct. at 902.

¹¹⁷ *Id.* at 913.

¹¹⁸ *W. Tradition P’ship, Inc. v. Att’y Gen.*, 271 P.3d 1, 15 (Mont. 2011).

¹¹⁹ *See id.*

¹²⁰ *Life After Citizens United*, NAT’L CONFERENCE OF STATE LEGISLATURES (Mar. 2, 2013), <http://www.ncsl.org/default.aspx?tabid=19607#laws>. The states include: Alabama, Alaska, Arizona, Colorado, Connecticut, Iowa, Kentucky, Massachusetts, Michigan, Minnesota, Montana, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, West Virginia, Wisconsin, and Wyoming. *Id.*

¹²¹ ARIZ. REV. STAT. ANN. § 16-941 (2012).

¹²² *A Brief History of Corruption Leading to Arizona Voters’ Adoption of the Clean Elections System*, ARIZ. ADVOCACY NETWORK (Mar. 2, 2013), http://stoptheazpowergrab.com/files/Brief_History_of_Corruption_in_AZ_Politics.pdf (“In 1991, Arizona Voters witnessed nearly 10 percent of their State legislature indicted on corruption-related charges in a scandal that came to be known as AzScam. Video of the sting showed legislators stuffing tens of thousands of dollars into gym bags while making comments such as, ‘I sold way too cheap’ and ‘There’s not an issue in the world I give a [expletive] about.’”).

¹²³ *Scandal in Phoenix*, TIME MAG., Feb. 18, 1991.

¹²⁴ *Jacobus v. Alaska*, 338 F.3d 1095, 1098 (9th Cir. 2003).

subsequent investigation was headed by the Public Integrity Section of the U.S. Department of Justice, the Federal Bureau of Investigation (FBI), and the Internal Revenue Service (IRS).¹²⁵ The investigation looked “into political corruption of lawmakers in the Alaska State Legislature, focusing in particular on lawmakers’ official actions in relation to the oil industry, fisheries, and private corrections industry.”¹²⁶ As of May 2007, the investigation had resulted in indictments against four current and former Alaska state legislators on corruption charges.¹²⁷ In 2003, FBI agents, posing as employees of a fake company, asked members of the Tennessee legislature to support legislation that would advance the company’s business in Tennessee. The legislators agreed to do so if they were to be paid for their introduction of legislation.¹²⁸

In Missouri, in the early 1990s, a reporter, Terry Ganey, uncovered a scandal involving campaign contributions directed to the Missouri Attorney General, William L. Webster, who was running for governor at the time.¹²⁹ In Missouri, the Second Injury Fund was supposed to supplement worker’s compensation benefits for injuries suffered on the job.¹³⁰ Ganey found that “unusually large contributions were flowing to Attorney General Webster’s campaign for re-election from a small group of St. Louis lawyers filling claims against the fund.”¹³¹ The investigation uncovered that lawyers who contributed to Webster had obtained much larger settlements from the fund for their clients than those lawyers who did not contribute to his campaign.¹³² Ganey accomplished this by analyzing information from Second Injury Fund documents and compared them with Webster’s campaign disclosure reports.¹³³ The two main lawyers behind the scandal pled guilty to charges that they conspired to use the Second Injury Fund to raise campaign contributions for Webster; subsequently they testified against Webster and he was sentenced to two years in prison.¹³⁴

In the 2008 Oregon state elections, the Public Employees Local 503 Union, whose parent organization is Service Employees International Union (“SEIU”), provided \$320,958 dollars to John Kroger, who was running for Attorney General of Oregon; Kroger ended up winning the election.¹³⁵ Attorney General Kroger

¹²⁵ *Alaska Political Corruption Probe*, SUNSHINE REVIEW (Mar. 2, 2013), http://sunshine-review.org/index.php/Alaska_political_corruption_probe#cite_note-mauer-probeledby-10.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ John Branston, *U.S. Indicts 4 Tennessee Lawmakers in Corruption Case*, N.Y. TIMES, May 27, 2005.

¹²⁹ Terry Ganey, *How Post Reporter Uncovered Second Injury Fund Scandal*, ST. LOUIS DISPATCH, Mar. 1, 1994.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Oregon 2008: Contributors*, FOLLOW THE MONEY (2008), <http://www.followthemoney.org/database/StateGlance/contributor.phtml?d=600611244>.

subsequently appointed a former SEIU attorney to oversee elections.¹³⁶ At the very least, this action raises the specter of quid pro quo corruption. i.e., rewarding a large expenditure with a favorable position in the new administration.

In Connecticut, from 1998 to 2002, TBI Construction, a construction company run by the Tomasso family, received construction contracts worth more than \$100 million dollars in exchange for contributing over \$400,000 dollars to Governor John Rowland's re-election campaigns.¹³⁷ TBI was awarded a \$37 million dollar no-bid contract in March 1999 and a \$52 million dollar no-bid contract in May 1999.¹³⁸ Governor Rowland also appointed TBI's president to the juvenile justice advisory panel that advised the Connecticut government on policy and funding, although he seemed to lack the qualifications or experience to service on the panel.¹³⁹ It is important to note that all of the contributions themselves were legal under Connecticut law.¹⁴⁰

For the Montana Court, they found that the government was able to show not only that a compelling state interest existed at the time the Montana Statute was enacted, but they were also able to show that the factors that led to the corruption were still present today.¹⁴¹ A state must show that, regardless of the language used by the Supreme Court in *Citizens United*, corporate independent expenditures can lead to corruption. This Article provides ample empirical evidence that even though an expenditure is not directly "coordinated" with a candidate, it can still lead the candidate to favor the corporation making the expenditures and rewarding those contributors.¹⁴²

Many states legislatures have also issued resolutions voicing their disagreement with the Supreme Court's decision in *Citizens United*. In Idaho, the state legislature urged Congress "to affirm the power of the states to set limits, through lawmaking or constitutional amendment, on all forms of contributions and expenditures made by corporations and labor organizations to influence the outcome of elections in the states."¹⁴³ In Kentucky, the state legislature expressed "deep disappointment over the decision of the United States Supreme Court in the case of *Citizens United*," and stated that the "the framers of the Kentucky Constitution recognized the possibility that corporate spending could corrupt and distort the electoral process."¹⁴⁴ In New Jersey, the state legislature expressed "strong opposition to U.S. Supreme Court

¹³⁶ Larry Huss, *The Corruption of Campaign Contributions*, OR. CATALYST (Dec. 31, 2008), <http://oregoncatalyst.com/1955-The-Corruption-of-Campaign-Contributions.html>.

¹³⁷ CONN. COMMON CAUSE, THE ROWLAND CORRUPTION TRAIL BEGINS ON THE CAMPAIGN TRAIL (Jan. 30, 2004), available at <http://www.commoncause.org/atf/cf/%7BFB3C17E2-CDD1-4DF6-92BE-BD4429893665%7D/Corruption%20Trail.pdf>.

¹³⁸ *Id.* at 4.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ See *W. Tradition P'ship, Inc. v. Att'y Gen.*, 271 P.3d 1 (Mont. 2011).

¹⁴² The issue of explicit and implicit coordination between candidates and PACs will be discussed in greater detail later in the Article.

¹⁴³ H.J. Memorial 12, 2010 Leg. 2d Reg. Sess. (Idaho 2010).

¹⁴⁴ 2010 Gen. Assemb., Reg. Sess. (Ky. 2010).

decision in *Citizens United*,” and requested that Congress “propose an amendment to the United States Constitution to provide that, with respect to corporation campaign spending, a person is only a natural person for First Amendment protection of free speech.”¹⁴⁵

In Pennsylvania, the state legislature urged Congress to amend the U.S. Constitution to state that “[e]ach State shall have the power to limit the contributions to or expenditures by any person or committee made in support of, in opposition to, or to influence the nomination or election of any person to State or local office.”¹⁴⁶ In South Dakota, the state legislature called upon Congress to “propose and to ratify a constitutional amendment that would reverse the Supreme Court’s decision in the case of [*Citizens United*] in order to protect our democracy from undue corporate influence and ensure that the people continue to have a voice in the operation of government.”¹⁴⁷ In Washington, the state legislature requested that Congress “transmit to the several states for ratification an amendment to the Fourteenth Amendment of the United States Constitution so that corporations will not be considered as persons for the purposes of electioneering communications or direct contributions to candidates for public office.”¹⁴⁸

Many states have unique histories and circumstances that require different standards for regulating political elections. Courts have determined that a one-size-fits-all approach is not appropriate in all cases affecting constitutional rights including Fourth Amendment search and seizure cases¹⁴⁹ and Fifth Amendment due process cases.¹⁵⁰ The Court should have extended this same type of factual specific analysis to its holding in *Citizens United*.

B. Lack of Transparency

One reason why the Supreme Court should have revisited the holding in *Citizens United* is the empirical data reflecting the difficulty of obtaining evidence of corruption or the appearance of corruption due to the lack of transparency concerning corporate independent political expenditures. The Bipartisan Campaign Reform Act of 2002 (BCRA) provides that any person who spends more than \$10,000 on electioneering communications within a calendar year must file a disclosure statement with the FEC.¹⁵¹ The BCRA also provides that the statement must identify the person making the expenditure, the amount of the expenditure, the election to which the communication was directed, and the names of certain contributors.¹⁵² Even with the disclosure provisions of the BCRA, the Supreme Court in *McConnell* found that “[t]here was evidence in the record that independent

¹⁴⁵ Assembly R. 64, 214th Leg. (N.J. 2010).

¹⁴⁶ H.R. 653, 2010 Gen. Assemb. Reg. Sess. (Pa. 2010).

¹⁴⁷ H.R. Con. Res 1018, 2010 Leg., 85th Sess. (S. D. 2010).

¹⁴⁸ S.J. Memorial 8027, 61st Leg., Reg. Sess. (Wash. 2010).

¹⁴⁹ See, e.g., *United States v. McGregor*, 650 F.3d 813 (1st Cir. 2011).

¹⁵⁰ See, e.g., *United States v. James Daniel Good Real Prop.*, 510 U.S. 43 (1993).

¹⁵¹ 2 U.S.C.A. § 434(f)(1) (West 2002).

¹⁵² 2 U.S.C.A. § 434(f)(2) (West 2002).

groups were running election-related advertisements ‘while hiding behind dubious and misleading names.’”¹⁵³

In *FEC v. Wisconsin Right to Life*, the Supreme Court held that the prohibition on corporate independent political expenditures was invalid as applied to expenditures that did not constitute “express advocacy” or the “functional equivalent of express advocacy.”¹⁵⁴ The Court explained that a communication is the “functional equivalent of express advocacy” only if it “is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.”¹⁵⁵ In 2007, the FEC promulgated rules to implement the Supreme Court’s holding in *Wisconsin Right to Life*. The FEC rule provided that disclosure would only be mandated for disbursements that were “made for the purpose of furthering electioneering communications.”¹⁵⁶ The FEC reasoned that organizations may have funding sources other than donations and that those persons may not support the electioneering communications and that compliance with the disclosure requirements would impose a burden on those organizations.¹⁵⁷

In March 2012, in *Van Hollen v. FEC*, the U.S. District Court for the District of Columbia found in favor of a plaintiff who challenged the FEC regulation regarding disclosure by corporations and unions that fund “electioneering communications.”¹⁵⁸ The Court held that the language of the BCRA disclosure provision was not ambiguous, and “there [was] no question that the regulation promulgated by the FEC directly contravenes the Congressional goal of increasing transparency disclosure in electioneering communications.”¹⁵⁹ The Court further held that the disclosure provision plainly required every person who funds electioneering communications to disclose contributors who contributed more than \$1,000 during the reporting period and that “there are no terms limiting that requirement to call only for the names of those who transmitted funds accompanied by an express statement that the contribution was intended for the purpose” of making electioneering communications.¹⁶⁰

It is unclear how the recent decision in *Van Hollen* will affect the corporate independent disclosure regime implemented by FEC regulations. It is important to note that even though *Citizens United* invalidated any prohibition on corporate independent political expenditures, it left the disclosure provision of the BCRA intact.¹⁶¹ The Supreme Court held that that disclosure “would help citizens ‘make

¹⁵³ *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 914 (2010) (quoting *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 197 (2003)).

¹⁵⁴ *Fed. Election Comm’n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 470-76 (2007).

¹⁵⁵ *Id.* at 470.

¹⁵⁶ 11 C.F.R. § 104.20(c)(9) (2011).

¹⁵⁷ Explanation and Justification for Final Rules on Electioneering Communications, 72 Fed. Reg. 72,899 (Dec. 26, 2007).

¹⁵⁸ See *Van Hollen v. Fed. Election Comm’n*, 851 F. Supp. 2d 69 (D.D.C. 2012).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 915 (2010).

informed choices in the political marketplace.”¹⁶² However, the evidence reflects that the reality of political expenditures is that they are shrouded in secrecy and lack the transparency referenced by the Supreme Court.

In an April 2012 *Washington Post* study, politically active non-profit groups that did not reveal their funding sources spent \$28.5 million dollars on advertising related to the 2012 presidential race, or about 90 percent of the total through April 21, 2012.¹⁶³ The study reflects that there is a shift away from PACs, which are required to disclose their donors to the FEC, and instead, the 2012 presidential race was likely dominated by non-profit organizations that did not have to identify their financial backers.¹⁶⁴ These non-profit organizations are able to circumvent the disclosure laws because “their ads are considered ‘issue ads’ [and] they do not specifically urge viewers to vote for a particular candidate. The strategy allows them to conform to [IRS] rules for ‘social welfare’ groups, which do not have to disclose their donors as long as their ‘primary purpose’ is not politics.”¹⁶⁵ These social welfare groups will be discussed in further detail later in the Article.¹⁶⁶

It is interesting to note that Western Tradition Partnership actually prided itself on the same type of secrecy that the Supreme Court in *Citizens United* cautioned against. Western Tradition Partnership represented to contributors that there was no limit to how much an individual or corporation could give, and that they were “not required to report the name or the amount of any contribution that we receive . . . no politician, no bureaucrat, and no radical environmentalist will ever know you helped make this program possible.”¹⁶⁷ This language is in direct contravention with the statements made by the majority in *Citizens United*, specifically that “transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.”¹⁶⁸

C. Supreme Court’s Narrow View of Corruption

Corruption is defined as “covering a multitude of official delinquencies, great and little; but it is strictly accurate to apply it to any color of influence, of mere relation of any kind, on the administration of justice.”¹⁶⁹ By analyzing the Supreme Court’s jurisprudence concerning independent political expenditures in the context of the First Amendment, the overwhelming conclusion is that the Supreme Court has a very narrow view of corruption in regard to corporate independent expenditures.

In *Buckley*, the Supreme Court found that because independent expenditures did not give rise to quid pro quo corruption, they would not be recognized as a

¹⁶² *Id.* (quoting *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 197 (2003)).

¹⁶³ Dan Eggen, *Most Independent Ads for 2012 Election are from Groups that Don’t Disclose Donors*, WASH. POST, Apr. 24, 2012.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *See infra* Part IV.F.

¹⁶⁷ *W. Tradition P’ship, Inc. v. Att’y Gen.*, 271 P.3d 1, 7 (Mont. 2011) (citing Western Tradition Partnership, 2010 Election Year Program Executive Briefing).

¹⁶⁸ *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 916 (2010).

¹⁶⁹ *BALLENTINE’S LAW DICTIONARY* (3d ed. 2010).

compelling government interest to restrict corporate political speech.¹⁷⁰ In *McConnell*, the Court stated that the evidence did “not [show] any direct examples of votes being exchanged for . . . expenditures.”¹⁷¹ In *Citizens United*, the Court held that “[w]hen *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption.”¹⁷²

It is in this line of reasoning that the Supreme Court has distinguished “contributions” and “independent expenditures,” with only the former raising a concern for corruption. However, the line between “contributions” and “independent expenditures” is often blurred, and in *Caperton*, the Supreme Court actually held them to be interchangeable by repeatedly referring to Blankenship's spending on behalf of Justice Benjamin that consisted of 99.97% independent expenditures (\$3 million) and 0.03% direct contributions (\$1,000) as “contributions.”¹⁷³ This issue will be discussed in further detail later in the Article.¹⁷⁴

D. Public Perception

In *Citizens United*, the Supreme Court relied on its decision in *Buckley* by holding that “the prevention of corruption and the appearance of corruption” are both sufficiently important government interests.¹⁷⁵ “[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests [] identified for restricting campaign finances.”¹⁷⁶ The Supreme Court has “long recognized ‘the governmental interest in preventing corruption and the appearance of corruption’ in election campaigns.”¹⁷⁷ This is an important distinction for states to make when challenging *Citizens United* and states must emphasize that under the Supreme Court’s jurisprudence, the “appearance of corruption” is a compelling government interest.

The empirical evidence does not support the Supreme Court’s blanket statements concerning corruption and the public perception of corruption. In a January 2010

¹⁷⁰ *Buckley v. Valeo*, 424 U.S. 1, 27-28 (1976) (per curiam).

¹⁷¹ *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 560 (2003).

¹⁷² *Citizens United*, 130 S. Ct. at 909.

¹⁷³ *Id.* at 967-68 (Stevens, Ginsburg, Breyer & Sotomayor, JJ., dissenting in part and concurring in part) (citing *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2263-64 (2009)).

¹⁷⁴ See *infra* Part IV.E.

¹⁷⁵ *Citizens United*, 130 S. Ct. at 908.

¹⁷⁶ *Davis v. Fed. Election Comm’n*, 554 U.S. 724, 741 (2008) (quoting *Fed. Election Comm’n v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 490 (1985)); see also *Randall v. Sorrell*, 548 U.S. 230, 268 (2006) (plurality opinion) (Thomas, J., concurring) (“the interests the Court has recognized as compelling, i.e., the prevention of corruption or the appearance thereof”); see also *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 296-97 (1981) (“*Buckley* identified a single narrow exception to the rule that limits on political activity were contrary to the First Amendment. The exception relates to the perception of undue influence of large contributors to a candidate.”).

¹⁷⁷ *Fed. Election Comm’n v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007) (quoting *Buckley v. Valeo*, 424 U.S. 1, 45 (1976) (per curiam)).

Gallup poll, 55 percent of respondents agreed that corporations should be treated the same as individuals under the campaign finance regulations; however, 76 percent responded that there should be limits on corporate political spending.¹⁷⁸ In a February 2010 *Washington Post-ABC News* poll, nearly 80 percent of poll respondents opposed the *Citizens United* decision to allow unfettered corporate political spending, with 65 percent “strongly” opposed.¹⁷⁹ In a February 2010 Greenberg Quinlan Rosner Research poll, 64 percent of respondents opposed the *Citizens United* decision.¹⁸⁰

An April 2012 survey conducted by the Brennan Center for Justice found that 69 percent of those surveyed believed that the ability of corporations to give unlimited amounts of money to PACs will lead to corruption.¹⁸¹ The survey also found that 65 percent of those surveyed said that they trusted the government less due to PACs having more influence than regular voters.¹⁸² Ironically, in *Citizens United*, the Supreme Court stated that the First Amendment was premised on mistrust of governmental power and stood against attempts to disfavor certain subjects or viewpoints.¹⁸³

This data reflects that even though there was support for the *Citizens United* decision immediately after it was announced, public support has decreased tremendously over the past two years. The polls reflect that this change occurred, because there is a majority belief that the ability of corporations and super PACs to spend unlimited amounts of money in political elections will lead to corruption and increasing mistrust of government officials.

There is also empirical data reflecting that even in states that imposed a ban or placed limits on campaign contributions and independent expenditures, corporations were still able to give to politicians indirectly. For example, in Louisiana, companies are limited to making a \$5,000 dollar contribution to a candidate per election or \$10,000 dollars for certain PACs.¹⁸⁴ Louisiana Governor Bobby Jindal’s wife, Supriya Jindal, has a charitable foundation that provides equipment and

¹⁷⁸ Lydia Saad, *Public Agrees with Court: Campaign Money is ‘Free Speech*, GALLUP POLITICS (Jan. 22, 2010), <http://www.gallup.com/poll/125333/Public-Agrees-Court-Campaign-Money-Free-Speech.aspx>.

¹⁷⁹ Dan Eggen, *Poll: Large Majority Opposes Supreme Court’s Decision on Campaign Financing*, WASH. POST, Feb. 17, 2010.

¹⁸⁰ Greenberg Quinlan Rosner, Common Cause, Change Congress, Public Campaign Action Fund, Frequency Questionnaire (Feb. 2-4, 2010), *available at* http://www.gqrr.com/articles/2425/5606_cc10020410fq1.pdf.

¹⁸¹ BRENNAN CTR. FOR JUSTICE, N.Y.U. SCH. OF LAW, NATIONAL SURVEY: SUPER PACS, CORRUPTION, AND DEMOCRACY 2 (Apr. 24, 2012), *available at* http://www.democracy21.org/index.asp?Type=B_PR&SEC=%7BAC81D4FF-0476-4E28-B9B1-7619D271A334%7D&DE=%7BE9D08E3E-2D85-4123-A7E2-920AF8015EA8%7D&Design=PrintView; *see also* ABC News/Washington Post, Poll, *available at* <http://www.langerresearch.com/uploads/1135a3SuperPACs.pdf>.

¹⁸² *See supra* note 181.

¹⁸³ *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 882-83 (2010).

¹⁸⁴ For Summaries of the Louisiana Campaign Finance Disclosure Act, La. Rev. Stat. Ann. § 18:1481 et seq. (2013), *see Campaign Finance Related Laws*, LA. ETHICS ADMIN. PROGRAM, <http://ethics.la.gov/EthicsPublicationSearch.aspx?portal=CampFinLaws>.

supplies for schools throughout the state.¹⁸⁵ AT&T Corp., which needed Governor Jindal to sign off on legislation allowing the company to sell cable television services without having to negotiate with individual parishes, has pledged at least \$250,000 dollars to the Supriya Jindal Foundation for Louisiana's Children. Marathon Oil, which won approval from the Jindal administration to increase the amount of oil it could refine at its Louisiana plant, also committed to a \$250,000 dollar donation.¹⁸⁶ Northrop Grumman, a military contractor which got state officials to help set up an airplane maintenance facility at a former Air Force base, promised \$10,000 dollars to the charity.¹⁸⁷

It is important to note that none of these contributions were illegal and the Governor has not been accused of any wrong-doing. However, political watch-dog groups have condemned this type of behavior. Anne Rolfes, director of the environmental group Louisiana Bucket Brigade, stated that the donations may be for a good cause, but "it creates the appearance [Governor Jindal] is being bribed."¹⁸⁸ Melanie Sloan, director of Citizens for Responsibility and Ethics, stated that "the donations that come in to charities like this are almost always from folks who want something from a politician."¹⁸⁹

The Supreme Court in *Citizens United* upheld that rationale from *Buckley* that the government has an "important governmental interest in preventing corruption or the appearance of corruption."¹⁹⁰ Even though the Supreme Court has a very narrow view of corruption,¹⁹¹ the empirical evidence provided in this Article meets that threshold and the Supreme Court should have revisited *Citizens United* in light of that evidence.

E. Independent Expenditures and the Independence of Super PACs

In *Citizens United*, the Supreme Court goes to great lengths to distinguish independent expenditures and direct contributions to political candidates. Independent political expenditures are defined as "an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate."¹⁹²

¹⁸⁵ Eric Lipton, *Wife's Charity Offers Corporate Tie to a Governor*, N.Y. TIMES, Mar. 2, 2011.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 908 (2010).

¹⁹¹ *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985) ("The hallmark of corruption is the financial quid pro quo: dollars for political favors.").

¹⁹² 2 U.S.C.A. § 431(17) (West 2002).

The Supreme Court relied upon the decision in *McConnell* when stating that the evidence did “not [show] any direct examples of votes being exchanged for . . . expenditures.”¹⁹³ The Court further held that “the independent expenditure ceiling . . . fails to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process.”¹⁹⁴ It is important to note that the Supreme Court only quoted part of the language from *McConnell*. The Court in *McConnell* went on to state that “the record presents an appearance of corruption stemming from the dependence of officeholders and parties on advertisements run by these outside groups.”¹⁹⁵ The Court further stated that “[t]he record powerfully demonstrates that electioneering communications paid for with the general treasury funds of labor unions and corporations endears those entities to elected officials in a way that could be perceived by the public as corrupting.”¹⁹⁶ This is an important omission that, if included, would have changed the context of the Supreme Court’s statement in *Citizens United*.

The Supreme Court believes that because independent expenditures do not involve collusion between the party making the expenditure and the candidate, there is no concern for corruption. “The absence of prearrangement and coordination . . . alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.”¹⁹⁷ This Article asserts that the Supreme Court’s statement is untenable.

For example, the “Make Us Great Again” Super PAC,¹⁹⁸ which is a candidate-specific super PAC that supported the 2012 Presidential bid of Texas Governor Rick Perry, was backed by Mike Toomey, who is a lobbyist who once served as Governor Perry’s chief of staff.¹⁹⁹ “Toomey also shares a business venture with a top Rick Perry campaign aide. According to state records, Toomey is a co-owner of a New Hampshire luxury resort island with Dave Carney, chief strategist for the Perry campaign.”²⁰⁰ The “Restore Our Future” Super PAC, which is a candidate-specific super PAC that supported the 2012 Presidential bid of former Massachusetts Governor Mitt Romney, was backed by Carl Forti, who was the national political director for Mitt Romney’s 2008 Presidential bid.²⁰¹ The “Winning Our Future”

¹⁹³ *Citizens United*, 130 S. Ct. at 910 (quoting *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 560 (2003)).

¹⁹⁴ *Id.* at 902 (citing *Buckley v. Valeo*, 424 U.S. 1, 47-48 (1976) (per curiam)).

¹⁹⁵ *McConnell*, 251 F. Supp. 2d at 560.

¹⁹⁶ *Id.*

¹⁹⁷ *Citizens United*, 130 S. Ct. at 902 (quoting *Buckley*, 242 U.S. at 47).

¹⁹⁸ *Mission, MAKE US GREAT AGAIN*, <http://makeusgreatagain.com/mission/> (last visited Mar. 4, 2013) (“The mission of Make Us Great Again is to support Rick Perry for the Republican nomination for President in 2012, to oppose Barack Obama’s reelection, and to support Rick Perry in the general election in November 2012.”).

¹⁹⁹ Robert Farley, *Make Us Great Again*, FACTCHECK.ORG (Oct. 6, 2011), <http://www.factcheck.org/2011/10/make-us-great-again>.

²⁰⁰ *Id.*

²⁰¹ Andy Kroll, *Mitt Romney’s \$12 Million Mystery Man*, MOTHER JONES (Feb. 2012), <http://www.motherjones.com/politics/2012/01/carl-forti-romney-super-PAC>.

Super PAC, which is a candidate-specific super PAC that supported the 2012 Presidential bid of Newt Gingrich, was backed by Rick Tyler, who is a former Gingrich spokesman and aide.²⁰²

The “Priorities USA Action” Super PAC, which is a candidate-specific super PAC that supported the 2012 Presidential bid of the incumbent United States President Barack Obama, was backed by Bill Burton, who is a former White House deputy press secretary.²⁰³ Billionaire Sheldon Adelson and his family, who donated \$16.5 million dollars to the “Winning Our Future” Super PAC, personally conferred with Newt Gingrich at fundraisings events.²⁰⁴ Billionaire Foster Friess, who bankrolled the “Red White and Blue Fund” Super PAC, which is a candidate-specific super PAC that supported the 2012 Presidential bid of Rick Santorum, traveled with Santorum to campaign events.²⁰⁵

The political candidates themselves and high-ranking and campaign staffers can also be seen at events hosted by these Super PACs, which further erodes the strength of the Supreme Court’s argument that these organizations are independent and do not collude with the candidates. In August 2011, Mitt Romney attended the first part of a fundraising event for the “Restore Our Future” Super PAC.²⁰⁶ In March 2012, David Plouffe, a top political adviser to President Obama, appeared at a fundraising event for the “Priorities USA Action” Super PAC.²⁰⁷ These events show that the line between political candidates and the super PACs that support them, and subsequently independent expenditures and coordinated communications, are often blurred.

For further evidence that these groups are not as independent as the Supreme Court believes them to be, Mitt Romney’s Presidential campaign team and the “Restore Our Future” Super PAC use the same consulting firm, TargetPoint Consulting.²⁰⁸ To muddy the water even further, “in the same suite [of offices] is WWP Strategies, whose co-founder is married to TargetPoint’s CEO and works for the Romney campaign.”²⁰⁹ Mike Toomey, chief financial backer of the “Make Us Great Again” Super PAC is a partner in The Texas Lobby Group, whose clients

²⁰² Andy Kroll, *Candidates and the Totally Unrelated Super-PACs That Love Them*, MOTHER JONES (Jan. 20, 2012), <http://www.motherjones.com/mojo/2012/01/stephen-colbert-citizens-united-super-pac>.

²⁰³ *Id.*

²⁰⁴ Trevor Potter, *Five Myths About Super PACs*, WASH. POST, Apr. 13, 2012.

²⁰⁵ *Id.*

²⁰⁶ Nicholas Confessore, *Lines Blur Between Candidates and PACs with Unlimited Cash*, N.Y. TIMES, Aug. 27, 2011.

²⁰⁷ Michael Luo & Nicholas Confessore, *Top Obama Adviser to Appear at ‘Super PAC’ Meeting*, N.Y. TIMES (Mar. 2, 2012, 6:37 PM), <http://thecaucus.blogs.nytimes.com/2012/03/02/top-obama-adviser-to-appear-at-super-pac-meeting>.

²⁰⁸ Mike McIntire & Michael Luo, *Fine Line Between ‘Super PACs’ and Campaigns*, N.Y. TIMES, Feb. 25, 2012.

²⁰⁹ *Id.* (“Restore Our Future, for example, has paid TargetPoint Consulting nearly \$350,000 for survey research. Meanwhile, the Romney campaign has paid TargetPoint nearly \$200,000 for direct mail consulting. In one instance, the campaign and the super PAC paid TargetPoint on the same day.”).

include the drug company Merck Sharp & Dohme (Merck). In 2007, Governor Perry issued an executive order requiring young girls to get a Merck-made vaccine designed to prevent a sexually transmitted disease that can lead to cervical cancer.²¹⁰ Under FEC regulations, the coordination rule's "conduct" standards are also met by use of a "common vendor" absent a firewall, or involvement of a person or contractor who had been employed by the candidate in the previous 120 days, absent a firewall.²¹¹

The political candidates themselves also contribute to blurring the lines of independence. For example, the *New York Times* reported that in the summer of 2011, when discussing a large donation to the "Restore Our Future" Super PAC by one of his former business partners, Mitt Romney characterized it as a donation to himself.²¹² Based upon this evidence, when looking at the independence of these groups, the Supreme Court would have had a hard time defending their earlier position.

The Supreme Court should have also analyzed its own rationale from *McConnell*.²¹³ In *McConnell*, the Supreme Court relied on "the close relationship between federal officeholders and the national parties" when upholding the federal ban on soft money contributions.²¹⁴ The Supreme Court also specifically found that there was "no meaningful separation between the national party committees and the public officials who control them," because the national committees were "run by, and largely composed of, federal officeholders and candidates."²¹⁵ The Supreme Court should have analogized this situation to the close ties between candidates and their respective super PACs. Based upon the evidence reported in this Article, it should have been difficult for the Supreme Court to find that there was not at least the appearance of corruption from the political candidate's intimate, albeit indirect, involvement with the super PAC organizations. The Supreme Court also did not address the contention that "'the absence of prearrangement and coordination' does not eliminate . . . 'danger' that a candidate will understand the expenditure as an effort to obtain a quid pro quo. The same is true of independent party expenditures."²¹⁶

²¹⁰ Exec. Order of the Governor of the State of Tex., RP65—Relating to the Immunization of Young Women from the Cancer-Causing Human Papilloma Virus (Feb. 2, 2007), available at <http://governor.state.tx.us/news/executive-order/3455>.

²¹¹ See 11 C.F.R. §§ 109.21(d)(1)-(5) and 109.21(h) (2010).

²¹² *Id.*

²¹³ *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003).

²¹⁴ *Id.* at 154.

²¹⁵ *Republican Nat'l Comm. v. Fed. Election Comm'n*, 698 F. Supp. 2d 150, 159 (D.D.C. 2010) (quoting *McConnell*, 540 U.S. at 155); see also *McConnell*, 540 U.S. at 154-55 ("[I]t is the close relationship between federal officeholders and the national parties, as well as the means by which parties have traded on that relationship, that have made all large soft-money contributions to national parties suspect.").

²¹⁶ *Republican Party of Minn. v. Pauly*, 63 F. Supp. 2d 1008, 1015 (D. Minn. 1999) (quoting *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n*, 518 U.S. 604, 615-16 (1996)).

F. Political Dark Money and 501(c)(4) Organizations

The U.S. Court of Appeals for the D.C. Circuit in *SpeechNow.org v. FEC*²¹⁷ and *EMILY'S List v. FEC*²¹⁸ established that PACs that sponsor independent campaign advocacy can collect unlimited contributions from their supporters.²¹⁹ Subsequently, in July 2010, the FEC issued an Advisory Opinion stating that PACs “may solicit and accept unlimited contributions from individuals, political committees, corporations, and labor organizations.”²²⁰

The effect of these decisions and from the *Citizens United* decision has been the rise in number of 501(c)(4) organizations, or social welfare organizations.²²¹ Marcus S. Owens, former head of the IRS division that oversees section 501(c)(4) groups, was quoted as saying with regard to the new 501(c)(4)s being formed that the “groups are popping up like mushrooms after a rain.”²²² To give a better idea of the amount of money spent by these groups, fifty-nine social welfare groups reported spending more than \$78.6 million dollars on political ads during the 2010 election cycle, according to the Center for Responsive Politics.²²³ The Center for Responsive Politics also reported that the percentage of spending coming from groups that do not disclose their donors has risen from 1 percent to 47 percent since the 2006 midterm elections and that 501(c)(4) spending increased from zero percent of total spending by outside groups in 2006 to 42 percent in 2010.²²⁴ The Center for Responsive Politics recently compiled a report showing that as of June 20, 2012, over \$100 million dollars in contributions have been given to non-disclosing groups, *i.e.*, 501(c)(4) organizations.²²⁵

In order to be eligible for qualification as a social welfare organization, the organization must promote the “common good and general welfare” of the

²¹⁷ *Speechnow.org v. Fed. Election Comm'n*, 599 F.3d 686 (2010).

²¹⁸ *EMILY's List v. Fed. Election Comm'n*, 581 F.3d 1 (2009).

²¹⁹ *FEC Approves Advisory Opinions for Independent Expenditure Committees*, CTR. FOR EFFECTIVE GOV'T (Jul. 27, 2010), <http://www.ombwatch.org/node/11164>.

²²⁰ Fed. Election Comm'n Advisory Op. 2010-11 (“Commonsense Ten”) (proposed Jul. 22, 2010), *available at* <http://www.fec.gov/agenda/2010/mtgdoc1042.pdf>.

²²¹ I.R.C. § 501(c)(4) (2006).

²²² M. Luo & S. Strom, *Donors' Names Kept Secret as They Influence the Midterms*, N.Y. TIMES, Sept. 21, 2010.

²²³ Kim Barker et al., *With the Spotlight on Super PACs, Here's How Donors are Really Hiding Money*, THE BUS. INSIDER (Feb. 4, 2012), <http://www.businessinsider.com/with-spotlight-on-super-pac-dollars-nonprofits-escape-scrutiny-2012-2>.

²²⁴ Spencer MacColl, *Citizens United Decision Profoundly Affects Political Landscape*, OPENSECRETS.ORG (May 5, 2011), <http://www.opensecrets.org/news/2011/05/citizens-united-decision-profoundly-affects-political-landscape.html>.

²²⁵ *See 2012 Outside Spending, by Groups*, OPENSECRETS.ORG, <http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&chrt=V&disp=O&type=U> (last visited Mar. 4, 2013).

community.²²⁶ It is important to note that Department of the Treasury regulations specifically state that intervention in a political campaign is not considered promotion of social welfare;²²⁷ however, social welfare organizations are “allowed to intervene in political campaigns, but intervening in a political campaign must not be their *primary* function.”²²⁸ It is also important to note that while the income of these social welfare organizations is tax-exempt, donations to the organizations are not deductible.²²⁹

A concern has been raised about how to define when a 501(c)(4) organization is truly a social welfare organization whose primary purpose is to promote the common good. In *Vision Service Plan v. United States*, the United States District Court for the Eastern District of California found that Vision Service Plan (VSP) was not a social welfare organization and, therefore, did not qualify for tax-exempt status under 501(c)(4).²³⁰ The district court found that while VSP offered some public benefits, they were not enough for us to conclude that VSP was primarily engaged in promoting the common good and general welfare of the community.²³¹ In a recent case out of the Fourth Circuit, the court upheld the FEC’s approach to determining whether an organization is a PAC.²³² In *Real Truth About Abortion v. FEC*, the court held that the FEC will first consider a group’s political activities, such as spending on a particular electoral or issue-advocacy campaign and then it will evaluate an organization’s “major purpose,” as revealed by that group’s public statements, fundraising appeals, government filings, and organizational documents.²³³ This will be an issue that will come up with many organizations who want to keep the identities of their donors secret, but also be able to contribute to political campaigns.

²²⁶ Treas. Reg. § 1.501(c)(4)-1(a)(2)(i) (1960) (“An organization embraced within this section is one which is operated primarily for the purpose of bringing about civic betterments and social improvements”).

²²⁷ Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii) (1960) (“The promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office”); *see also* Rev. Rul. 67-368, 1967-2 C.B. 194 (An organization, “formed for the purpose of promoting an enlightened electorate,” whose primary activity was rating candidates for public office, was not exempt under I.R.C. 501(c)(4) because such activity is not “the promotion of social welfare.”).

²²⁸ Donald B. Tobin, *Political Advocacy and Taxable Entities: Are They the Next ‘Loophole’?* (Mortiz Coll. of Law Pub. Law & Legal Theory Working Paper Series, Paper No. 105, 2007), available at <http://ssrn.com/abstract=1020421> (citing I.R.C. § 527(f)) (emphasis added).

²²⁹ *Id.*

²³⁰ *See* *Vision Serv. Plan v. United States*, No. Civ. S-04-1993 LKK/JFM, 2005 U.S. Dist. LEXIS 38812 (E.D. Cal. Dec. 12, 2005), *aff’d*, 265 F. App’x 650 (9th Cir. 2008).

²³¹ *Id.* at *13-14; *see also* *Monterey Pub. Parking Corp. v. United States*, 481 F.2d 175, 177 (9th Cir. 1973) (noting that the district court made a quantitative comparison between the private and public benefits); *Comm’r of Internal Revenue v. Lake Forest, Inc.*, 305 F.2d 814, 818 (4th Cir. 1962) (noting that the public benefits of organization were too insubstantial to qualify the organization as exempt under section 501(c)(4)).

²³² *See* *Real Truth About Abortion, Inc. v. Fed. Election Comm’n*, 681 F.3d 544, 555 (4th Cir. 2012) (citing *Political Comm. Status*, 72 Fed. Reg. 5595, 5596-97 (Feb. 7, 2007)).

²³³ *Id.* at 555 (citing *Political Comm. Status*, 72 Fed. Reg. 5595, 5596-97 (Feb. 7, 2007)).

This practice has received greater scrutiny since the Supreme Court's decision in *Citizens United*. In January 2012, the IRS sent out letters to certain 501(c)(4) organizations, who are politically active to determine whether they are "primarily" engaged in social welfare and not political campaigning.²³⁴ If these organizations are found to not qualify for 501(c)(4) status, they could face severe penalties including fines and/or imprisonment.²³⁵ The 501(c)(4) organizations have retained counsel to fight the IRS inquiry, so this issue may stay undecided for some time.

The IRS also recently revoked the tax-exempt status of a small political nonprofit organization, "Emerge America."²³⁶ "Emerge America" was founded for the primary purpose of identifying and training democratic women to run for office, get elected and to seek higher office.²³⁷ The March 2012 IRS letter stated that "Emerge America" was not being operated primarily to promote social welfare because its activities were conducted primarily for the benefit of a political party and a private group of individuals, rather than the community as a whole.²³⁸

A recent example of a 501(c)(4) organization that has raised red flags for the IRS is the recently created "Patriot Voices," a group formed by ex-Presidential candidate Rick Santorum. As noted above, to qualify as a social welfare organization, intervening in a political campaign must not be the organization's *primary* function.²³⁹ However, when announcing the creation of "Patriot Voices" in early June, Rick Santorum stated that "the defeat of Barack Obama, and those who support his policies, will be our first priority."²⁴⁰ The IRS has not taken action as of the date of this Article, but multiple tax experts have opined that "Patriot Voices" will be under intense IRS scrutiny in the near future.²⁴¹

Another issue that arises with these organizations is unlike other political advocacy groups, such as PACs, they are not required to disclose their donors.²⁴² This has led many super PACs to form sister 501(c)(4) organizations. For example, the super PAC "American Crossroads" has a sister 501(c)(4) organization named

²³⁴ Jonathan Weisman, *Scrutiny of Political Nonprofits Sets Off Claim of Harassment*, N.Y. TIMES, Mar. 6, 2012. An example of the letter is available at <http://www.documentcloud.org/documents/323502-letter-from-the-irs-to-tea-party-organizations.html>.

²³⁵ See I.R.C. § 7201 (Proposed Amendment 2011).

²³⁶ Jonathan D. Salant, *IRS Denial of Tax Exemption to U.S. Political Group Spurs Alarms*, BLOOMBERG NEWS (June 8, 2012), <http://www.bloomberg.com/news/2012-06-08/irs-denial-of-tax-exemption-to-u-s-political-group-spurs-alarms.html>.

²³⁷ *About Emerge*, EMERGE AMERICA, <http://www.emergeamerica.org/about> (last visited Mar. 4, 2013).

²³⁸ I.R.S. Priv. Ltr. Rul. 2012-21-028 (Mar. 2, 2012), available at <http://www.irs.gov/pub/irs-wd/1221028.pdf>.

²³⁹ Tobin, *supra* note 228.

²⁴⁰ Andy Kroll, *Is Rick Santorum's New Dark-Money Group Breaking the Law?*, MOTHER JONES (July 3, 2012), <http://www.motherjones.com/politics/2012/07/rick-santorum-patriot-voices-dark-money-irs>.

²⁴¹ *Id.*

²⁴² See Alex Trepp, *501(See)(4)s Leave Public Blind*, HARV. C.R.-C.L. L. REV. (Oct. 6, 2011), <http://harvardcrcl.org/2011/10/06/501see4s-leave-public-blind/>.

“Crossroads Grass Roots Policy Strategies (GPS).” The super PAC “Priorities USA Action” has a sister 501(c)(4) organization named “Priorities USA” that had contributed over \$215,000 dollars to the super PAC.²⁴³ The super PAC “Freedom Works for America,” shares an office and staff with its sister 501(c)(4) organization named “Freedom Works, Inc.”²⁴⁴

For donors that want to maintain anonymity, they can simply donate to the 501(c)(4) organization, who does not have to report its donors, who will then contribute those funds to the affiliated super PAC.²⁴⁵ When the super PAC files its contribution report with the FEC, it will only reflect the 501(c)(4) contribution. A strong argument can be made that this type of activity harms the American people’s right to transparency regarding the financing of federal elections, which was held to be of paramount importance in *Citizens United*.²⁴⁶

G. Shell Corporations and Circumventing Disclosure and Tax Laws

This Article asserts that individuals are circumventing disclosure and tax laws by creating shell corporations specifically set up for the sole purpose of contributing money to a PAC. This practice violates the goal of transparency in the political system. As the Supreme Court wrote in *Citizens United*, “transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.”²⁴⁷ The Court also wrote that campaign finance disclosure laws “help citizens make informed choices in the political marketplace.”²⁴⁸

In August 2011, the Campaign Legal Center²⁴⁹ and Democracy 21²⁵⁰ filed a complaint with the FEC based upon a \$1 million dollar contribution to the “Restore Our Future” Super PAC.²⁵¹ The complaint alleges that W Spann LLC and any

²⁴³ Michael Beckel & Rachel Marcus, *Donors to Conservative Super PAC Masked by Nonprofit*, NATION OF CHANGE (Mar. 12, 2012), <http://www.nationofchange.org/donors-conservative-super-pac-masked-nonprofit-1331561155>.

²⁴⁴ *Id.*

²⁴⁵ See Letter from Gerald Herbert, Exec. Dir., Campaign Legal Ctr. & Fred Wertheimer, President, Democracy 21, to Hon. Douglas H. Shulman, Comm’r, Internal Revenue Serv. & Lois Lerner, Dir. of the Exempt Org. Div., Internal Revenue Serv. (Oct. 5, 2010), *available at* <http://graphics8.nytimes.com/images/blogs/thecaucus/05IRSLETTER.pdf> (requesting that the IRS investigate Crossroads GPS for operating in violation of tax status).

²⁴⁶ *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 914 (2010).

²⁴⁷ *Id.* at 916.

²⁴⁸ *Id.* at 914.

²⁴⁹ *Mission Statement*, THE CAMPAIGN LEGAL CTR., http://www.campaignlegalcenter.org/index.php?option=com_content&view=article&id=50&Itemid=64 (last visited Mar. 4, 2012) (“The Campaign Legal Center is a nonpartisan, nonprofit organization which works in the areas of campaign finance and elections, political communication and government ethics.”).

²⁵⁰ *Our Mission*, DEMOCRACY 21, <http://www.democracy21.org/our-mission/> (last visited Mar. 4, 2012) (“Democracy 21 is a nonprofit, nonpartisan organization dedicated to making democracy work for all Americans.”).

²⁵¹ See Complaint Before the U.S. Fed. Election Comm’n, Campaign Legal Ctr. & Democracy 21 v. W Spann LLC. [hereinafter Spann FEC Complaint], *available at* <http://>

person who created, operated and made contributions in the name of W Spann LLC may have violated the provisions of the Federal Election Commission Act (FECA).²⁵² After the complaint was filed, the person who created W Spann LLC came forward, therefore I will use the individual's name, Edward Conard, instead of the generic "John Doe" listed in the complaint.²⁵³

As background information, W Spann LLC's "corporate records provide no information about the owner of the firm, its address or its type of business."²⁵⁴ The address included on "Restore Our Future's" mid-year report for W Spann LLC is "a midtown Manhattan office building that has no record of such a tenant."²⁵⁵ Records reflect that W Spann LLC was created on March 15, 2011, when a "certificate of formation" was filed with the Delaware Secretary of State's Office.²⁵⁶ The complaint also alleges that W Spann LLC made a \$1 million contribution to "Restore Our Future" Super PAC on April 28, 2011 and then filed a "certificate of cancellation" on July 11, effectively dissolving as a corporate entity.²⁵⁷

The complaint alleges that Edward Conard violated federal law by making an individual contribution through a shell company, W Spann LLC. The complainant alleges that this action violates federal election regulations by "[m]aking a contribution of money or anything of value and attributing as the source of the money or thing of value another person when in fact the contributor is the source."²⁵⁸ The complaint also alleges that W Spann LLC should have filed as a "political committee" with the FEC.²⁵⁹ Political committee, under the FECA, is defined as "any committee, club, association or other group of persons which receives contributions aggregating in excess of \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000 during a calendar year."²⁶⁰ The complainants allege that W Spann LLC "met the . . . test for political committee status by (1) being an entity or group of persons with the 'major purpose' of

www.campaignlegalcenter.org/attachments/W_Spann_LLC_FEC_Complaint_Signed_and_Notarized_8.5.11.pdf; see also Michael Isikoff, *Firm Gives \$1 Million to Pro-Romney Group, then Dissolves*, NBC NEWS (Aug. 4, 2011), http://today.msnbc.msn.com/id/44011308/ns/politics-decision_2012. The Campaign Legal Center also requested the Justice Department to pursue criminal charges; however, there is no evidence that criminal charges were filed.

²⁵² See Spann FEC Complaint, *supra* note 251, ¶ 1.

²⁵³ Paul S. Ryan, *Some Questions for Mitt Romney and Edward Conard*, THE HILL (Aug. 20, 2011), <http://thehill.com/blogs/congress-blog/campaign/176305-some-questions-for-mitt-romney-and-edward-conard>.

²⁵⁴ See Spann FEC Complaint, *supra* note 251, ¶ 7 (quoting Isikoff, *supra* note 251).

²⁵⁵ *Id.* (quoting Isikoff, *supra* note 251).

²⁵⁶ *Id.* ¶ 8.

²⁵⁷ *Id.*

²⁵⁸ *Id.* ¶ 12 (quoting 11 C.F.R. § 110.4(b)(2)(ii)).

²⁵⁹ *Id.* ¶ 22; see also 2 U.S.C.A. § 433 (West 2011) (political committee filing requirements).

²⁶⁰ 2 U.S.C.A. § 431(4) (West 2002).

influencing the ‘nomination or election of a candidate’ and (2) by receiving ‘contributions’ of \$1,000 or more in a calendar year.’²⁶¹

The Campaign Legal Center has also filed complaints against Steven J. Lund, Eli Publishing, LC, and F8, LLC, for two separate contributions of \$1 million dollars each made to the “Restore Our Future” Super PAC.²⁶² Both companies, Eli Publishing and F8, share an address in Utah.²⁶³ News reports showed that the companies did not seem to do any real business and when the news reporter went to the address listed in the official filings, there was an accounting firm whose employees were not aware of those activities.²⁶⁴ Steven J. Lund, the registered agent for Eli Publishing, claimed that he used the corporation to make the contribution, because donating through a corporation has accounting advantages.²⁶⁵

In May 2011, Citizens for Responsibility and Ethics in Washington (CREW) called for the IRS and the FEC to investigate whether the 501(C)(4) organization Commission on Hope, Growth and Opportunity (CHGO) violated tax and campaign finance laws.²⁶⁶ The complaint alleged that even though CHGO represented that it had not and would not spend any money on influencing political elections, Scott Reed, the organization’s founder,²⁶⁷ stated that the organization planned to raise \$25 million dollars to air political advertisements in 2012.²⁶⁸ In 2010, CHGO received over \$4 million dollars from one donor, Meridian Strategies, LLC.²⁶⁹

The complaint also alleged specific instances where CHGO has spent money for advertisements advocating the defeat of a political candidate.²⁷⁰ The complaint

²⁶¹ See Spann FEC Complaint, *supra* note 251, ¶ 22.

²⁶² See Fed. Election Comm’n Complaints, Campaign Legal Ctr. & Democracy 21 v. Steven J. Lund & Eli Publ’g, LC & Campaign Legal Ctr. & Democracy 21 v. Steven J. Lund & F8, LLC [hereinafter Lund FEC Complaint].

²⁶³ Lund FEC Complaint, *supra* note 262, ¶ 6 (citing Utah Government Division of Corporations and Commercial Code website database).

²⁶⁴ *Id.* ¶ 9 (citing Max Roth, 2 *Utah Companies Donate \$1 million Apiece to Romney PAC*, FOX 13 NEWS (Aug. 4, 2011), <http://www.fox13now.com/news/local/kstu-mitt-romney-2-utah-companiesdonate-1-million-apiece-to-romney-campaign-20110804,0,4424937.story>).

²⁶⁵ *Id.* ¶ 10 (citing Roth, *supra* note 264).

²⁶⁶ CREW Renews Call for IRS, FEC to Investigate the Commission on Hope, Growth and Opportunity, CITIZENSFORETHICS.ORG (May 23, 2011), <http://www.citizensforethics.org/legal-filings/entry/irs-fec-complaints-commission-hope-growth-opportunity>.

²⁶⁷ Brody Mullins & Danny Yadron, *GOP Groups Launch Massive Ad Blitz*, WALL ST. J., Oct. 13, 2010.

²⁶⁸ Letter from Citizens for Responsibility & Ethics in Wash., to Internal Revenue Serv. 3-4 (May 23, 2011), available at http://crew.3cdn.net/2258532ac243e4ed58_32m6vthuy.pdf. Exhibits to the May 2012 IRS Letter are available at http://crew.3cdn.net/cb45382703b3ca4e0b_0hm6i0lpa.pdf.

²⁶⁹ CHGO 2010 Form 990, Schedule B, available at http://crew.3cdn.net/7b7d3553ee5754bca4_kim6b0s9j.pdf.

²⁷⁰ Letter, *supra* note 268, at 6.

relied upon data from the Campaign Media Analysis Group (CMAG),²⁷¹ which showed that CHGO spent \$2.3 million dollars on campaign advertisements from September 25, 2010 to November 1, 2010.²⁷² The complaint further alleged that CHGO not only failed to report its spending to the FEC, it also failed to disclose it to the IRS. CHGO asserted under penalty of perjury on its 2010 and 2011 tax returns it did not spend any money on political activities in either year.²⁷³ CREW contended that because the advertisements attacked Democratic candidates and advocated the election of Republican candidates, they went beyond mere issue advocacy and were political activity.²⁷⁴ CREW also calculated CHGO spent at least 51.5 percent of its total spending in 2010 producing and broadcasting the advertisements, making politics its primary activity in violation of its tax-exempt status.²⁷⁵ Because CHGO reported to the IRS, under penalty of perjury,²⁷⁶ that the organization did not spend any money on political advertising, those advertisements would be fraudulent speech, which as discussed below, does not receive First Amendment protection.

These contributions show that not only are individuals gaining anonymity from creating shell corporations for the sole purpose of contributing to super PACs, they are also gaining tax advantages and possibly committing tax fraud. The Supreme Court's jurisprudence reflects that fraudulent statements and statements and speech integral to criminal conduct, which in this case would be political expenditures from a shell corporation made for the express purpose of circumventing tax laws, do not receive First Amendment protection.²⁷⁷ In *Virginia Board of Pharmacy*, the Court held that fraudulent speech generally falls outside the protections of the First Amendment.²⁷⁸ In *Giboney v. Empire Storage*, the Court held that the First Amendment does not immunize speech or writing used as an integral part of conduct in violation of a valid criminal statute.²⁷⁹

The Supreme Court erred by not analyzing the government's compelling interest in stopping tax fraud. Because the assertions made to the IRS are under oath of perjury, they are not mere statements of falsehood. The Supreme Court has

²⁷¹ "Campaign Media Analysis Group, a Kantar Media solution, is the exclusive source of . . . content analysis [and advertising expenditure data] for political, public affairs and issue advocacy [professionals]." KANTAR MEDIA, <http://www.kantarmediana.com/cmag/expertise>.

²⁷² Letter, *supra* note 268, at 3-4.

²⁷³ CHGO 2010 Form 990, pt. IV, ln. 3; CHGO 2011 Form 990, pt. IV, ln. 3, *available at* http://crew.3cdn.net/8ba93bf54d3a54b31b_yrm6bqld7.pdf.

²⁷⁴ Letter, *supra* note 268, at 5.

²⁷⁵ *Id.*

²⁷⁶ Failure to include required information on a tax return can make a tax-exempt entity liable for civil penalties, 26 U.S.C. § 6652(c)(1)(A)(ii), 6652(c)(4) (2006); Internal Revenue Serv., Instructions for Form 990 at 6-7 (2011), and willfully submitting a false tax return under penalty of perjury is a felony that can be punished by up to three years in prison and a fine of \$100,000. 26 U.S.C. § 7206(1) (2006).

²⁷⁷ See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); see *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949).

²⁷⁸ *Va. State Bd. of Pharmacy*, 425 U.S. at 771.

²⁷⁹ *Giboney*, 336 U.S. at 498.

consistently upheld the constitutionality of perjury statutes.²⁸⁰ The Court has found that to “uphold the integrity of our trial system . . . the constitutionality of perjury statutes is unquestioned.”²⁸¹ Even though the Supreme Court recently held that lying about your military service decorations is protected by the First Amendment,²⁸² it did uphold the constitutionality of criminalizing perjured statements by finding that “perjured testimony ‘is at war with justice’ because it can cause a court to render a ‘judgment not resting on truth.’”²⁸³

Another issue that arises from these shell corporations is the ability of foreign citizens to flood the U.S. political system with foreign money. In *Bluman v. Fed. Election Comm’n*, which will be discussed in greater detail later in this Article, the United States District Court for the District of Columbia relied on Supreme Court jurisprudence when holding that “[t]he government may exclude foreign citizens from activities ‘intimately related to the process of democratic self-government.’”²⁸⁴ According to Trevor Potter, former chairman of the FEC, it is “more difficult to enforce the ban on foreign spending when the source of the money is not publicly disclosed.”²⁸⁵

There is empirical evidence that this practice is widespread and has been occurring for many years. In 1992, John Huang, an employee of Lippo Group²⁸⁶ and a long-time friend of then Presidential candidate Bill Clinton, began to raise illegal foreign money for the Democratic National Committee (DNC) through Lippo Group owned shell companies; these contributions were reimbursed with funds from Lippo Group's headquarters in Jakarta, Indonesia.²⁸⁷ In 1994, Haley Barbour, who was chairman of the Republican National Committee (RNC), persuaded a Hong Kong businessman, Ambrous Young, to post collateral of \$2 million dollars in support of a loan to the National Policy Forum, which was a think tank presided over by Barbour, and a de facto subsidiary of the RNC.²⁸⁸ The collateral was posted by a shell corporation that had no assets other than money transferred from Hong Kong.²⁸⁹ In 1997, the DNC returned a \$250,000 dollar contribution from a recently established U.S. subsidiary of a South Korean electronics company because it violated a ban on donations from foreign nationals.²⁹⁰

²⁸⁰ *United States v. Grayson*, 438 U.S. 41, 54 (1978) (“unquestioned constitutionality of perjury statutes”); *see also* *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 51 n.10 (1961).

²⁸¹ *United States v. Dunnigan*, 507 U.S. 87, 97 (1993).

²⁸² *See United States v. Alvarez*, 132 S. Ct. 2537 (2012).

²⁸³ *Id.* at 2546 (quoting *In re Michael*, 326 U.S. 224, 227 (1945)).

²⁸⁴ *Bluman v. Fed. Election Comm’n*, 800 F. Supp. 2d 281, 287 (2011) (quoting *Bernal v. Fainter*, 467 U.S. 216, 220 (1984)).

²⁸⁵ Stephen Braun, *Super PAC Foreign Donations a Risk in 2012 Presidential Election*, HUFFINGTON POST, Feb. 10, 2012.

²⁸⁶ Lippo Group is an Indonesian industrial conglomerate.

²⁸⁷ S. REP. NO. 105-167 (1998).

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ H.R. REP. NO. 105-829 (1998). The report details a \$250,000 dollar contribution from a subsidiary of a South Korean company, Cheong Am America Inc. The DNC acknowledged

Other examples include CITGO Petroleum Company, once the American-born Cities Services Company, but purchased in 1990 by the Venezuelan government-owned *Petróleos de Venezuela S.A.* could allow Venezuelan President Hugo Chavez, who has sharply criticized both of the past two U.S. presidents, to spend government funds to defeat an American political candidate, just by having CITGO buy TV ads.²⁹¹ The U.S. Chamber of Commerce, a trade association organized as a 501(c)(6) that can raise and spend unlimited funds without ever disclosing any of its donors, operates foreign chapters of the Chamber in places abroad (which are known as "AmChams") which pay yearly dues to the U.S. Chamber; however, a spokeswoman for the Chamber stated that the AmChams are independent organizations and they do not fund political programs in the United States.²⁹²

This evidence reinforces the dangers of allowing corporations to spend unlimited amounts of money in political campaigns. It also reflects the danger of organizations to accept unlimited amounts of money without disclosing the source of the funds. The Supreme Court even agreed with this rationale in *Citizens United* when it stated "that independent groups were running election related advertisements while hiding behind dubious and misleading names"²⁹³

However, even with empirical evidence reflecting that this practice is widespread, the Supreme Court refused to revisit their holding in *Citizens United*.

V. WHY THE COURT SHOULD HAVE REVISITED *CITIZENS UNITED*

The Montana Court argued that because of Montana's "unique" history and circumstances, the Montana Statute was distinguishable from the BCRA and, therefore, constitutional. As noted above, the Supreme Court recently granted certiorari and summarily reversed the Montana Supreme Court's decision in *Western Tradition Partnership*²⁹⁴ This part provides additional arguments to strengthen the argument that *Citizens United* should have been limited or overturned. These arguments include: the breadth of the First Amendment, the ability of PACs to speak for corporations, "foreign" corporations and the governmental power to regulate elections, shareholder protection, the treatment of public unions, and the Supreme Court's history of altering constitutional doctrine when its understanding of the doctrine's factual underpinnings are no longer accurate.

that it did not return the contribution until the *Los Angeles Times* raised questions about its propriety.

²⁹¹ Mike Lillis, *Supreme Court Empowers Foreign Governments to Sway Federal Elections?*, WASH INDEP., Jan. 22, 2010, available at <http://washingtonindependent.com/74600/supreme-court-empowers-foreign-governments-to-sway-federal-elections>.

²⁹² Brian Montopoli, *Chamber of Commerce Denies Foreign Money Funding Campaign Ads*, CBS NEWS (Oct. 5, 2010), http://www.cbsnews.com/8301-503544_162-20018631-503544.html.

²⁹³ *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 914 (2010).

²⁹⁴ *Am. Tradition P'ship v. Bullock*, 132 S. Ct. 2490 (2012).

A. Breadth of the First Amendment

In *Citizens United*, the Supreme Court discussed multiple cases where corporations are afforded First Amendment protection.²⁹⁵ The Court, citing to *NAACP v. Button*²⁹⁶ and *Grosjean v. American Press Co.*,²⁹⁷ held that First Amendment “protection has been extended [to corporations] by explicit holdings to the context of political speech.”²⁹⁸ The Court also cited *Austin* when stating that “[s]tate law grants corporations special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets.”²⁹⁹

It is important to note that the Supreme Court, before *Citizens United*, never stated that corporations receive the same treatment under the First Amendment that individuals do. In *Pacific Gas & Electric Co. v. Public Utilities Com.*, the Supreme Court stated that “[t]he identity of the speaker is not decisive in determining whether speech is protected. Corporations and other associations, like individuals, contribute to the ‘discussion, debate, and the dissemination of information and ideas’ that the First Amendment seeks to foster.”³⁰⁰ In *California Medical Association v. FEC*, the Supreme Court held that “‘differing structures and purposes’ of corporations and unions ‘may require different forms of regulation in order to protect the integrity of the electoral process.’”³⁰¹ In *FEC v. National Right to Work*, the Supreme Court held that “‘the special characteristics of the corporate structure require particularly careful regulation’” in an electoral context.³⁰² Throughout the Supreme Court’s jurisprudence, the Court has strived to fashion a balance between the integrity of the electoral process and the freedom of speech provided by the First Amendment.

The Supreme Court also relies heavily on *Bellotti* to show that restrictions distinguishing among different speakers, specifically allowing speech by some but not others, is not permitted and that “political speech does not lose First Amendment protection ‘simply because its source is a corporation.’”³⁰³ The Supreme Court’s discussion of *Bellotti* is somewhat misleading. In *Bellotti*, the Court struck down a

²⁹⁵ See, e.g., *Linmark Assocs., Inc. v. Town of Willingboro*, 431 U.S. 85 (1977); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975); *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974); *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam); *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

²⁹⁶ *Nat’l Assoc. for the Advancement of Colored People v. Button*, 371 U.S. 415, 433 (1963).

²⁹⁷ *Grosjean v. Am. Press Co.*, 297 U.S. 233, 244 (1936).

²⁹⁸ *Citizens United*, 130 S. Ct. at 900.

²⁹⁹ *Id.* at 905 (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990)).

³⁰⁰ *Pac. Gas & Electric Co. v. Pub Utilities Co.*, 475 U.S. 1, 8 (1986) (citing *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 783 (1978)).

³⁰¹ *Cal. Med. Ass’n v. Fed. Election Comm’n*, 453 U.S. 182, 201 (1981).

³⁰² *Fed. Election Comm’n v. Nat’l Right to Work Comm.*, 459 U.S. 197, 209-10 (1982).

³⁰³ *Citizens United*, 130 S. Ct. at 900 (quoting *Bellotti*, 435 U.S. at 784).

law that distinguished between a corporation whose business was materially affected by a referendum and one whose business was not.³⁰⁴

It is important to note that *Bellotti* does not make any effort to distinguish expenditures by individuals and expenditures by corporations. Interestingly, the Court in *Citizens United* specifically stated that the “*Bellotti* did not address the constitutionality of the State’s ban on corporate independent expenditures to support candidates.”³⁰⁵ It is also important to note that *Bellotti* involved expenditures on a referendum, not expenditures directed to a specific candidate. The Court in *Bellotti* specifically stated that “[r]eferenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue.”³⁰⁶ This language suggests that the Supreme Court believed that corporate expenditures supporting or opposing a candidate could present a risk of corruption.

The majority in *Citizens United* also goes to great lengths to emphasize that “the Government may not suppress political speech on the basis of the speaker’s corporate identity.”³⁰⁷ The Supreme Court’s jurisprudence, as noted by the dissent in *Citizens United*, reflects that the Court has regulated speech differently based upon a speaker’s identity.³⁰⁸ “It is clear that [neither] the right to associate nor the right to participate in political activities is absolute.”³⁰⁹

In *Bethel School Dist. No. 403 v. Fraser*, the Supreme Court held that “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.”³¹⁰ The Court specifically found that the “‘fundamental values necessary to the maintenance of a democratic political system’ disfavor the use of terms of debate highly offensive or highly threatening to others. Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions.”³¹¹

In *Jones v. North Carolina Prisoners’ Labor Union, Inc.*, the Supreme Court held that “[i]n a prison context, an inmate does not retain those First Amendment rights that are ‘inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.’”³¹² The Court further held that:

³⁰⁴ Alexander Polikoff, *So How Did We Get Into This Mess? Observations on the Legitimacy of Citizens United*, 105 NW. U. L. REV. COLLOQUY 203, 216 (2011).

³⁰⁵ *Citizens United*, 130 S. Ct. at 903.

³⁰⁶ Polikoff, *supra* note 304, at 215 (quoting *Bellotti*, 435 U.S. at 790).

³⁰⁷ *Citizens United*, 130 S. Ct. at 913.

³⁰⁸ *Id.* at 945 (Stevens, Ginsburg, Breyer & Sotomayor, JJ., dissenting in part and concurring in part) (“The Government routinely places special restrictions on the speech rights of students, prisoners, members of the Armed Forces, foreigners, and its own employees.”).

³⁰⁹ Fed. Election Comm’n v. Nat’l Right to Work Comm., 459 U.S. 197, 207 (1982) (quoting Civil Serv. Comm’n v. Letter Carriers, 413 U.S. 548, 567 (1973)).

³¹⁰ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986).

³¹¹ *Id.* at 683. “In *Ambach v. Norwick*, 441 U.S. 68, 76-77 . . . (1979), we echoed the essence of this statement of the objectives of public education as the ‘inculcate[ion of] fundamental values necessary to the maintenance of a democratic political system.’” *Id.* at 681.

³¹² *Jones v. N.C. Prisoners’ Labor Union, Inc.*, 433 U.S. 119, 129 (1977).

[i]n banning Union solicitation or organization, appellants have merely affected one of several ways in which inmates may voice their complaints to, and seek relief, from prison officials. There exists an inmate grievance procedure through which correctional officials are informed about complaints concerning prison conditions, and through which remedial action may be secured. With this presumably effective path available for the transmission of grievances, the fact that the Union's grievance procedures might be more "desirable" does not convert the prohibitory regulations into unconstitutional acts.³¹³

In *Parker v. Levy*, the Supreme Court held that "[w]hile the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections."³¹⁴ The Court further held that "[s]peech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected."³¹⁵

The Supreme Court has also placed limits on the political speech of federal employees. In *Civil Service Commission v. Letter Carriers*, the Supreme Court held that:

The government has an interest in regulating the conduct and "the speech of its employees that differ[s] significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees."³¹⁶

The majority in *Citizens United* held that these decisions upheld a narrow class of speech restrictions operating to the disadvantage of certain persons because the "rulings were based on an interest in allowing governmental entities to perform their functions."³¹⁷ However, one could argue that a political system fraught with corruption or even the appearance of corruption would impede the government from allowing the democratic process to function the way it was intended. The dissent made a strong argument that "Congress and half the state legislatures have concluded, over many decades, that their core functions of administering elections and passing legislation cannot operate effectively without some narrow restrictions on corporate electioneering paid for by general treasury funds."³¹⁸

³¹³ *Id.* at 131 n.6.

³¹⁴ *Parker v. Levy*, 417 U.S. 733, 758 (1974).

³¹⁵ *Id.* at 759.

³¹⁶ *Civil Serv. Comm'n v. Letter Carriers*, 413 U.S. 548, 564 (1973).

³¹⁷ *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 898 (2010).

³¹⁸ *Id.* at 946 (Stevens, Ginsburg, Breyer & Sotomayor, JJ., dissenting in part and concurring in part).

B. PACs Can Speak for Companies

In *Citizens United*, the Supreme Court held that “[a] PAC is a separate association from the corporation . . . the PAC exemption from the [law’s] expenditure ban does not allow corporations to speak.”³¹⁹ The Montana Court distinguished PACs in Montana, stating that unlike the federal rules for PACs, Montana law reflects that PACs can “be formed and maintained by filing simple and straight-forward forms or reports.”³²⁰

This Article posits that PACs do have the ability to speak for corporations. In *FEC v. Nat’l Right to Work Comm.*, the Supreme Court held that PACs permit “some participation of unions and corporations in the federal electoral process by allowing them to establish and pay the administrative expenses of “separate segregated [funds],” which may be “utilized for political purposes.”³²¹ In *FEC v. Beaumont*, the Supreme Court held that PACs “allow[] corporate political participation without the temptation to use corporate funds for political influence, quite possibly at odds with the sentiments of some shareholders or members, and it lets the government regulate campaign activity through registration and disclosure.”³²² It is important to note that neither of these cases was overruled by *Citizens United*.³²³

The Supreme Court’s jurisprudence reflects a line of cases that found PACs to be a sufficient vehicle for corporate speech. By ignoring their own jurisprudence, the Court in *Citizens United* stated that “[a] PAC is a separate association from the corporation.”³²⁴ It is instructive to look at the construction of a PAC and analyze this claim. Federal election law refers to “a corporate or labor political committee as a ‘separate segregated fund’ (SSF), though it is more commonly called a PAC.”³²⁵ “As the name implies, money contributed to a [PAC] is held in a separate bank account from the general corporate or union treasury.”³²⁶ This structure seems to support the Court’s statements in *Citizens United* concerning the “separate” nature of PACs.

However, a corporation or union that sponsors a PAC is called the connected organization.³²⁷ The connected organization may use its general treasury funds to pay for the costs of operating and raising money for the PAC. These costs include: office space, phones, salaries, utilities, supplies, bank charges and fundraising

³¹⁹ *Id.* at 897.

³²⁰ *W. Tradition P’ship, Inc. v. Att’y Gen.*, 271 P.3d 1, 20 (Mont. 2011).

³²¹ *Fed. Election Comm’n v. Nat’l Right to Work Comm.*, 459 U.S. 197, 201 (1982).

³²² *Fed. Election Comm’n v. Beaumont*, 539 U.S. 146, 163 (2003).

³²³ The majority in *Citizens United* discussed these cases, but did not specifically overrule either of the decisions.

³²⁴ *Citizens United*, 130 S. Ct. at 897.

³²⁵ FED. ELECTION COMM’N, FEDERAL ELECTION COMMISSION CAMPAIGN GUIDE: CORPORATIONS AND LABOR ORGANIZATIONS (Jan. 2007), available at <http://www.fec.gov/pdf/colagui.pdf>.

³²⁶ *Id.* at ii.

³²⁷ *Id.*

activities.³²⁸ Contributions may be solicited from the corporation's executive and administrative personnel and stockholders and also the families of these two groups.³²⁹ Stockholders include employees of the corporation who participate in an employee stock ownership plan (ESOP), such as a 401(k).³³⁰ Because corporations are made up of and managed by individuals, and those same individuals have the ability to contribute to political campaigns through a corporation's PAC, this is evidence that corporations do have the ability to speak through their respective PACs.

C. "Foreign" Corporations and Governmental Power to Regulate Elections

The BCRA provides that it is unlawful for a foreign national to make a contribution or independent expenditure in a federal, state, or local election.³³¹ A foreign national includes corporations and organizations formed under the laws of or having its principal place of business in a foreign country.³³² In *Citizens United*, the Supreme Court specifically stated that they "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."³³³ Because the Supreme Court did not rule on this issue many questions still exist such as how to treat corporations in the United States whose majority shareholders are foreign nationals and how to treat corporations that are incorporated in the United States, but have their principal place of business outside the United States.

The seminal case discussing the First Amendment rights of foreign nationals in political elections is *Bluman v. FEC*.³³⁴ In *Bluman*, Canadian citizens, who were temporarily living and working in the U.S., argued to the U.S. District Court for the District of Columbia that the federal ban on their ability to contribute to U.S. political elections was unconstitutional.³³⁵ The court denied the plaintiffs' claims and found that the government could exclude foreign citizens from activities that were part of democratic self-government in the United States and that the limitations on the activities of foreign citizens were part of the sovereign's obligation to preserve the basic conception of a political community.³³⁶

The D.C. District Court relied on the Supreme Court's holding that "[t]he government may exclude foreign citizens from activities 'intimately related to the process of democratic self-government.'"³³⁷ The D.C. District Court further held that because foreign nationals are by definition outside of the U.S. political

³²⁸ 11 C.F.R. § 114.1(b) (2011).

³²⁹ 11 C.F.R. § 114.5(g)(1) (2011).

³³⁰ *Id.*

³³¹ *See* 2 U.S.C. § 441e (2006).

³³² 31 C.F.R. § 800.216 (2011).

³³³ *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 911 (2010).

³³⁴ *See Bluman v. Fed. Election Comm'n*, 800 F. Supp. 2d 281 (2011).

³³⁵ *See id.*

³³⁶ *Id.*

³³⁷ *Id.* at 287 (quoting *Bernal v. Fainter*, 467 U.S. 216, 220 (1984)).

community, they were not entitled to influence the political process.³³⁸ In regard to foreign corporations, the Court stated that foreign corporations are also barred from making contributions and expenditures in U.S. political elections.³³⁹

Based upon the discussion above, courts have clearly stated that the government has a compelling interest in excluding foreign corporations from participating in the U.S. political process. This Article proposes that the Supreme Court should have revisited *Citizens United* in light of the empirical evidence showing foreign influence in U.S. politics and the rationale from *Bluman* and grant states the power to exclude all corporations that are not incorporated in that particular state or have their principal place of business in that state. A “foreign” corporation in regard to a state is different than a “foreign” corporation in regard to the U.S. as a whole. For example, the Texas Secretary of State website states that “[i]f an organization was formed under, and the internal affairs are governed by, the laws of a jurisdiction other than Texas, the organization is a “foreign entity.”³⁴⁰ The Vermont Secretary of State website states that “[a]n out-of-state (“foreign”) corporation must procure a certificate of authority from our office in order to do business legally in Vermont.”³⁴¹ All states have the same or similar requirements and definitions.

States should argue that they have the same concern as the U.S. in excluding foreign corporations from activities that are part of democratic self-government in their respective state. A critical distinction that can be made is that while persons can be citizens of a state and the U.S. at the same time, corporations are artificial creations of the state. The Supreme Court has stated on multiple occasions that corporations are creatures of state law and that it is state law which grants corporate directors' powers.³⁴² Based upon the current case law, states should argue that they have the same compelling interest preserving the basic conception of a political community in their respective state.

The June 2012 Wisconsin Gubernatorial Recall Election is a good example of out of state corporations influencing state political elections. According to an analysis

³³⁸ *Id.* at 288.

³³⁹ *Id.* at 292 n.4.

³⁴⁰ *Foreign or Out-of-State Entities*, TEX. SEC’Y OF STATE JOHN STEEN, http://www.sos.state.tx.us/corp/foreign_outofstate.shtml (last visited Feb. 21, 2013).

³⁴¹ Corps. Div., *Foreign Corporations*, VT. SEC’Y OF STATE JIM CONDOS, http://www.sec.state.vt.us/corps/dobiz/foreign_corps/getqual.htm (last visited Feb. 21, 2013).

³⁴² *See* *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 98 (1991); *Burks v. Lasker*, 441 U.S. 471, 478 (1979); *see also* *Dartmouth Coll. v. Woodward*, 17 U.S. 518, 636 (1819) (“A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created.”); *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69 (1987) (“It thus is an accepted part of the business landscape in this country for States to create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares.”); *United States v. Morton Salt*, 338 U.S. 632, 652 (1950) (“[Corporations] are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege to act as artificial entities.”).

by the Wisconsin Democracy Campaign,³⁴³ approximately 60 percent of the money raised by current Governor Scott Walker came from outside Wisconsin.³⁴⁴ Even though it is difficult to accurately track these numbers because of the lack of transparency from corporations concerning their donors, as an idea of the money flowing from out of state donors, Governor Walker raised \$13 million dollars in the first three months of 2012 alone.³⁴⁵

The Supreme Court has long held that states are permitted to regulate in-state components of interstate transactions so long as the regulation furthers legitimate in-state interests.³⁴⁶ In *Bigelow v. Virginia*, Justice Rehnquist wrote in his dissenting opinion that the Supreme Court had “consistently recognized that irrespective of a State’s power to regulate extraterritorial commercial transactions in which its citizens participate it retains an independent power to regulate the business of commercial solicitation and advertising within its borders.”³⁴⁷

The Supreme Court also has a long history of permitting the legislature, especially at the state and local levels, to regulate elections. In *Burroughs v. United States*, the Supreme Court held that Congress possessed the power “to pass appropriate legislation to safeguard [the election of the President and Vice-President] from the improper use of money to influence the result . . . as it possesses every other power essential to preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption.”³⁴⁸ In *United States v. Harriss*, the Supreme Court held that Congress could legislate to obtain “information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose” to determine “who is being hired, who is putting up the money, and how much.”³⁴⁹ In *Ex Parte Yarbrough*, the Supreme Court held that states “must have the power to protect the elections on which its existence depends from violence and corruption.”³⁵⁰

The Supreme Court has even stated that “the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections,”³⁵¹ and that “[s]tates [have] significant flexibility in

³⁴³ The Wisconsin Democracy Campaign is a non-profit organization whose mission includes tracking the money in state politics and working for campaign finance reform and other democracy reforms.

³⁴⁴ See WIS. DEMOCRACY CAMPAIGN, <http://wisdc.org/> (last visited Feb. 21, 2013).

³⁴⁵ Andy Kroll, *Half of Scott Walker's Cash Comes From Out-of-State Dark-Money Donors*, MOTHER JONES (May 26, 2012), <http://www.motherjones.com/mojo/2012/05/wisconsin-recall-campaign-cash-walker-barrett>.

³⁴⁶ See *Hall v. Geiger-Jones Co.*, 242 U.S. 539 (1917); *Caldwell v. Sioux Falls Stock Yards Co.*, 242 U.S. 559 (1917); *Merrick v. N.W. Halsey & Co.*, 242 U.S. 568 (1917) (collectively, the “Blue Sky Cases”).

³⁴⁷ *Bigelow v. Virginia*, 41 U.S. 809, 835 (1975) (Rehnquist, J., dissenting).

³⁴⁸ *Burroughs v. United States*, 290 U.S. 534, 545 (1934).

³⁴⁹ *United States v. Harriss*, 347 U.S. 612, 625 (1954).

³⁵⁰ *Ex parte Yarbrough*, 110 U.S. 651, 658 (1884).

³⁵¹ *Oregon v. Mitchell*, 400 U.S. 112, 124-25 (1970); see also *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 68-69 (1978).

implementing their own voting systems.”³⁵² The Supreme Court completely ignored not only the amount of empirical data reflecting the power of corporations and organizations to anonymously affect political processes, but also its own long history of granting states the ability to regulate state and local elections.

D. Shareholder Protection

The Supreme Court also dismissed the shareholder protection argument raised in *Citizens United*. The Court wrote that there was little evidence of abuse that could not be corrected by shareholders “through the procedures of corporate democracy.”³⁵³ However, the Supreme Court does not provide any evidence to support this claim, they only make the assertion and then move to the next issue. Based upon the current state of securities laws, there is empirical evidence reflecting that shareholders do not hold the power proscribed to them by the Court in *Citizens United*.

The first issue that arises is the transparency of political expenditures and contributions. Corporate managers can spend corporate money on politics without notifying shareholders and do not need authorization from shareholders.³⁵⁴ An October 2010 study conducted by Sustainable Investments Institute (SSI) and the Investor Responsibility Research Center Institute (IRRC) found that very few companies mention independent political expenditures in their stated policies.³⁵⁵

The second issue is even if the shareholders are aware of a corporation’s political spending, they do not have the authority to stop the transaction. Under corporate

³⁵² *Doe v. Reed*, 130 S. Ct. 2811, 2818 (citing *Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992)); *see also* *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 191-92 (1999) (“States [] have considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to election processes generally.”); *see also* *Nevada v. Hall*, 440 U.S. 410, 425 (1979) (“[t]he existence of express limitations on state sovereignty may equally imply that caution should be exercised before concluding that unstated limitations on state power were intended by the Framers.”); *see also* *Randall v. Sorrell*, 548 U.S. 230, 265 (2006) (Kennedy, J., concurring) (recognizing the rise of entities created for political influence “which are as much the creatures of law as of traditional forces of speech and association” and “can manipulate the system and attract their own elite power brokers, who operate in ways obscure to the ordinary citizen”).

³⁵³ *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 911 (2010) (quoting *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 794 (1978)).

³⁵⁴ CIARA TORRES-SPELLISY, BRENNAN CTR. FOR JUSTICE, N.Y.U. SCH. OF LAW, CORPORATE CAMPAIGN SPENDING: GIVING SHAREHOLDERS A VOICE (2010), *available at* http://brennan.3cdn.net/54a676e481f019bfb8_bvm6ivakn.pdf (“Corporate law is ill-prepared for this new age of corporate political spending by publicly-traded companies. Today, corporate managers need not disclose to their investors—individuals, mutual funds, or institutional investors such as government or union pension funds—how funds from the corporate treasury are being spent, either before or after the fact. And the law does not require corporate managers to seek shareholder authorization before making political expenditures with corporate funds.”).

³⁵⁵ *See generally* HEIDI WELSH & ROBIN YOUNG, SUSTAINABLE INVESTMENT INST. & INVESTOR RESPONSIBILITY RESEARCH CTR. INST., CORPORATE GOVERNANCE OF POLITICAL EXPENDITURES: 2011 BENCHMARK REPORT ON S&P 500 COMPANIES (Nov. 2011), *available at* http://www.irrcinstitute.org/pdf/Political_Spending_Report_Nov_10_2011.pdf.

law, shareholders must allege corruption or reckless conduct in order to even state a claim challenging management actions.³⁵⁶ This is not an easy burden to meet.³⁵⁷

E. Treatment of Public Unions

It is instructive to look at Supreme Court decisions which have favored the First Amendment rights of public employees. The Supreme Court has limited public unions with respect to political expenditures. In *International Association of Machinists v. Street*, Justice Douglas wrote in his concurring opinion that the “use of union funds for political purposes subordinates the individual’s First Amendment rights to the views of the majority.”³⁵⁸ In *Abood v. Detroit Board of Education*, the Supreme Court found that a public-sector union can bill nonmembers for chargeable expenses, but may not require them to fund its political projects.³⁵⁹ The Court specifically held that “a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment.”³⁶⁰ In *United States v. United Foods*, the Supreme Court stated that “First Amendment values [would be] at serious risk if the government [could] compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that [the government] favors.”³⁶¹ It is important to note that the Supreme Court in *Citizens United* did not discuss these cases.

In a recent post-*Citizens United* case, *Knox v. SEIU*, the Supreme Court specifically referenced *Citizens United* when it stated that even though public-sector unions have the right under the First Amendment to express their views on political and social issues, those employees who choose not to join a union have the same rights.³⁶² These decisions show that the Justices granted First Amendment rights to some classes of employees, but not to others, which is in direct contravention of the spirit of the First Amendment and their own rationale used in *Citizens United*.

F. History of Altering Constitutional Doctrine

The Supreme Court has a history of altering constitutional doctrine when its understanding of the doctrine’s factual underpinnings no longer appeared to be

³⁵⁶ Thomas W. Joo, *People of Color, Women, and the Public Corporation: Corporate Hierarchy and Racial Justice*, 79 ST. JOHN’S L. REV. 955, 959 (2005).

³⁵⁷ See, e.g., *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 748-49 (Del. Ch. 2005) (“Corporate waste is very rarely found in Delaware courts because the applicable test imposes such an onerous burden upon a plaintiff—proving ‘an exchange that is so one sided that no business person of ordinary, sound judgment could conclude that the corporation has received adequate consideration.’ In other words, waste is a rare, ‘unconscionable case[] where directors irrationally squander or give away corporate assets.’”).

³⁵⁸ *Int’l Ass’n of Machinists v. Street*, 367 U.S. 740, 778 (1960) (Douglas, J., concurring); see also *Davenport v. Wash. Ed. Ass’n*, 551 U.S. 177, 181 (2007) (“[A]gency-shop arrangements in the public sector raise First Amendment concerns because they force individuals to contribute money to unions as a condition of government employment”).

³⁵⁹ See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1997).

³⁶⁰ *Id.* at 234.

³⁶¹ *United States v. United Foods, Inc.*, 533 U.S. 405, 411 (2001).

³⁶² *Knox v. Serv. Emp. Int’l Union*, 132 S. Ct. 2277 (2012).

accurate. These cases have become some of the most important and powerful decisions throughout the Supreme Court's jurisprudence. Based upon the empirical evidence reported in this Article alone, the Supreme Court should have reconsidered its holding in *Citizens United*.

In *State Board of Education v. Barnette*, a group of students who were Jehovah's Witnesses refused to salute on the ground that the act of saluting the flag was a forbidden form of worship.³⁶³ The Supreme Court found that the state could not compel students to salute the American flag and recite the pledge of allegiance under penalty of expulsion because such compulsion exceeded constitutional limitations and invaded the sphere of intellect and spirit protected by the First Amendment.³⁶⁴ This case overruled *Minersville School District v. Gobitis*, which held that a student's constitutional rights were not violated by the school board's rule that they participate in a flag-salute ceremony as a condition of their attendance at public schools even though the students' refusal was based on their religious beliefs.³⁶⁵ In *Barnette*, the Supreme Court's decision was partially based upon the Supreme Court's inaccurate overestimation of government power to build national unity in *Gobitis*.³⁶⁶

In *Brown v. Board of Education*, the Supreme Court overturned *Plessy v. Ferguson*³⁶⁷ and the "separate but equal" doctrine, finding that it had no place in public education.³⁶⁸ The Court found that the segregation of white and African-American children in public schools has a detrimental effect upon the African-American children.³⁶⁹ The Court went further and stated that "[w]hatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority" and that "[a]ny language in *Plessy v. Ferguson* contrary to this finding is rejected."³⁷⁰ In *West Coast Hotel Co. v. Parrish*, the Supreme Court overruled *Adkins v. Children's Hospital*³⁷¹ and found that based upon recent economic experience, the denial of a living wage is not only detrimental to a person's health and well being but also casts a direct burden for his/her support upon the community.³⁷²

These cases all reflect that the Supreme Court has overruled previous decisions based upon changed circumstances or when understanding of the doctrine's factual underpinnings no longer appeared to be accurate. Even though the *Citizens United* decision was only two years ago, the campaign finance landscape has changed dramatically. A 2010 study conducted by the Sunlight Foundation calculated the

³⁶³ See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

³⁶⁴ *Id.*

³⁶⁵ See *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940).

³⁶⁶ *Barnette*, 319 U.S. at 640.

³⁶⁷ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

³⁶⁸ *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

³⁶⁹ *Id.* at 494.

³⁷⁰ *Id.*

³⁷¹ *Adkins v. Children's Hosp. of the Dist. of Columbia*, 261 U.S. 525 (1923).

³⁷² *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

effect of *Citizens United* on the 2010 midterm election and found that the decision was responsible for adding \$126 million dollars in undisclosed spending by outside groups and \$60 million dollars in disclosed spending by outside groups to the midterm election.³⁷³ According to the FEC, over \$200 million dollars has been spent so far in the 2012 election cycle.³⁷⁴ According to a *New York Times* study, super PACs have spent over \$113 million dollars in the 2012 election cycle.³⁷⁵ This empirical data and the empirical data of corruption listed earlier in this Article reflects that the Supreme Court's statement that independent expenditures do not lead to, or create the appearance of, *quid pro quo* corruption has been found to be inaccurate and untenable.

V. CONCLUSION

This Article has provided ample empirical evidence that there is virtually no actual difference between independent and coordinated expenditures and that independent expenditures can and do lead to corruption and the appearance of corruption. It has presented empirical evidence of individuals creating shell corporations to conceal the source of political expenditures and also non-profit corporations being used to conceal the identities of those making political expenditures.

The Supreme Court had a chance to revisit the *Citizens United* holding in light of this evidence, but refused to do so. The Supreme Court should have reexamined its own holding, especially when there has been a significant change in factual conditions which renders its previous holding as "detrimental to the public interest."³⁷⁶ This Article has certainly demonstrated this circumstance.

³⁷³ Nancy J. Whitmore, *Facing the Fear: A Free Market Approach for Economic Expression*, 17 COMM. L. & POL'Y 21, 60 (2012) (citing Paul Blumenthal, *The Citizens United Effect: 40 Percent Outside Money Made Possible by Supreme Court Ruling*, SUNLIGHT FOUNDATION (Nov. 4, 2010), <http://sunlightfoundation.com/blog/2010/11/04/the-citizens-united-effect-40-percent-of-outside-money-made-possible-by-supreme-court-ruling/>).

³⁷⁴ *2012 Independent Expenditures*, FED. ELECTION COMM'N, http://www.fec.gov/data/IndependentExpenditure.do?format=html&election_yr=2012 (last visited Feb. 21, 2013).

³⁷⁵ *Election 2012 Independent Spending Totals*, N.Y. TIMES, <http://elections.nytimes.com/2012/campaign-finance/independent-expenditures/totals> (last visited Feb. 21, 2013).

³⁷⁶ *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 384 (1992).