



2014

Foreigners United: Foreign Influence in American Elections After Citizens United v. Federal Election Commission

Corey R. Sparks

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Note, Foreigners United: Foreign Influence in American Elections After Citizens United v. Federal Election Commission, 62 Clev. St. L. Rev. 245

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**FOREIGNERS UNITED: FOREIGN INFLUENCE IN
AMERICAN ELECTIONS AFTER *CITIZENS UNITED*
V. *FEDERAL ELECTION COMMISSION***

COREY R. SPARKS*

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I. INTRODUCTION

In the early 1990s, then-Republican National Committee (“RNC”) chair Haley Barbour used a spurious “think tank” called the National Policy Forum to funnel \$2.2 million from Hong Kong businessman Ambrous Young into the RNC’s

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This note is dedicated to my late grandfather, Robert Lee Sparks, through whom I have been eternally blessed.

political coffers for the 1994 and 1996 elections.¹ Barbour faced questioning from Senate investigators, but ultimately avoided punishment.² According to then-Senator John Glenn, Barbour's scheme was, at the time, "the only one so far where the head of a national party knowingly and successfully solicited foreign money, infused it into the election process, and intentionally tried to cover it up."³ A prominent tax law attorney also noted that the Barbour-Hong Kong scandal illustrates "the ease by which foreign money can find its way into American elections."⁴

Many Americans are aware of the power "special interests" hold over our electoral process, but far fewer comprehend that these interests now include foreign entities, including foreign corporations and governments. What may come as a shock to the electorate is far from a surprise to many of our nation's leaders. President Barack Obama,⁵ Senators John McCain⁶ and Sherrod Brown,⁷ and former Supreme Court Justice John Paul Stevens⁸ have all recognized that the Supreme Court's decision in *Citizens United v. Federal Election Commission*⁹ has resulted in the ability of foreign entities to circumvent a Congressional ban that "prohibits any foreign national from contributing, donating or spending funds in connection with any federal, state, or local election in the United States, either directly or indirectly."¹⁰

¹ Andy Kroll, *How Secret Foreign Money Could Infiltrate U.S. Elections*, MOTHER JONES (Aug. 28, 2012), <http://www.motherjones.com/politics/2012/08/foreign-dark-money-2012-election-nonprofit>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ "Last week, the Supreme Court reversed a century of law to open the floodgates for special interests—including foreign companies—to spend without limit in our elections." Andrew Malcolm, *Obama's State of the Union Address: Criticism of the Supreme Court Campaign Finance Ruling*, L.A. TIMES (Jan. 27, 2010), <http://latimesblogs.latimes.com/washington/2010/01/obamas-state-of-the-union-address-criticism-of-the-supreme-court-campaign-finance-ruling.html>.

⁶ "[O]bviously, maybe in a roundabout way, foreign money is coming into an American campaign." Alexander Besant, *McCain Says Foreign Money Leaking into U.S. Elections*, GLOBAL POST (June 16, 2012), <http://www.globalpost.com/dispatch/news/regions/americas/united-states/120616/mccain-says-foreign-money-leaking-us-elections>.

⁷ "There certainly are ways that the Chinese could get money into this country." Stephen Koff, *Sherrod Brown Suggests China, Too, May Be Spending Money to Unseat Him*, CLEVELAND PLAIN DEALER (Sep. 12, 2012), http://www.cleveland.com/open/index.ssf/2012/09/sherrod_brown_suggests_china_t.html.

⁸ Bill Mears, *Former Justice Stevens Criticizes Court Over Campaign Spending Rules*, CNN (May 31, 2012), <http://www.cnn.com/2012/05/30/politics/stevens-campaign-spending/index.html>.

⁹ *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

¹⁰ *Foreign Nationals*, FED. ELECTION COMM'N (July 2003), <http://www.fec.gov/pages/brochures/foreign.shtml> [hereinafter *Foreign Nationals*, FEC].

These are not unfounded concerns. During the 2012 election cycle, independent, but politically involved, organizations¹¹ that are not required to disclose their donors contributed at least \$416 million¹² to federal election campaigns.¹³ This accounted for 37% of the total amount spent by *all* independent political organizations during the same period.¹⁴ Further, the amount of undisclosed money spent as a portion of total election spending has been exponentially increasing since 2004.¹⁵ Accordingly, the concern with foreign money influencing American elections is neither political in nature nor hypothetical in its relevance. Rather, the concern is a legitimate response to a potential flood of foreign money pouring into American campaigns in the wake of *Citizens United*.

This Note argues that the majority's decision in *Citizens United* allows foreign nationals to circumvent the Congressional ban on influencing American elections, and that *Citizens United* should be reconsidered in light of this fact, as well as the compelling government interest in preventing such circumvention, and preserving the integrity of the electoral process. Part II provides an overview of the Congressional ban and *Citizens United's* relationship to its circumvention. Part III.A analyzes the methods by which foreign nationals can circumvent the ban in order to influence American elections. Part III.B proposes both judicial and legislative solutions to the problem of foreign election influence created by *Citizens United*. Part III.C presents and analyzes a representative sample of other existing solutions to

¹¹ Independent political organizations are those organizations that are not directly affiliated with any party or candidate. In contrast to groups like the Republican National Committee, the Democratic Senatorial Campaign Committee, or Obama for America (President Obama's 2012 reelection campaign committee), which are not considered independent and are controlled by the party or the candidate, independent organizations have no such affiliation.

¹² Total spending by these groups is likely far greater, because they are required to report only a fraction of their spending to the FEC. Paul Blumenthal, "Dark Money" Hits \$172 Million in 2012 Election, Half of Independent Group Spending, HUFFINGTON POST (July 29, 2012), http://www.huffingtonpost.com/2012/07/29/dark-money-2012-election_n_1708127.html.

¹³ Paul Blumenthal, "Dark Money" in 2012 Election Tops \$400 Million, 10 Candidates Outspent By Groups With Undisclosed Donors, HUFFINGTON POST (Nov. 2, 2012), http://www.huffingtonpost.com/2012/11/02/dark-money-2012-election-400-million_n_2065689.html. The Wall Street Journal reports that such spending exceeds \$560 million. *How Much Are Super PACs Spending?*, WALL ST. J., <http://projects.wsj.com/super-pacs/>. The Center for Responsive Politics places the figure at over \$600 million. *2012 Outside Spending by Super PAC*, CENTER FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&chrt=V&type=S>.

¹⁴ *Id.* Some independent political organizations are required to disclose their donors, while others are not.

¹⁵ *Outside Spending by Disclosure, Excluding Party Committees*, CENTER FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/outsidespending/disclosure.php>. The amount of undisclosed-donor money spent in federal elections was 3.0% of all reported spending in 2004, 7.6% in 2006, 20.4% in 2008, 42.9% in 2010, and 30.0% in 2012. Although undisclosed spending was lower as a percentage of overall outside spending in 2012, the total amount of undisclosed spending more than doubled from 2010 to 2012.

foreign election influence. Part IV identifies and refutes counterarguments that would support the decision in *Citizens United* and its progeny.

II. THE CIRCUMVENTION OF PROHIBITIONS AGAINST FOREIGN ELECTION INFLUENCE

This section provides an overview of background information necessary to fully comprehend the problem of foreign influence in American elections. Subsection A discusses federal statutes that currently prohibit foreign nationals from influencing American elections. Subsection B discusses the leading cases of *Citizens United* and *Speechnow.org*, which currently allow foreign nationals to circumvent the federal statutes discussed in Subsection A. Subsections C and D describe Super PACs and Social Welfare Organizations, respectively, which have become the corporate conduits for foreign nationals to channel money into American elections and circumvent federal law.

A. Statutory Prohibitions on Foreign Election Influence

Foreign influence in American elections has been prohibited since 1966.¹⁶ That year, Congress enacted an amendment to the Foreign Agents Registration Act of 1937 (“FARA”) that created a general prohibition on political contributions from foreign nationals.¹⁷ The goal of FARA was to minimize foreign interventions in American elections by establishing a series of limitations on foreign entities seeking to influence the American electoral process.¹⁸

In 1974, the general prohibition on political contributions by foreign nationals in FARA was incorporated into the Federal Election Campaign Act (“FECA”), giving the Federal Election Commission (“FEC”) jurisdiction over its enforcement and interpretation.¹⁹ FECA prohibits any foreign national from contributing, donating, or spending funds in connection with any federal, state, or local election in the United States, either directly or indirectly.²⁰ FECA also prohibits United States citizens from helping foreign nationals violate the ban, or from soliciting, receiving, or accepting contributions or donations therefrom.²¹ Persons who knowingly and willfully engage in these activities may be subject to fines and imprisonment.²²

FECA defines a “foreign national” to include the following groups and individuals: foreign governments; foreign political parties; foreign corporations; foreign associations; foreign partnerships; individuals with foreign citizenship; and immigrants who do not have a “green card.”²³ Additionally, an American subsidiary

¹⁶ *Foreign Nationals*, FEC, *supra* note 10.

¹⁷ See 22 U.S.C. § 611 *et seq.* (1938).

¹⁸ *Foreign Nationals*, FEC, *supra* note 10. These restrictions included registration requirements for the agents of foreign principals and, as mentioned, a general prohibition on political contributions by foreign nationals.

¹⁹ See 2 U.S.C. § 431 *et seq.* (1974).

²⁰ *Foreign Nationals*, FEC, *supra* note 10.

²¹ *Id.*

²² *Id.*

²³ *Id.* “Green card” is the informal name for a United States Permanent Resident Card (USCIS Form I-551), an ID card attesting to the permanent resident status of an immigrant to the United States.

of a foreign corporation or an American corporation that is owned by foreign nationals may be subject to the same prohibition.²⁴

B. Paving the Way for Circumvention: Citizens United and Speechnow.org

Citizens United v. FEC was a Supreme Court decision decided in 2010 that held, in part, that “independent expenditures,^[25] including those made by corporations, do not give rise to corruption or the appearance of corruption” in federal elections.²⁶ The decision shattered government policy of restricting corporations’ influence over elections dating back over 100 years.²⁷ Specifically, *Citizens United* overruled two Supreme Court decisions that had upheld restrictions on corporations making independent political expenditures.²⁸ In *Austin v. Michigan Chamber of Commerce*, and later in *McConnell v. FEC*, the Court found a compelling government interest in preventing corruption, or the appearance thereof, in federal elections, which justified the restriction on corporations’ otherwise free-speech right to make independent political expenditures.²⁹ In *Citizens United*, the Court held that such restrictions *did* violate the First Amendment because the compelling government interest identified in *Austin*, and affirmed in *McConnell*, did not apply to independent expenditures.³⁰ The Court further rejected each of the two other interests³¹ the Government had

²⁴ *Id.*

²⁵ An independent expenditure is “an expenditure by a person . . . expressly advocating the election or defeat of a clearly identified candidate; and . . . that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate’s authorized political committee, or their agents, or a political party committee or its agents.” 2 U.S.C. § 431(17) (2006).

²⁶ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 357 (2010).

²⁷ In 1907, Congress passed the Tillman Act, which banned all direct corporate contributions to candidates made from a corporation’s general treasury funds. Tillman Act, ch. 420, 34 Stat. 864 (1907) (codified as amended at 2 U.S.C. § 441b(a) (2006)). In 1947, Congress passed the Taft-Hartley Act, which extended this ban to independent expenditures as well. Taft-Hartley Act, ch. 120, 61 Stat. 136, 159 (1947) (codified as amended at 2 U.S.C. § 441b(a) (2006)).

²⁸ *See Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 655 (1990) (holding that government restrictions of political speech based on a speaker’s corporate identity did not violate the First Amendment guarantee of freedom of speech); *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 233 (2003) (affirming *Austin* and holding that the Bipartisan Campaign Reform Act, which barred independent corporate expenditures in elections, did not violate the First Amendment).

²⁹ *Id.*

³⁰ *Citizens United*, 558 U.S. at 357.

³¹ These interests included antidistortion and shareholder protection. The antidistortion interest has been described as: “unregulated general treasury expenditures will give corporations unfair influence in the electoral process and distort public debate in ways that undermine rather than advance the interests of listeners.” *Id.* at 469 (Stevens, J., dissenting). The shareholder protection interest has been described as: “[w]hen corporations use general treasury funds to praise or attack a particular candidate for office, it is the shareholders, as the residual claimants, who are effectively footing the bill. Those shareholders who disagree with the corporation’s electoral message may find their financial investments being used to undermine their political convictions.” *Id.* at 475.

suggested as a justification for restricting corporations' free-speech rights.³² The Court's decision did not address the ban³³ on direct contributions from corporations to candidate campaigns or political parties, which remain illegal in federal elections.³⁴

While *Citizens United* declared that independent political expenditures did not give rise to corruption or the appearance thereof, another decision, decided in light of *Citizens United* by the Court of Appeals for the D.C. Circuit, removed all restrictions on the source and size of contributions to groups making such expenditures.³⁵ In *Speechnow.org v. FEC*,³⁶ the Court held that limitations on contributions to political action committees ("PACs") that made only independent expenditures violated the First Amendment.³⁷ The Court reasoned,

[i]n light of [*Citizens United*'s holding] that independent expenditures do not corrupt or create the appearance of . . . corruption, *contributions* to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption. . . . Given this analysis . . . we must conclude that the government has no anti-corruption interest in limiting contributions to an independent expenditure group.³⁸

In line with the Supreme Court's decision in *Citizens United*, the D.C. Circuit limited its holding to independent expenditures, declaring that *Speechnow.org* did not affect limits³⁹ on direct contributions to candidates.⁴⁰

Taken together, *Citizens United* and *Speechnow.org* hold that money spent in the form of independent expenditures, whether for an expenditure itself or a contribution to a group making such expenditures, cannot be restricted in light of the First Amendment's guarantee of freedom of speech. Additionally, it matters not whether the entity making the expenditure or contribution is a natural person or a corporation. Accordingly, after *Citizens United* and *Speechnow.org*, the federal government is powerless to restrict corporate monetary influence in American elections, provided that corporations choose to spend money in the form of independent expenditures, rather than direct contributions to candidates.

³² See generally *id.* at 310.

³³ See *supra* text accompanying note 27. The Tillman Act banned all direct corporate contributions to candidates.

³⁴ See *supra* text accompanying note 32.

³⁵ *Speechnow.org v. Fed. Election Comm'n*, 599 F.3d 686, 694-95 (D.C. Cir. 2010).

³⁶ *Id.*

³⁷ *Speechnow.org* is credited with having created the "Super PAC." A Super PAC is a PAC that makes solely independent expenditures and therefore can raise and spend unlimited funds to influence elections.

³⁸ *Speechnow.org*, 599 F.3d at 694-95 (emphasis added).

³⁹ See *supra* text accompanying note 27.

⁴⁰ *Speechnow.org*, 599 F.3d at 696 ("Our holding does not affect . . . limits on direct contributions to candidates.").

C. Super PACs

Super PACs were created as a result of the D.C. Circuit's decision in *Speechnow.org*.⁴¹ While similar to other, "traditional" politically involved organizations, Super PACs are given more freedom to influence elections. Super PACs may receive unlimited contributions from individuals and corporations, and may spend unlimited amounts in the form of independent expenditures.⁴² Super PACs must also disclose their donors, but unlike some other political organizations, Super PACs report to the FEC rather than the IRS.⁴³ The crucial difference between other political organizations and Super PACs is that while other political organizations are limited to "issue-only advocacy,"⁴⁴ Super PACs may overtly advocate for or against a specific candidate.⁴⁵ Accordingly, Super PACs possess more freedom to influence elections than traditional political organizations because Super PACs may expressly advocate support or opposition to both candidates *and* issues in federal elections. The result is an organization that may accept unlimited contributions, both from individuals and corporations, and then spend unlimited amounts to influence *any* aspect of the political process.

D. 501(c)(4) Organizations

501(c) organizations are tax-exempt, nonprofit organizations created under § 501(c) of the Internal Revenue Code.⁴⁶ While the code provides for twenty-eight types⁴⁷ of such organizations, one is particularly relevant: 501(c)(4) organizations.

501(c)(4) organizations are commonly referred to as "Social Welfare Organizations."⁴⁸ Examples of such organizations include the AARP and NAACP.⁴⁹ As with other 501(c) organizations, the Internal Revenue Code provides that Social Welfare Organizations are tax exempt, but, in contrast, generally does not allow

⁴¹ *See generally id.*

⁴² *Super PACs*, OPENSECRETS.ORG CENTER FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/pacs/superpacs.php?cycle=2012>.

⁴³ *Id.*

⁴⁴ Issue-only advocacy is the act of making generalized communications regarding a public issue or problem without advocating voters to take a specific action at the election booth. In general terms, issue-only advocacy is "a position statement about, or a discussion of, public issues." David Goldberger, *The Power of Special Interest Groups to Overwhelm Judicial Election Campaigns: The Troublesome Interaction Between the Code of Judicial Conduct, Campaign Finance Laws, and the First Amendment*, 72 U. Cin. L. Rev. 1, 38 (2003).

⁴⁵ *Super PACs*, *supra* note 42.

⁴⁶ 26 U.S.C. § 501(c) (2006).

⁴⁷ *Id.*

⁴⁸ *Id.* Specifically, § 501(c)(4) describes these organizations as "[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees."

⁴⁹ *What is a 501(c)(4) Organization*, BOARD SOURCE, <http://www.boardsource.org/Knowledge.asp?ID=3.173>.

federal income tax deductions for donors.⁵⁰ The most important difference between other 501(c) organizations and Social Welfare Organizations is that Social Welfare Organizations are *not* prohibited from influencing elections.⁵¹ Like Super PACs, Social Welfare Organizations may accept unlimited amounts of money from donors,⁵² but unlike Super PACs, are not required to disclose those donors.⁵³ These rules result in the ability of Social Welfare Organizations to clandestinely influence elections, because they can spend money provided by undisclosed donors. Further, because Social Welfare Organizations' donors are undisclosed, it is possible for foreign nationals to circumvent the Congressional prohibition on election influence by channeling their funds through a Social Welfare Organization.

III. THE ILL CONSEQUENCES OF *CITIZENS UNITED* AND ITS PROGENY

This Section discusses the process by which foreign nationals may clandestinely influence American elections in direct violation of federal law, as well as solutions for combating and solving this problem. Subsection A discusses the process by which foreign money can enter the American electoral process after the decisions in *Citizens United* and *Speechnow.org*, including the role and interplay of Super PACs and Social Welfare Organizations. Subsection B proposes both judicial and legislative remedies to the problem of foreign election influence described in Subsection A. Subsection C describes other existing solutions to the problem and analyzes their potential effectiveness.

A. Foreign Money Can Influence Elections After *Citizens United* and *Speechnow.org*

No single case or rule allows foreign nationals to influence American elections. In fact, a long-standing congressional prohibition on such influence is still in force.⁵⁴ However, recent court decisions, coupled with current FEC⁵⁵ and IRS⁵⁶ law, have created the opportunity for foreign nationals to anonymously contribute money to organizations that are permitted to influence elections. This process allows foreign nationals to circumvent the congressional prohibition on their election influence.

⁵⁰ 26 U.S.C. § 170 (2006); see also *Donations to Section 501(c)(4) Organizations*, IRS, [http://www.irs.gov/Charities-&-Non-Profits/Other-Non-Profits/Donations-to-Section-501\(c\)\(4\)-Organizations](http://www.irs.gov/Charities-&-Non-Profits/Other-Non-Profits/Donations-to-Section-501(c)(4)-Organizations).

⁵¹ “An exempt IRC 501(c)(4) organization may intervene in political campaigns as long as its primary activity is the promotion of social welfare.” *Internal Revenue Manual*, IRS, http://www.irs.gov/irm/part7/irm_07-025-004.html#d0e332.

⁵² Michael Luo & Stephanie Strom, *Donor Names Remain Secret as Rules Shift*, N.Y. TIMES (Sep. 20, 2010), http://www.nytimes.com/2010/09/21/us/politics/21money.html?pagewanted=all&_r=0.

⁵³ “The 501(c)(4) retains the ability to engage in campaign activities but is not subject to donor disclosure requirements.” POLITICAL ACTIVITY OF ENVIRONMENTAL GROUPS AND THEIR SUPPORTING FOUNDATIONS: UPDATE 2008, U.S. SENATE 6 (Sept. 2008), available at http://epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=142d595f-411a-4057-b495-029a095fe25f.

⁵⁴ See Foreign Agents Registration Act (FARA), 22 U.S.C. § 611 *et seq.* (2006); Federal Election Campaign Act (FECA), 2 U.S.C. § 431 *et seq.* (2006).

⁵⁵ See *supra*, Part II.C.

⁵⁶ See *supra*, Part II.D.

In *Citizens United*, the Supreme Court declared that “independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption” in federal elections.⁵⁷ With this statement, the Court determined that the only compelling government interest that justifies restrictions on corporations free speech rights (i.e., the anticorruption interest) did not apply to independent expenditures. Accordingly, after *Citizens United*, corporations are free to spend unlimited amounts to influence elections, provided that their spending is for independent expenditures, and not direct contributions to candidates.

In light of *Citizens United*, the Court of Appeals for the D.C. Circuit ruled in *Speechnow.org* that if limits on corporations’ independent expenditures violated the First Amendment, then limits on contributions to corporations that make only independent expenditures also violate the First Amendment.⁵⁸ While *Citizens United* struck down all limits on independent expenditures made *by* corporations, *Speechnow.org* struck down all limits on contributions made *to* corporations making only independent expenditures. When considered together, *Citizens United* and *Speechnow.org* allow unlimited amounts of money to be spent on independent expenditures in federal elections.

Facially, the decisions in *Citizens United* and *Speechnow.org* seemingly have no relation to foreign nationals influencing American elections. Certainly, these decisions allowed for the creation of Super PACs, which can raise and spend unlimited funds in furtherance of election-related goals, but the implicit understanding in both decisions was that independent expenditures would involve only domestic organizations raising and spending domestic money.⁵⁹ However, when considered in relation to current FEC and IRS law, these decisions paved the way for foreign money to clandestinely enter the American electoral process.

The Internal Revenue Code is important to consider because corporations and other organizations implicated in *Citizens United* and *Speechnow.org* are organized under its laws and must abide by its rules with regard to political expenditures. Some tax-exempt organizations, for example 501(c)(3) “Charitable Organizations,” are prohibited from spending money to influence elections.⁶⁰ Others, like Social Welfare Organizations, are permitted to spend money to influence elections.⁶¹ It is these Social Welfare Organizations that create the possibility for foreign money to infiltrate American elections.

Social Welfare Organizations create such a possibility because, under IRS law, they are not required to disclose their donors.⁶² Disclosure has long been a method

⁵⁷ *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 357 (2010).

⁵⁸ *Speechnow.org v. Fed. Election Comm'n*, 599 F.3d 686 (D.C. Cir. 2010).

⁵⁹ This understanding can be inferred from the fact that foreign influence in American elections is prohibited by statute, and that the Court has spoken approvingly of such restrictions. See e.g., *Citizens United*, 558 U.S. at 423 (Stevens, J., dissenting) (“[W]e have never cast doubt on laws that place special restrictions on campaign spending by foreign nationals.”).

⁶⁰ See *supra* text accompanying note 46.

⁶¹ *Internal Revenue Manual*, *supra* note 51.

⁶² POLITICAL ACTIVITY OF ENVIRONMENTAL GROUPS AND THEIR SUPPORTING FOUNDATIONS, *supra* note 53.

for the government to ensure transparency and integrity in the electoral process, and many other tax-exempt organizations that spend money to influence elections, even in unlimited amounts, must adhere to disclosure requirements.⁶³ Social Welfare Organizations are an exception to the IRS's general disclosure requirements. Accordingly, they can accept money from any entity, whether it is a natural person or a corporation, without public knowledge. Further, because they do not disclose their donors,⁶⁴ Social Welfare Organizations can accept money from foreign nationals seeking to circumvent Congressional bans on their election influence without providing knowledge to the public or the IRS through disclosure. Because Social Welfare Organizations are permitted to spend money to influence elections,⁶⁵ money received by such organizations from foreign donors can be spent directly on elections.

While Social Welfare Organizations are permitted to spend money themselves to influence elections, they become even more suspect when their relation to Super PAC spending is examined. Both Social Welfare Organizations and Super PACs may *accept* unlimited amounts of money from their donors, but there are two important differences. First, Super PACs must disclose their donors, while Social Welfare Organizations have no such requirement.⁶⁶ Second, Super PACs can *spend* unlimited funds to influence elections, while Social Welfare Organizations are subject to the limitation that influencing elections cannot be their "primary activity."⁶⁷ When used in conjunction, however, Social Welfare Organizations and Super PACs can be used to channel unlimited amounts of foreign money into American elections.

The process by which this may occur is quite simple. A foreign entity, whether a foreign individual or a foreign corporation, seeking to influence an American election need only accumulate the desired funds and donate them to a Social Welfare Organization. Because Social Welfare Organizations are not required to disclose their donors, there is no record of such a foreign donation with either the IRS or the FEC.⁶⁸ For all regulatory purposes, the money is treated as if it came from a domestic entity, because nondisclosure shields the source of the funds. Further, because Social Welfare Organizations may accept unlimited amounts of money from donors,⁶⁹ there is no limit on the amount of money that may be given to a Social Welfare Organization by a foreign entity.

Once foreign money is donated to a Social Welfare Organization, that organization is permitted to spend it to influence elections.⁷⁰ If the Social Welfare

⁶³ *Super PACs*, *supra* note 42. Super PACs are one such organization.

⁶⁴ POLITICAL ACTIVITY OF ENVIRONMENTAL GROUPS AND THEIR SUPPORTING FOUNDATIONS, *supra* note 53.

⁶⁵ *Internal Revenue Manual*, *supra* note 51.

⁶⁶ *See supra* Part II.C, II.D.

⁶⁷ Luo & Strom, *supra* note 52.

⁶⁸ POLITICAL ACTIVITY OF ENVIRONMENTAL GROUPS AND THEIR SUPPORTING FOUNDATIONS, *supra* note 53.

⁶⁹ Luo & Strom, *supra* note 52.

⁷⁰ *Internal Revenue Manual*, *supra* note 51.

Organization chooses to do so, it will be seen and reported as an expenditure solely by that Social Welfare Organization, with no indication or disclosure of any foreign contribution. In this way, foreign influence over American elections is shielded by the Social Welfare Organization. However, this is not the only, or most effective, way to shield such foreign influence.

Social Welfare Organizations can accept unlimited contributions, but they are subject to one limitation on the amount of money they may spend to influence elections—*influencing elections may not become a Social Welfare Organization's primary purpose.*⁷¹ In practice, this means that no more than 50% of a Social Welfare Organization's expenditures may be for political purposes.⁷² This rule provides a minimal limit on the amount of money foreign entities can channel directly through Social Welfare Organizations, because the Social Welfare Organization will only be able to spend half of any foreign contribution for political purposes, or will have to “offset” the foreign contribution with an equal amount of domestic contributions spent outside the political process. This is where the relationship between Social Welfare Organizations and Super PACs becomes crucial.

Social Welfare Organizations may donate to Super PACs, and many Social Welfare Organizations have created their own Super PACs to facilitate this process.⁷³ Unlike Social Welfare Organizations, Super PACs have no limitation on the amount of money they may spend to influence elections.⁷⁴ Further, while Super PACs are required to disclose their donors to the FEC, this requirement extends only to the immediate donor.⁷⁵ Accordingly, a Super PAC that accepts donations from a Social Welfare Organization, even a Social Welfare Organization that has accepted money from a foreign entity, need only disclose the Social Welfare Organization itself. Therefore, as when Social Welfare Organizations spend foreign money *themselves* to influence elections, Social Welfare Organizations' *donations* to a Super PAC similarly shield the identity of any foreign contributors. The FEC, in reviewing a Super PAC's disclosure statement, will see only the identity of the Social Welfare Organization and the amount donated. It will not see the identity of any of the Social Welfare Organization's contributors, and, indeed, never will

⁷¹ Luo & Strom, *supra* note 52.

⁷² *Id.*

⁷³ A humorous example of this interplay can be seen in the activities of comedian Steve Colbert. During the 2012 election cycle, Colbert created a Super PAC called “Colbert Super PAC” or, alternatively, “Americans for a Better Tomorrow, Tomorrow,” as well as a Social Welfare Organization called “Colbert Super PAC S.H.H.” to satirize the American campaign-finance system after *Citizens United*. Colbert received a Peabody award for his Super PAC parody, recognizing it as an “innovative means of teaching American viewers about [*Citizens United*].” Courtney Subramanian, *Stephen Colbert's Super PAC Satire Lands Him a Peabody*, TIME NEWSFEED (Apr. 5, 2012), <http://newsfeed.time.com/2012/04/05/stephen-colberts-super-pac-satire-lands-him-a-peabody>; *see also* STEPHEN COLBERT'S COLBERT SUPER PAC, <http://www.colbertsuperpac.com/home.php>.

⁷⁴ *Super PACs, supra* note 42.

⁷⁵ *Id.*

because Social Welfare Organizations do not share the same disclosure requirement as Super PACs.⁷⁶

This interplay between Social Welfare Organizations and Super PACs results in an election-financing system that permits the clandestine influence of foreign entities on the American political process, in direct violation of federal law. Any foreign entity wishing to influence an American election can shield its activities through the use of a Social Welfare Organization, and this Social Welfare Organization can then spend foreign contributions directly or indirectly through a Super PAC. These loopholes manifest a broken and contradictory election-financing system after the decision in *Citizens United* and its progeny.

B. Proposed Solutions

This Section proposes both judicial and legislative remedies to the problem of foreign nationals illegally influencing American elections, and the requirements for each to be accomplished. Subsection 1 discusses the Supreme Court overruling its decision in *Citizens United*. Subsection 2 discusses Congress passing legislation mandating disclosure requirements for all Super PACs and Social Welfare Organizations. Subsection 3 discusses passing a constitutional amendment, as opposed to mere legislation. For each Subsection, an outline of the solution will be presented, followed by an analysis of the viability of the solution given our country's current political demographics.

1. Overrule *Citizens United*

The simplest way to correct the campaign-finance problems created by *Citizens United* is for the Supreme Court to overrule its decision. The doctrine of *stare decisis*, by which courts follow legal precedents articulated in previously decided cases, does *not* preclude the Supreme Court from overruling a prior case.⁷⁷ Indeed, as Justice Kennedy has noted, “[o]ur precedents are not sacrosanct, for we have overruled prior decisions where the necessity and propriety of doing so has been established.”⁷⁸ There are many examples of such overruling in the Court's history.⁷⁹ Even the decision in *Citizens United* itself required the Court to overrule precedent from two prior cases.⁸⁰

⁷⁶ POLITICAL ACTIVITY OF ENVIRONMENTAL GROUPS AND THEIR SUPPORTING FOUNDATIONS, *supra* note 53.

⁷⁷ James F. Spriggs II & Thomas G. Hansford, *Explaining the Overruling of U.S. Supreme Court Precedent*, 63 J. POL. 1091, 1091 (2001).

⁷⁸ *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989).

⁷⁹ *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), which had held that a state sodomy statute did not violate the fundamental rights of homosexuals); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896), which had allowed state-sponsored segregation); *Slaughter-House Cases*, 83 U.S. 36 (1872) (overruling *Scott v. Sanford*, 60 U.S. 393 (1856), which had held that people of African descent brought into the United States and held as slaves were not protected by the Constitution and were not U.S. citizens); Spriggs & Hansford, *supra* note 77 (“Between 1946 and 1992 . . . the Supreme Court overruled 154 of its prior decisions, for an average of about three overruled decisions each term.”).

⁸⁰ *See McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990).

As Justice Stevens noted in his dissenting opinion in *Citizens United*, one of “the standard considerations we have used to determine *stare decisis* value” is “the workability of [a precedent’s] legal rule.”⁸¹ As discussed, *Citizens United* is proving to be most unworkable because it allows foreign nationals to clandestinely circumvent the Congressional ban on their influencing American elections.⁸² Ironically, this was something that the majority refused to consider in its decision in *Citizens United*.⁸³ Accordingly, *Citizens United* is ripe for reconsideration because its rule, and other rules stemming therefrom,⁸⁴ has proven to be unworkable in that it creates the opportunity for foreign nationals to illegally, and secretly, influence American elections.

In fact, the Supreme Court had the opportunity to overrule *Citizens United* shortly after it was decided. In *American Tradition Partnership, Inc. v. Bullock*,⁸⁵ the Court granted certiorari to consider whether its decision in *Citizens United* applied to a Montana statute⁸⁶ that had been upheld by the Montana Supreme Court.⁸⁷ Given this procedural posture, the Court could have taken the opportunity to reconsider, and overrule, its decision in *Citizens United*. Instead, the court issued a per curiam opinion⁸⁸ reversing the Montana Supreme Court and holding that “[t]here can be no serious doubt” that *Citizens United*’s ruling applied to the Montana statute and that the statute violated First Amendment protections of political speech.⁸⁹

However, in an interesting and important twist, Justice Breyer wrote a dissenting opinion, in which Justices Ginsburg, Sotomayor, and Kagan joined.⁹⁰ In his dissent, Justice Breyer wrote, “I disagree with the Court’s holding for the reasons expressed in Justice Stevens’ dissent in [*Citizens United*]. . . . Were the matter up to me, I would vote to grant the petition for certiorari in order to reconsider *Citizens United*.”⁹¹ This dissent is important because it signals that at least four justices

⁸¹ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 411 (2010) (Stevens, J., dissenting).

⁸² *See supra* Part III.A.

⁸³ “We need not reach the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation’s political process.” *Citizens United*, 558 U.S. at 362.

⁸⁴ *See, e.g.*, *Speechnow.org v. Fed. Election Comm’n*, 599 F.3d 686 (D.C. Cir. 2010).

⁸⁵ *Am. Tradition P’ship, Inc. v. Bullock*, 132 S. Ct. 2490 (2012).

⁸⁶ The statute provided that a “corporation may not make . . . an expenditure in connection with a candidate or a political committee that supports or opposes a candidate or a political party.” MONT. CODE ANN. § 13–35–227(1) (2011).

⁸⁷ *Bullock*, 132 S. Ct. at 2491.

⁸⁸ A per curiam opinion is a ruling issued by an appellate court of multiple judges in which the decision rendered is made by the court (or at least, a majority of the court) acting collectively and anonymously. In contrast to regular opinions, a per curiam does not list the individual judge responsible for authoring the decision, but minority dissenting and concurring decisions are signed. BLACK’S LAW DICTIONARY 523 (2nd Pocket ed.).

⁸⁹ *Bullock*, 132 S. Ct. at 2491.

⁹⁰ *Id.*

⁹¹ *Id.* at 2491-92.

currently on the court are in favor of overruling the *Citizens United* decision.⁹² Further, because *Citizens United* was a 5-4 decision,⁹³ the slimmest of Supreme Court margins, it would take only one additional Justice to join the thinking of Justices Breyer, Ginsburg, Sotomayor, and Kagan for the Court to have a majority in favor of overruling the decision. Finally, because several Justices who sided with the majority in *Citizens United* are nearing retirement age,⁹⁴ there is the very real possibility that a newly appointed Justice will be the deciding fifth vote in favor of overruling.

While overruling *Citizens United* is simple in theory, it becomes more difficult in practice given the current composition of the Court. As discussed, *Citizens United* was decided on a 5-4 basis, and the five Justices who decided the majority remain on the Court.⁹⁵ It is unlikely that any of these five Justices will make a striking reversal and side with the minority in any reconsideration of the case. Indeed, this is exactly what did *not* happen in *American Tradition Partnership*.⁹⁶ While the Court's opinion was issued per curiam, Justice Breyer's dissent evidences that the decision in *American Tradition Partnership* was in fact a 5-4 decision similar to *Citizens United*, with the newly appointed Justice Kagan replacing the recently retired Justice Stevens in dissent.⁹⁷ Accordingly, for there to be any realistic chance of overruling *Citizens United*, the Court will have to change its composition, specifically by replacing a Justice from the majority in *Citizens United* with a Justice who recognizes the wisdom in overruling. Concerned citizens should demand to know presidential candidates' opinions of the *Citizens United* decision, and vote for those candidates who are likely to appoint a Justice who favors overruling.

2. Pass Disclosure Legislation

All hope is not lost for the present, however. While *Citizens United* held that political speech may not be restricted based on the identity of the speaker as a corporation,⁹⁸ the Court also *upheld* existing disclosure requirements for politically involved organizations.⁹⁹ Even Justice Stevens' dissent agreed with the majority in

⁹² While not expressly stated in Justice Breyer's dissent, an inference may be drawn that these four Justices are in favor of overruling *Citizens United* because there is no other motivation for reconsidering the case if not to overrule it.

⁹³ See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

⁹⁴ A 2006 study in the Harvard Journal of Law and Public Policy found that the average retirement age for Supreme Court Justices was 78.7 years. Sheryl Gay Stolberg, *Future of an Aging Court Raises Stakes of Presidential Vote*, N.Y. TIMES (June 27, 2012), <http://www.nytimes.com/2012/06/28/us/presidential-election-could-reshape-an-aging-supreme-court.html>. Currently, Justices Scalia and Kennedy are both 77.

⁹⁵ See *Citizens United*, 558 U.S. 310. Those Justices were Kennedy, who authored the opinion, Chief Justice Roberts, Justice Scalia, Justice Thomas, and Justice Alito.

⁹⁶ *Bullock*, 132 S. Ct. 2490.

⁹⁷ *Id.*

⁹⁸ *Citizens United*, 558 U.S. at 358.

⁹⁹ "The Government may regulate . . . political speech through disclaimer and disclosure requirements." *Id.* at 310; "The judgment is affirmed with respect to BCRA's disclaimer and disclosure requirements." *Id.* at 372; see also *Buckley v. Valeo*, 424 U.S. 1, 64 (1976)

this respect.¹⁰⁰ Indeed, the Court preferred disclosure to other forms of regulating political speech,¹⁰¹ noting that “modern technology makes disclosures rapid and informative;”¹⁰² “prompt disclosure of expenditures can provide . . . citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters;”¹⁰³ and that “disclosure permits citizens . . . to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.”¹⁰⁴ Finally, in a similar context “the Court has upheld registration and disclosure requirements on lobbyists, even though Congress has no power to ban lobbying itself.”¹⁰⁵

Based on its decision in *Citizens United*, the Court would allow, and perhaps even encourage, legislation that increased disclosure requirements for *all* politically involved organizations in an attempt to prevent foreign nationals from influencing American elections.¹⁰⁶ Indeed, the Court of Appeals for the D.C. Circuit suggested exactly that in its opinion in *Speechnow.org*. “[R]equiring disclosure . . . deters and helps expose violations of other campaign finance restrictions, such as those barring contributions from foreign corporations or individuals.”¹⁰⁷ Interestingly, *Citizens United* seems to stand for the premise that disclosure requirements, as opposed to more direct restrictions of political speech, are the best, and perhaps only, way to police foreign nationals who wish to influence American elections. In this way, the Court may be seen as having closed the door of direct restrictions on the speech of politically involved organizations, but having left open the window of disclosure requirements thereon.

Congress has taken sight of such a window. In 2010, versions of the Democracy is Strengthened by Casting Light on Spending in Elections Act, commonly referred to as the “DISCLOSE Act,” were introduced in both the House of Representatives¹⁰⁸

(“[D]isclosure requirements impose no ceiling on campaign-related activities.”); *Citizens United v. Fed. Election Comm’n*, 530 F. Supp. 2d 274, 281 (D.D.C. 2008) (“[T]he Supreme Court has written approvingly of disclosure provisions triggered by political speech even though the speech itself was constitutionally protected under the First Amendment.”).

¹⁰⁰ “I concur in the Court’s decision to sustain BCRA’s disclosure provisions and join Part IV of its opinion.” *Citizens United*, 558 U.S. at 396 (Stevens, J., dissenting).

¹⁰¹ “The Court has explained that disclosure is a less restrictive alternative to more comprehensive regulations of speech.” *Id.* at 369; *see also* *Fed. Election Comm’n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986).

¹⁰² *Citizens United*, 558 U.S. at 371.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 368 (quoting *United States v. Harris*, 347 U.S. 612, 625 (1954) (“[Congress] has merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose.”)).

¹⁰⁶ As discussed, Social Welfare Organizations are permitted to involve themselves in the political process, but are not required to disclose their donors to the public. *Supra*, Part II.D.

¹⁰⁷ *Speechnow.org v. Fed. Election Comm’n*, 599 F.3d 686, 698 (D.C. Cir. 2010).

¹⁰⁸ H.R. 5175, 111th Cong. (2010) (introduced by Rep. Chris Van Hollen (D-Maryland)).

and the Senate.¹⁰⁹ The purpose of the Act was to “amend [FECA] to prohibit foreign influence in Federal elections, to prohibit government contractors from making expenditures with respect to such elections, and to establish additional disclosure requirements with respect to spending in such elections, and for other purposes.”¹¹⁰ The Act received support from President Obama.¹¹¹ Unfortunately, while the Act passed the House of Representatives on a 219-206 vote,¹¹² it failed to receive the 60-vote “super majority” in the Senate required to overcome a Republican filibuster.¹¹³ Encouragingly, the Act was revived in 2012 as the so called “DISCLOSE Act 2.0.”¹¹⁴ Unfortunately, the 2012 version stalled in the Senate Committee on Rules and Administration after hearings had been held.¹¹⁵ In 2013, the act was again revived in the house as the “DISCLOSE 2013 Act.”¹¹⁶ This latest version has been referred to the House Subcommittee on the Constitution and Civil Justice.¹¹⁷ It seems unlikely that any iteration of the DISCLOSE Act will be passed in 2014, given that Republicans currently control the House and Democrats do not possess a 60-vote super majority in the Senate, but the opportunity remains for a more disclosure-inclined Congress to craft a legislative solution to the campaign-finance problems created by *Citizens United*. Concerned citizens should address their federal legislators and encourage passage of the DISCLOSE Act, or similar disclosure legislation.

3. Pass Constitutional Amendment

While disclosure legislation would remedy many of the ills created by the *Citizens United* decision, the importance of integrity in the electoral process may require greater protection than mere legislation. Legislation requires the approval of

¹⁰⁹ S. 3628, 111th Cong. (2010) (introduced by Sen. Charles Schumer (D-New York)).

¹¹⁰ S. 3628, 111th Cong. (2010), 2010 CONG US S 3628 (Westlaw).

¹¹¹ “The DISCLOSE Act would establish the strongest-ever disclosure requirements for election-related spending by special interests . . . and it would restrict spending by foreign-controlled corporations. It would give the American public the right to see exactly who is spending money in an attempt to influence campaigns for public office.” Press Release, *Statement by the President on Passage of the DISCLOSE Act in the House of Representatives*, THE WHITE HOUSE OFFICE OF THE PRESS SECRETARY, (June 24, 2010), <http://www.whitehouse.gov/the-press-office/statement-president-passage-disclose-act-house-representatives>.

¹¹² *Final Vote Results for Roll Call 391*, OFFICE OF THE CLERK OF THE U.S. HOUSE OF REPRESENTATIVES (June 24, 2010), <http://clerk.house.gov/evs/2010/roll391.xml>.

¹¹³ The Senate fell one vote short, at 59-39. *U.S. Senate Roll Call Votes 111th Congress—2nd Session*, UNITED STATES SENATE (Sept. 23, 2010), http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=2&vote=00240.

¹¹⁴ S. 3369, 112th Cong. (2012) (introduced by Sen. Sheldon Whitehouse (D-Rhode Island)).

¹¹⁵ *Bill Summary & Status 112th Congress S. 2219*, THE LIBRARY OF CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:SN02219:@@@X>.

¹¹⁶ *Bill Summary & Status 113th Congress H.R. 148*, THE LIBRARY OF CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d113:h.r.148>.

¹¹⁷ *Id.*

only a simple majority of both houses of Congress,¹¹⁸ and any such disclosure legislation, if passed, may likewise be repealed by a simple majority vote. Accordingly, the threat exists that any disclosure legislation passed in the wake of *Citizens United* may be repealed by a later Congress. To alleviate this threat, provisions designed to increase transparency and disclosure in the electoral process may be enshrined as an amendment to the Constitution. President Obama has called for such an amendment,¹¹⁹ and Senator Max Baucus has opined that a constitutional amendment is “the only way we can solve [the problems created by *Citizens United*].”^{120 121}

Article V provides the procedures by which the Constitution may be amended.¹²² The amendment process has two stages: proposal and ratification.¹²³ Amendments may be proposed in two ways. First, Congress may propose amendments directly by a two-thirds vote of both houses.¹²⁴ Alternatively, when requested by two-thirds of the state legislatures, Congress is required to call a convention for the purpose of proposing amendments.¹²⁵ Once an amendment has been proposed, it must be ratified by three-fourths of the states, either through the state legislatures or conventions in each state.¹²⁶

¹¹⁸ U.S. CONST. art. I, § 7, cl. 2.

¹¹⁹ “Over the longer term, I think we need to seriously consider mobilizing a constitutional amendment process to overturn *Citizens United* (assuming the Supreme Court doesn't revisit it).” Byron Tau, *Obama Calls for Constitutional Amendment to Overturn Citizens United*, POLITICO (Aug. 29, 2012), <http://www.politico.com/politico44/2012/08/obama-calls-for-constitutional-amendment-to-overturn-133724.html>.

¹²⁰ Paul Blumenthal, *Citizens United Constitutional Amendment Floated by Senate Democrats*, HUFFINGTON POST (July 24, 2012), http://www.huffingtonpost.com/2012/07/24/citizens-united-constitutional-amendment-senate-democrats_n_1700269.html.

¹²¹ Numerous and various constitutional amendments have been proposed in the wake of *Citizens United*. See, e.g., *Review of Constitutional Amendments Proposed in Response to Citizens United*, LEAGUE OF WOMEN VOTERS, <http://www.lwv.org/content/review-constitutional-amendments-proposed-response-citizens-united>.

¹²² U.S. CONST. art. V, § 2. “The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.” *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* In this way, state legislatures can pressure Congress into proposing desired amendments. Thirty-four states would be required.

¹²⁶ *Id.* Thirty-eight states would be required.

Unfortunately, the short-term prospects for amending the Constitution to remedy the ills of *Citizens United* are bleak. As discussed, Republicans currently control the House of Representatives, and, while Democrats control the Senate, they are well short of the two-thirds majority needed to propose an amendment in that body. Similarly, a glance at the Electoral College map from the 2012 election reveals that twenty-five states voted for Governor Mitt Romney, and accordingly, as “red states,” are unlikely to support a constitutional amendment.¹²⁷ Therefore, it is unlikely that an amendment will be proposed directly by two-thirds of Congress or through a constitutional convention called by two-thirds of the state legislatures. Further, it is even more unlikely, given the current demographics of the nation, that three-fourths of the states would approve any proposed amendment. Nonetheless, concerned citizens should address both their state and federal legislators and encourage passage of a constitutional amendment increasing disclosure of campaign finances and restoring integrity to the electoral process.

C. Analysis of Existing Solutions

This Section is a survey and analysis of several existing solutions proposed to remedy the ills of *Citizens United* and *Speechnow.org*. While far from an exhaustive list, the solutions identified in this section are representative of many proposals currently in existence.¹²⁸ Subsections 1 and 2 discuss two leading constitutional amendments proposed in the wake of *Citizens United* and its progeny. Subsection 3 discusses public campaign financing, or what has come to be referred to as “Fair Elections” or “Clean Elections.” Subsection 4 discusses a novel way in which the otherwise free-speech rights of corporations that contract with the federal government may be regulated. Subsection 5 discusses a recent proposal to amend federal regulations regarding the political activities of Social Welfare Organizations. For each Subsection, an outline of the solution is presented, followed by an analysis of the solution’s potential effectiveness in preventing foreign money from illegally influencing American elections. While many of the solutions focus nominally on “corporate” monetary influence in American elections, they can be understood as also addressing foreign influence in American elections because the conduits for foreign money entering the American electoral process, Super PACs and Social Welfare Organizations, are themselves corporations.

¹²⁷ 2012 Presidential Election Results, WASH. POST, <http://www.washingtonpost.com/wp-srv/special/politics/election-map-2012/president/> (last updated Nov. 19, 2012). Generally speaking, opinions of *Citizens United* fall along ideological lines, with Republicans supporting the decision, and Democrats opposing it. Indeed, all five Justices in the majority in *Citizens United* were appointed by Republican Presidents. Justices Scalia and Kennedy were appointed by President Reagan, Justice Thomas was appointed by President George H.W. Bush, and Chief Justice Roberts and Justice Alito were appointed by President George W. Bush; see also Adam Liptak, “Politicians in Robes”? Not Exactly, But . . ., N.Y. TIMES (Nov. 26, 2012), http://www.nytimes.com/2012/11/27/us/judges-rulings-follow-partisan-lines.html?_r=0.

¹²⁸ Generally, proposed solutions fall within two categories: constitutional amendments and federal legislation. In this Section, Subsections 1 and 2 discuss proposed constitutional amendments, while Subsections 3 and 4 discuss legislative solutions. Subsection 5 discusses a current proposal to amend existing federal regulations through the federal rulemaking process.

1. Move to Amend

Move to Amend (“MTA”) is a national, grassroots coalition of hundreds of organizations and nearly 250,000 people.¹²⁹ Formed in 2009, the group is committed to “social and economic justice, ending corporate rule, and building a vibrant democracy that is generally accountable to the people, not corporate interests.”¹³⁰ MTA’s statement of values consists of “accountability and responsibility, both personally and organizationally; transparency; community; movement building, dedication to MTA mission, goal and tactics; and commitment to anti-oppression within ourselves, communities, work places, policies, and representation.”¹³¹

MTA is calling for an amendment to the Constitution to unequivocally state that inalienable rights belong to human beings only, that money is not a form of protected free speech under the First Amendment, and that any and all campaign spending may be regulated.¹³² The text of the proposed amendment is as follows:

Section 1 [A corporation is not a person and can be regulated]

The rights protected by the Constitution of the United States are the rights of natural persons only.

Artificial entities, such as corporations, limited liability companies, and other entities, established by the laws of any State, the United States, or any foreign state shall have no rights under this Constitution and are subject to regulation by the People, through Federal, State, or local law.

The privileges of artificial entities shall be determined by the People, through Federal, State, or local law, and shall not be construed to be inherent or inalienable.

Section 2 [Money is not speech and can be regulated]

Federal, State and local government shall regulate, limit, or prohibit contributions and expenditures, including a candidate’s own contributions and expenditures, for the purpose of influencing in any way the election of any candidate for public office or any ballot measure.

Federal, State and local government shall require that any permissible contributions and expenditures be publicly disclosed.

¹²⁹ Kaitlin Sopoci-Belknap, *Move to Amend Wins Big at the Ballot Box: Americans Fed Up with Big Money and Undue Corporate Influence*, MOVE TO AMEND, <https://movetoamend.org/press-release/move-amend-wins-big-ballot-box-americans-fed-big-money-and-undue-corporate-influence>; see also *Endorsing Organizations*, MOVE TO AMEND, <https://movetoamend.org/organizations>.

¹³⁰ *MTA Coalition*, MOVE TO AMEND, <https://movetoamend.org/about-us>.

¹³¹ *Id.*

¹³² *Id.*

The judiciary shall not construe the spending of money to influence elections to be speech under the First Amendment.

Section 3

Nothing contained in this amendment shall be construed to abridge the freedom of the press.¹³³

MTA's strategy is to work on the local level before moving on to the state or federal level to build a grassroots movement organized and powerful enough to force Congress to act on its proposed amendment.¹³⁴ The group's primary organizational tool is the local resolution campaign, in which local affiliates of MTA work to pass resolutions in support of amending the constitution in their communities.¹³⁵ MTA considers local resolutions to be "a great way to educate the public and to send a strong signal to legislators that people care about these issues."¹³⁶

The ways in which a resolution may be passed depend on the laws of the state and locality in which an MTA affiliate operates, but generally include: (1) City Council Resolutions, in which residents request that their city council, county commissioners, village board, or other governing body passes a resolution; (2) Ballot Initiative Resolutions through City Council, in which residents request that their council or board place a resolution on the ballot to be voted on by the people, rather than passing it directly; and (3) Ballot Initiative Resolutions through a Citizen Signature Gathering Process, in which residents put a resolution onto their local, county, or state ballot directly by collecting signatures from other residents.¹³⁷

For the 2012 election cycle, MTA's goal was to have 50 resolutions on local ballots.¹³⁸ However, as a sign of the broad appeal of MTA's amendment, local affiliates placed resolutions on ballots in over 150 cities, and "in every single town the vote was supportive, often by an overwhelming margin."¹³⁹ Indeed, as stated by Kaitlin Sopoci-Belknap, a member of the MTA National Leadership Team,

In every single community where Americans have had the opportunity to call for a Constitutional amendment to outlaw corporate personhood, they have seized it and voted yes overwhelmingly. Tuesday's results show that the Movement to Amend has *nearly universal approval*. Americans are fed up with large corporations wielding undue influence over our elections and our legal system. Citizens United is not the cause, it is a

¹³³ *Move to Amend's Proposed 28th Amendment to the Constitution*, MOVE TO AMEND, <https://movetoamend.org/democracy-amendments>.

¹³⁴ *Frequently Asked Questions*, MOVE TO AMEND, <https://movetoamend.org/frequently-asked-questions> [hereinafter *FAQs*, MOVE TO AMEND].

¹³⁵ *Id.*

¹³⁶ *Pass a Local Resolution*, MOVE TO AMEND, <https://movetoamend.org/pass-local-resolution>.

¹³⁷ *Id.*

¹³⁸ *FAQs*, MOVE TO AMEND, *supra* note 134.

¹³⁹ Sopoci-Belknap, *supra* note 129; *see also Resolutions and Ordinances*, MOVE TO AMEND, <https://movetoamend.org/resolutions-map>.

symptom and Americans want to see that case overturned not by simply going back to the politics of 2009 before the case, but rather by removing big money and special interests from the process entirely.¹⁴⁰

In a similar sign of broad support, an online petition in support of the MTA amendment has received 332,255 signatures as of March 7, 2014, nearly two-thirds of the way towards the 500,00 signatures goal.¹⁴¹

Based on its text, MTA's amendment, if passed, would remedy many of the ills created by *Citizens United* and its progeny, including the ability of foreign nationals to clandestinely influence American elections. Section 1 of the amendment declares that a corporation is not a person and can be regulated.¹⁴² Section 2 declares that money is not speech and can be regulated.¹⁴³ This language is in direct opposition to that used in the opinions of *Citizens United* and *Speechnow.org*, in which the Court held that monetary expenditures were the equivalent of speech and that political speech by corporations could not be restricted under the First Amendment.¹⁴⁴

Accordingly, Sections 1 and 2 of MTA's proposed amendment would preempt the decisions of *Citizens United* and *Speechnow.org* and allow the federal government to place restrictions on the ability of corporations, including Super PACs and Social Welfare Organizations, to participate in the electoral process. Specifically, the federal government would be permitted to place restrictions on both donations to, and expenditure by, such corporations, as well as place disclosure requirements thereon. If well crafted, such restrictions would effectively end the ability of foreign nationals to inject money into the American electoral process, either by strengthening the current ban on foreign election influence¹⁴⁵ or by increasing disclosure on corporations like Super PACs and Social Welfare Organizations that currently may secretly accept foreign money without public knowledge. Therefore, MTA's proposed constitutional amendment would be an effective solution to the problem of foreign money clandestinely influencing American elections after *Citizens United* and *Speechnow.org*.

2. The OCCUPIED Amendment

The Outlawing Corporate Cash Undermining the Public Interest in our Elections and Democracy ("OCCUPIED") Amendment is a constitutional amendment introduced by Congressman Ted Deutch of Florida's now-21st district in November 2011.¹⁴⁶ Deutch is a Democrat and a member of the House Judiciary Committee.¹⁴⁷

¹⁴⁰ Sopoci-Belknap, *supra* note 129.

¹⁴¹ *Motion to Amend the US Constitution—Sign the Petition*, MOVE TO AMEND, <http://movetoamend.nationbuilder.com/petition>.

¹⁴² *Move to Amend's Proposed 28th Amendment to the Constitution*, *supra* note 133.

¹⁴³ *Id.*

¹⁴⁴ See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010); *Speechnow.org v. Fed. Election Comm'n*, 599 F.3d 686 (D.C. Cir. 2010).

¹⁴⁵ See 2 U.S.C. §§ 431 *et seq.* (1974).

¹⁴⁶ THE OCCUPIED AMENDMENT, http://teddeutch.house.gov/uploadedfiles/occupied_amendment_information.pdf. In a sign of nonpartisan, bicameral support, Senator Bernie Sanders (I-Vermont) introduced a Senate version of the OCCUPIED Amendment in December 2011. Sanders declared, "[t]here comes a time when an issue is so important that

The amendment “would overturn the *Citizens United* decision, reestablishing the right of Congress and the states to regulate campaign finance laws, and to effectively outlaw the ability of for-profit corporations to contribute to campaign spending.”¹⁴⁸ According to Deutch,

Americans of all stripes agree that for far too long, corporations have occupied Washington and drowned out the voices of the people. I introduced the OCCUPIED Amendment because the days of corporate control of our democracy must end. It is time to return the nation’s capital and our democracy to the people.¹⁴⁹

The OCCUPIED Amendment was directly inspired by the Occupy Wall Street movement of 2012, and shares many of the movement’s ideas and goals, including eliminating corporate monetary influence in American elections.¹⁵⁰ The amendment would restore to Congress the authority to write campaign finance laws that regulate and disclose *all* contributions and expenditures by *all* individuals and *all* types organizations in American elections.¹⁵¹ The text of the proposed amendment, including brief explanations, is as follows:

Section I. – Corporations are not people.

The rights protected by the Constitution of the United States are the rights of natural persons and do not extend to for-profit corporations, limited liability companies, or other private entities established for business purposes or to promote business interests under the laws of any state, the United States, or any foreign state.

Explanation: Section I of the OCCUPIED Amendment makes clear that corporations, and entities established to promote the business interests of their member corporations, are not people with inalienable rights enshrined in our Constitution. This section overturns the incorrect assertion in the Supreme Court decision *Citizens United* that

the only way to address it is by a constitutional amendment.” Zaid Jilani, *Bernie Sanders Introduces OCCUPIED Constitutional Amendment to Ban Corporate Money in Politics*, THINK PROGRESS (Dec. 8, 2011), <http://thinkprogress.org/special/2011/12/08/385511/bernie-sanders-introduces-occupied-constitutional-amendment-to-ban-corporate-money-in-politics/>.

¹⁴⁷ Zaid Jilani, *Rep. Deutch Introduces OCCUPIED Constitutional Amendment to Ban Corporate Money in Politics*, THINK PROGRESS, <http://thinkprogress.org/special/2011/11/18/372361/rep-deutch-introduces-occupied-constitutional-amendment-to-ban-corporate-money-in-politics/>.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ Suzy Khimm, *House Democrat: Occupy the Constitution!*, WASH. POST (Nov. 18, 2011), http://www.washingtonpost.com/blogs/wonkblog/post/house-democrat-occupy-the-constitution/2011/11/18/gIA63CPZN_blog.html.

¹⁵¹ See K. Hoerner, *Why We Must Work Together to Pass the OCCUPIED Amendment*, OCCUPY LAS VEGAS MOVEMENT, <http://www.occupylv.org/topics/why-we-must-work-together-pass-occupied-amendment>.

corporations have free speech rights protected by the Constitution and are therefore able to spend unlimited corporate profits in our elections. Section I also denies corporations and other entities established for business purposes the right to claim that worker protections, environmental regulations, and other laws written by the people violate their court-awarded constitutional rights.

Section II. – Corporations can be regulated by people.

Such corporate and other private entities established under law are subject to regulation by the people through the legislative process so long as such regulations are consistent with the powers of Congress and the States and do not limit the freedom of the press.

Explanation: Section II simply states that corporations are established in accordance with the laws of the people and they are therefore subject to laws written by the people. Corporations cannot claim they have constitutional protections from laws written by the people to limit pollution, ensure the fair treatment of workers, and safeguard the public.

Section III. – Corporate prohibition in elections.

Such corporate and other private entities shall be prohibited from making contributions or expenditures in any election of any candidate for public office or upon any ballot measure submitted to a vote of the people.

Explanation: Section III prohibits business corporations and business associations from using their profits to participate in our elections, whether it is through direct expenditures from their general treasuries or through funding third party groups that air attack ads, influence voters, or electioneer communications. This section slams shut the door opened by Citizens United that enabled our elections to be flooded by corporate campaign spending.

Section IV. – Regulation of all electioneering, contributions, and expenditures by individuals and other entities.

Congress and the States shall have the power to regulate and set limits on all election contributions and expenditures, including a candidate's own spending, and to authorize the establishment of political committees to receive, spend, and publicly disclose the sources of those contributions and expenditures.

Explanation: Section IV strikes back against the argument made in Citizens United that caps on electoral spending and expenditures are unconstitutional. By reaffirming the right of Congress and the States to establish campaign finance laws that require public disclosure, corporations will no longer be able to anonymously funnel cash to

third party groups for the purpose of funding malicious attack ads, smear campaigns, and companion Super PACs. Section IV also allows Congress to set limits and require disclosure for any and all political contributions and expenditures by individuals and other private entities. This section allows Congress to end the practice of a few billionaires spending unlimited funds to promote their personal political agendas.¹⁵²

Based on its text, the OCCUPIED Amendment, if passed, would remedy many of the ills created by *Citizens United* and its progeny, including the ability of foreign nationals to clandestinely influence American elections. While similar to MTA's amendment, the OCCUPIED Amendment is slightly different and somewhat broader in scope.

Sections I and II of the OCCUPIED Amendment are similar to Section 1 of MTA's amendment, in that both declare that corporations are not people and can be regulated by the people.¹⁵³ However, where Section 1 of MTA's amendment would apply to *all* corporations, including Super PACs and Social Welfare Organizations, Section I of the OCCUPIED Amendment, on its face, applies to only *for-profit* corporations.¹⁵⁴ MTA claims that the OCCUPIED Amendment "[i]mply[es] by omission that [Super PACs and Social Welfare Organizations] may claim personhood rights under the Constitution."¹⁵⁵ However, supporters of the OCCUPIED Amendment claim that subsequent sections of the amendment "enable[] Congress to regulate, limit, and require disclosure of [Super PACs' and Social Welfare Organizations'] electoral expenditures."¹⁵⁶

Section IV of the OCCUPIED Amendment is similar to Section 2 of MTA's amendment in that both declare that federal campaign spending may be regulated by Congress.¹⁵⁷ Section III of the OCCUPIED Amendment, however, is stronger than MTA's amendment because it entirely prohibits corporate influence in American elections.¹⁵⁸ Where MTA's amendment simply states that Congress *may* regulate corporations and their election spending, presumably up to and including an entire prohibition if it so desires, the OCCUPIED Amendment does not leave this decision to the discretion of Congress.¹⁵⁹ According to Deutch,

¹⁵² THE OCCUPIED AMENDMENT, *supra* note 146.

¹⁵³ Compare *Move to Amend's Proposed 28th Amendment to the Constitution* § 1, *supra* note 133, with THE OCCUPIED AMENDMENT §§ 1 and 2, *supra* note 146.

¹⁵⁴ Compare *Move to Amend's Proposed 28th Amendment to the Constitution* § 1, *supra* note 133, with THE OCCUPIED AMENDMENT § 1, *supra* note 146. Super PACs and Social Welfare Organizations are non-profit corporations.

¹⁵⁵ *Other Amendments*, MOVE TO AMEND, <https://movetoamend.org/other-amendments>.

¹⁵⁶ Hoerner, *supra* note 151.

¹⁵⁷ Compare *Move to Amend's Proposed 28th Amendment to the Constitution* § 2, *supra* note 133, with THE OCCUPIED AMENDMENT § 4, *supra* note 146.

¹⁵⁸ THE OCCUPIED AMENDMENT § 3, *supra* note 146.

¹⁵⁹ Compare *Move to Amend's Proposed 28th Amendment to the Constitution*, *supra* note 133, with THE OCCUPIED AMENDMENT, *supra* note 146.

the American people don't want to rely upon Congress to pass a law that may just help at the margins. What they want is to return government back to the people, so that corporations don't dictate the outcome of elections. I believe there will be a groundswell of support that moves us forward in a way that respects the American people again.¹⁶⁰

Accordingly, the OCCUPIED Amendment would preempt the decisions of *Citizens United* and *Speechnow.org* and allow the federal government to restrict corporations', including Super PACs' and Social Welfare Organizations', election spending. However, the OCCUPIED Amendment goes a step further by entirely banning corporations from electoral participation. While some have argued that this ban would apply only to for-profit corporations and not non-profit corporations like Super PACs and Social Welfare Organizations,¹⁶¹ the language of Section IV of the OCCUPIED Amendment makes clear that, at the very least, Congress would be permitted to enact disclosure requirements on non-profit corporations that may currently accept secret foreign money. Therefore, the proposed OCCUPIED Amendment would be an effective solution to the problem of foreign money clandestinely influencing American elections after *Citizens United* and *Speechnow.org*.

3. Public Campaign Financing

Under current federal law,¹⁶² qualified presidential candidates may receive federal government funds to pay for the valid expenses of their political campaigns in both the primary and general elections.¹⁶³ To qualify for public funding, presidential candidates must first meet various eligibility requirements, such as agreeing to limit campaign spending to a specified amount.¹⁶⁴ The Supreme Court has affirmed that expenditure limits for publicly funded presidential candidates are constitutional.¹⁶⁵

For primary elections, partial public funding is available to primary candidates in the form of matching payments.¹⁶⁶ Specifically, the federal government will match up to \$250 of an individual's total contributions to an eligible candidate.¹⁶⁷ A candidate must establish eligibility by showing broad-based public support.¹⁶⁸ This is

¹⁶⁰ Khimm, *supra* note 150.

¹⁶¹ See *Other Amendments*, *supra* note 155.

¹⁶² See Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001 *et seq.*; 2 U.S.C. §§ 431 *et seq.*; Pub. L. No. 93-443.

¹⁶³ *Public Funding of Presidential Elections*, FED. ELECTION COMM'N, <http://www.fec.gov/pages/brochures/pubfund.shtml#1>.

¹⁶⁴ *Id.*

¹⁶⁵ See *Republican Nat'l Comm. v. Fed. Election Comm'n*, 487 F. Supp. 280, 283 (S.D.N.Y. 1980) (holding that conditioning eligibility for public campaign funds upon compliance with expenditure limitations does not violate First Amendment rights of candidates or supporters), *aff'd*, 445 U.S. 955 (1980).

¹⁶⁶ *Public Funding of Presidential Elections*, *supra* note 163.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

achieved by raising in excess of \$5,000 in each of at least 20 states, for a total of over \$100,000.¹⁶⁹ Candidates must also agree to: limit campaign spending for all primary elections to \$10 million plus a cost of living adjustment (“COLA”);¹⁷⁰ limit campaign spending in each state to \$200,000 plus COLA, or to a specified amount based on the number of voting age individuals in the state plus COLA, whichever is greater;¹⁷¹ and limit spending of personal funds to \$50,000.¹⁷²

For general elections, the presidential nominee of each major party is eligible for a public grant of \$20 million plus COLA.¹⁷³ To be eligible to receive public funds, the candidate must limit spending to the amount of the grant and may not accept private contributions for the campaign.¹⁷⁴ Additionally, candidates may spend up to \$50,000 from their own personal funds.¹⁷⁵

Additional eligibility requirements for both primary and general elections candidates include: spending public funds only for campaign-related expenses; limiting spending to amounts specified by the campaign finance law; keeping records and, if requested, supplying evidence of qualified expenses; cooperating with an audit of campaign expenses; repaying public funds, if necessary; and paying any civil penalties imposed by the FEC.¹⁷⁶

Many election-minded organizations support public financing of election campaigns, and would have public financing extended to all federal candidates, not merely presidential candidates.¹⁷⁷ These groups claim many benefits for public financing, including: making candidates and elected officials accountable only to the public interest, rather than powerful special interests; saving taxpayer dollars by reducing inappropriate giveaways to campaign contributors; making elections fair by leveling the playing field for candidates; allowing politicians to spend less time fundraising and more time addressing national priorities; giving all citizens, regardless of wealth, a fair shot to be heard and participate in every step of the democratic process; and reinvigorating our democracy by helping to reengage voters

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* This is known as the “National Spending Limit.”

¹⁷¹ *Id.*; see also *Presidential Spending Limits for 2012*, FED. ELECTION COMM’N, http://www.fec.gov/pages/brochures/pubfund_limits_2012.shtml.

¹⁷² *Public Funding of Presidential Elections*, *supra* note 163.

¹⁷³ *Id.* A major party candidate is the nominee of a party whose candidate received 25% or greater of the total popular vote in the preceding presidential election. Minor party candidates (i.e., the nominee of a party whose candidate received between 5% and 25% of the total popular vote in the preceding presidential election) and new party candidates (i.e., the nominee of a party that is neither a major party nor a minor party) may also be eligible for public funding.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ See, e.g., *Fair Elections Now*, COMMON CAUSE, <http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=4773857>. Such organizations may refer to public financing by other terms, including “Fair Elections” and “Clean Elections;” see also *Fair Elections Now Act: Frequently Asked Questions*, COMMON CAUSE, <http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=4773859>.

and increasing voter turnout.¹⁷⁸ As a sign of grassroots support for these contentions, a recent bipartisan poll reported that voters strongly support a proposal to provide qualified candidates limited public funding in exchange for their agreement to abstain from accepting large contributions.¹⁷⁹

Unfortunately, a problem exists that prevents public campaign financing from being an effective remedy to the ills of *Citizens United* and its progeny. While public financing is certainly an effective method for combating the deleterious effects of large, individual contributions directly to federal candidates, the problem with public financing in regard to *Citizens United* is that public financing does not address independent expenditures supporting or opposing a candidate for public office.¹⁸⁰ Indeed, under current public campaign finance law, individuals may make their own independent expenditures regardless of whether a candidate receives public funds.¹⁸¹

Accordingly, public funding of federal election campaigns, even if extended to all candidates for federal office, will not be able to solve the problem of foreign nationals clandestinely influencing American elections because public financing leaves open the independent expenditure loophole by which foreign money may enter the American electoral process. Therefore, organizations and individuals seeking to curtail foreign nationals circumventing the ban on their election influence must look to other remedies.¹⁸²

4. Restricting Federal Contractors

In response to the Supreme Court's *Citizens United* decision, two law professors at Yale University, Bruce Ackerman and Ian Ayres, proposed a novel way in which the federal government can still limit corporations' campaign spending.¹⁸³ Specifically, the professors note that "[w]hile Congress can't issue a broad ban on all corporations, it *can* target the very large class of corporations that does business with the federal government, and ban those corporations from endorsing or opposing a candidate for public office."¹⁸⁴

A 2008 Government Accountability Office ("GAO") study found that almost three-quarters of the largest 100 publicly traded corporations, as well as tens of thousands of others, are federal contractors.¹⁸⁵ If Congress endorsed the professors'

¹⁷⁸ *The Benefits of Fair Elections*, COMMON CAUSE, <http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=4773849>.

¹⁷⁹ *Fair Elections Poll*, THE TARRANCE GROUP, <http://www.commoncause.org/atf/cf/%7Bfb3c17e2-cdd1-4df6-92be-bd4429893665%7D/POLLING%20MEMO%20FEB%202009%20FINAL.PDF>.

¹⁸⁰ See *Public Funding of Presidential Elections*, *supra* note 163.

¹⁸¹ *Id.*

¹⁸² Public campaign financing remains an effective solution to curtail many of the problems identified by its supporters. See *Fair Elections Poll*, *supra* note 179.

¹⁸³ Bruce Ackerman & Ian Ayres, *Despite Court Ruling, Congress Can Still Limit Campaign Finance*, WASH. POST, January 26, 2010, at A15; see also Ian Ayres, *A Contractual Solution to Citizens United*, FREAKONOMICS BLOG (January 29, 2010), <http://www.freakonomics.com/2010/01/29/a-contractual-solution-to-citizens-united/>.

¹⁸⁴ *Id.* (internal quotation marks omitted).

¹⁸⁵ *Id.*

proposal to restrict the election influence of corporations that contract with the federal government, such corporations would face a stark choice: they could endorse candidates or do business with the federal government, but they couldn't do both.¹⁸⁶ The professors conclude that “[w]hen push [comes] to shove, it’s likely that very few corporations [will] be willing to pay such a high price for their free speech.”¹⁸⁷

The professors’ proposal requires only a modest extension of existing federal law.¹⁸⁸ Federal contractors are already prohibited from “directly or indirectly . . . [making] any contribution of money or other things of value” to “any political party, committee, or candidate.”¹⁸⁹ Accordingly, current federal law prohibits federal contractors from making *direct contributions* to political parties, committees, or candidates, but federal contractors are currently free to make *independent expenditures*. The professors’ proposal would extend the current ban to include independent expenditures “endorsing or opposing a candidate for public office.”¹⁹⁰

The professors find support for their solution in case law. First, the constitutionality of the current “contractor statute”¹⁹¹ has never been seriously challenged.¹⁹² In fact, there is only one case in which the statute has been considered.¹⁹³ In that case, the District Court for the Southern District of New York upheld the ban, noting the “greater likelihood that the public will perceive corrupt relationships” when contractors endorse their friends in power.¹⁹⁴

Second, the Supreme Court has addressed a closely related problem and found that the government’s similar restriction on the otherwise free-speech rights of government employees passed constitutional muster.¹⁹⁵ The Hatch Act of 1939¹⁹⁶ prohibited government employees from express endorsements “in a political advertisement, a broadcast, campaign literature, or similar material.”¹⁹⁷ This language can be understood to prohibit independent expenditures by government employees. Importantly, the Supreme Court has upheld the Hatch Act as a valid

¹⁸⁶ *Id.*

¹⁸⁷ Ayres, *supra* note 183 (internal quotation marks omitted).

¹⁸⁸ Ackerman & Ayres, *supra* note 183.

¹⁸⁹ *Id.*; see also 2 U.S.C.A. § 441(c) (West 2013) (restricting contributions by federal government contractors).

¹⁹⁰ Ackerman & Ayres, *supra* note 183.

¹⁹¹ 2 U.S.C.A. § 441(c) (West 2013).

¹⁹² Ackerman & Ayres, *supra* note 183.

¹⁹³ Fed. Election Comm’n v. Weinstein, 462 F. Supp. 243 (S.D.N.Y. 1978) (holding that the ban prohibiting certain political contributions by governmental contractors did not abridge their First Amendment rights).

¹⁹⁴ *Id.* at 243.

¹⁹⁵ Ackerman & Ayres, *supra* note 183.

¹⁹⁶ See 5 U.S.C.A. §§ 1501-1508, 7321-7326 (West 1939) (officially “An Act to Prevent Pernicious Political Activities”).

¹⁹⁷ Ackerman & Ayres, *supra* note 183; see also 5 C.F.R. § 733.122 (1997).

restriction of federal employees' otherwise free-speech rights.¹⁹⁸ Accordingly, the inference can be made, and the professors indeed infer,¹⁹⁹ that if the Court approves of restricting the otherwise free-speech rights of federal employees (i.e., individuals who contract with the government), it would similarly approve of restricting the otherwise free-speech rights of government contractors (i.e., corporations that contract with the government). As the professors note,

these powerful and publicly-traded fictional people should at least also be subject to the same anti-corruption restrictions as real people. Current law prohibits federal contractors (and those that are trying to become one) from directly or indirectly making contributions to political parties and candidates. Our proposal to bar contractors from buying endorsement time merely captures one powerful method of making an indirect contribution.²⁰⁰

Accordingly, the professors' proposal may be seen as a permissible "carve out" to the decisions of *Citizens United* and *Speechnow.org*, and would allow the federal government to restrict a nontrivial amount²⁰¹ of corporations from making independent expenditures in federal elections. In this way, the professors' "contractual solution" to the ills of *Citizens United* and its progeny would serve to restrict *some* corporations from making independent expenditures. If passed, the proposal would be a positive step in eliminating many of the channels by which foreign nationals may choose to infuse their money into American elections. However, the contractual solution must be seen as only an incremental step in eliminating the loopholes by which foreign money can enter the American electoral process, but one that would likely have the support of the Supreme Court.

5. Proposed Regulations on Social Welfare Organizations

In November 2013, the Obama administration, through the Treasury Department and the IRS, proposed new regulations intended to curb political activity by Social Welfare Organizations.²⁰² These regulations would clarify both how the IRS defines political activity with regard to Social Welfare Organizations and the amount of

¹⁹⁸ *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75 (1947) (holding that the Hatch Act did not violate the First Amendment), *aff'd*, 413 U.S. 548 (1973).

¹⁹⁹ Ackerman & Ayres, *supra* note 183; Ayres, *supra* note 183.

²⁰⁰ Ayres, *supra* note 183.

²⁰¹ Corporations that contract with the federal government.

²⁰² Nicholas Confessore, *New Rules Would Rein In Nonprofits' Political Role*, N.Y. TIMES (Nov. 26, 2013), http://www.nytimes.com/2013/11/27/us/politics/new-campaign-rules-proposed-for-tax-exempt-nonprofits.html?_r=0; see also Matea Gold & Tom Hamburger, *Obama Administration Proposes Rule that Would Rein in Political Activity of Nonprofits*, WASH. POST (Nov. 26, 2013), http://www.washingtonpost.com/politics/obama-administration-proposes-new-rule-that-would-rein-in-political-activity-of-nonprofits/2013/11/26/505f5e28-56ca-11e3-8304-caf30787c0a9_story.html; Treasury, *IRS Will Issue Proposed Guidance for Tax-Exempt Social Welfare Organizations*, U.S. DEPT. OF THE TREASURY (Nov. 26, 2013), <http://www.treasury.gov/press-center/press-releases/Pages/jl2225.aspx>; Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities, 78 Fed. Reg. 230, 71535 (Nov. 29, 2013) (to be codified at 26 C.F.R. pt. 1).

money that Social Welfare Organizations may spend on such activity.²⁰³ If adopted, the changes would be “the first wholesale shift in a generation in the regulations governing political activity by Social Welfare Organizations.”²⁰⁴ While not prohibiting political activity outright, the proposed regulations seek to establish clearer limits for campaign-related spending and would force Social Welfare Organizations to either limit their political expenditures or register as openly political organizations, such as Super PACs.²⁰⁵ The proposed regulations have been described as “a first critical step toward creating clear-cut definitions of political activity by . . . social welfare organizations.”²⁰⁶

The proposed regulations provide guidance to Social Welfare Organizations regarding political activities that will not be considered to promote social welfare.²⁰⁷ Specifically, the regulations define the term “candidate-related political activity” and would amend current regulations to indicate that the promotion of social welfare does not include this type of activity.²⁰⁸ Under the proposed regulations, “candidate-related political activity” would include:

Communications

- Communications that expressly advocate for a clearly identified political candidate or candidates of a political party.
- Communications that are made within 60 days of a general election (or within 30 days of a primary election) and clearly identify a candidate or political party.
- Communications expenditures that must be reported to the Federal Election Commission.

Grants and Contributions

- Any contribution that is recognized under campaign finance law as a reportable contribution.
- Grants to section 527 political organizations and other tax-exempt organizations that conduct candidate-related political activities (note that a grantor can rely on a written certification from a grantee stating that it does not engage in, and will not use grant funds for, candidate-related political activity).

Activities Closely Related to Elections or Candidates

- Voter registration drives and “get-out-the-vote” drives.
- Distribution of any material prepared by or on behalf of a candidate or by a section 527 political organization.
- Preparation or distribution of voter guides that refer to candidates (or, in a general election, to political parties).

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.* For discussion of Super PACs, see *supra* Part II.C.

²⁰⁶ Gold & Hamburger, *supra* note 202.

²⁰⁷ Treasury, *IRS Will Issue Proposed Guidance for Tax-Exempt Social Welfare Organizations*, *supra* note 202.

²⁰⁸ *Id.*

- Holding an event within 60 days of a general election (or within 30 days of a primary election) at which a candidate appears as part of the program.²⁰⁹

While the proposed regulations are an effort to limit the use of undisclosed money in federal elections, several caveats caution against their potential effectiveness in preventing foreign money from entering the American political process. First, as of the writing of this Note, the regulations remain preliminary, and must go through a 90-day public comment process that is likely to include a public hearing.²¹⁰ Such a process may result in the “watering-down” of the regulations, particularly if powerful organizations that support the use of undisclosed money voice their objections. Indeed, strong resistance to the regulations is anticipated.²¹¹ Next, legal challenges similar to those in *Citizens United* and *Speechnow.org* may result in the regulations being declared unconstitutional on free-speech grounds.²¹² Further, the regulations may simply result in donors sending their money to other entities, such as private partnerships, which may engage in politics without disclosing their donors,²¹³ or still other entities whose campaign spending is not subject to IRS jurisdiction.²¹⁴ Such a migration would make the proposed regulations ineffective at combating the very problem sought to be remedied. Finally, and perhaps most importantly, the regulations themselves are confusing and perhaps as ambiguous, if not more so, than the current situation.²¹⁵

Notwithstanding these issues, the proposed regulations are significant in spirit, if not in form, because they seek to restrict the influence of undisclosed, and potentially foreign, money in federal elections. The regulations themselves are evidence that the Obama administration recognizes the problems created by the ability of political donors and organizations to clandestinely participate in the electoral process. If nothing more, the regulations and subsequent comment process will amplify the discourse surrounding federal campaign-financing, and may ultimately lead to a more effective solution to the problem of foreign money influencing American elections.

IV. OPPOSING VIEWPOINTS

This Section identifies and refutes two counterarguments to the assertions of this Note. Subsection A discusses the argument that *Citizens United* was decided correctly and should not be overruled. Subsection B discusses the argument that foreign nationals are not, in fact, influencing American elections at all. Both arguments will be refuted as inapplicable to the scope of this Note, as well as evidencing a misunderstanding of the topics presented herein.

²⁰⁹ *Id.*

²¹⁰ Gold & Hamburger, *supra* note 202.

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ Confessore, *supra* note 202.

²¹⁵ *Id.*

A. Citizens United was Decided Correctly

Perhaps the most obvious objection to this Note is that *Citizens United* was decided correctly, and accordingly should continue to stand as good law. The arguments in support of this contention are similar, if not identical, to those made by the majority of the Supreme Court in its *Citizens United* decision.²¹⁶ In summary, these arguments include: assertions that corporations are persons under the law, and therefore are entitled to the same constitutional rights and protections as natural persons; that spending money is the equivalent of making protected, First Amendment speech; and that independent expenditures by politically involved organizations do not corrupt or create the appearance of corruption in the political process.²¹⁷

Regardless of the validity of any of these arguments, they are simply inapplicable to a discussion of foreign influence in American elections after *Citizens United*. The majority in *Citizens United* refused to consider the possibility of foreign money entering the American electoral process as part of its decision.²¹⁸ Accordingly, the problem with *Citizens United*, at least in relation to foreign monetary influence, is not that it was incorrectly decided, but rather that it was decided without consideration of the role foreign nationals may come to play as a result of the new rules articulated by the Court. One cannot credibly argue that a decision was correctly or incorrectly decided on an issue that the Court did not consider. Therefore, arguments that *Citizens United* was correctly decided have no bearing on the discussion presented in this Note.

Further, even allowing that *Citizens United* was decided correctly, the majority opinion wrote approvingly of disclosure requirements that would remedy many of the ills caused by the decision.²¹⁹ Accordingly, any credible argument in support of *Citizens United* must recognize that the Court would still allow the disclosure-oriented solutions presented in this Note. Indeed, such recognition was evident in the decision of *Speechnow.org*.²²⁰ Therefore, arguments that *Citizens United* was correctly decided would not suffice to refute many of the legislative solutions presented herein.

B. Foreign Nationals are Not Influencing American Elections

Similarly, the objection may be made that this entire discussion is irrelevant because, regardless of existing legal loopholes, foreign nationals are simply not, in fact, influencing American elections. This argument may, at least initially, be supported by the existence of current federal legislation that prohibits foreign nationals from influencing American elections.²²¹

However, this argument has little force when considered in full. The very problem created by the decisions in *Citizens United* and *Speechnow.org* is the

²¹⁶ See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

²¹⁷ *Id.*

²¹⁸ See *supra* note 83 and accompanying text.

²¹⁹ See *supra* notes 99, 101, and accompanying text.

²²⁰ *Speechnow.org v. Fed. Election Comm'n* 599 F.3d 686, 698 (D.C. Cir. 2010).

²²¹ See *supra* notes 17-19 and accompanying text.

opportunity for foreign nationals to circumvent the federal prohibition on their election influence—an opportunity that has been shown to exist.²²² Even allowing that no foreign national has successfully circumvented the prohibition to date, the mere existence of the opportunity is the real problem, not whether the opportunity has been seized successfully. Therefore, simply objecting that no foreign national has, in fact, influenced an American election evidences a misunderstanding of the central problem created by *Citizens United* and its progeny.

Further, any contention that foreign nationals are not currently influencing American elections is merely wishful thinking with no evidentiary support. The process by which foreign nationals may infuse money into the American electoral process is a clandestine one, in which nondisclosure hides the identity of the donor, whether foreign or domestic.²²³ Indeed, the very problem discussed throughout this Note is the inability of the government and the public to ascertain who, in fact, is making donations to independent-expenditure groups. Therefore, the argument that *no* foreign national is influencing American elections carries as much weight and support as the argument that *every* foreign national is influencing American elections. Under current law, it is simply impossible to ascertain the amount or frequency of foreign contributions to domestic political organizations, and any argument to the contrary is disingenuous. Accordingly, this argument is simply meritless conjecture, and again evidences a misunderstanding of the real problem our nation is facing.

V. CONCLUSION

The Supreme Court's decision in *Citizens United* has created the opportunity for foreign nationals to clandestinely influence American elections in direct violation of federal law. *Citizens United*, and its progeny, allows foreign nationals to channel unlimited political funds through Social Welfare Organizations and on to Super PACs, where they may be spent without limit. Accordingly, *Citizens United* should be reconsidered and overruled by the Supreme Court, given the government's compelling interest in preventing foreign influence in American elections. Absent a decision to overrule, many of the ills created by *Citizens United* can be remedied through legislation increasing disclosure requirements for politically involved organizations or by passing a constitutional amendment of similar effect.

The American election system is broken, directly because of *Citizens United*. In order for American citizens to reclaim control of their electoral process, *Citizens United* must be reconsidered and overruled by the Supreme Court. If the Court refuses to do so, both state and federal legislators have the power to craft a solution that works within the bounds established by *Citizens United*. Unfortunately, the short-term prospects for judicial and legislative solutions are grim.

Perhaps the most important and effective method for remedying the ills caused by *Citizens United* is to raise political awareness of the decision and its effects, thereby allowing for a more robust political discourse surrounding our nation's campaign-finance system. Concerned and informed citizens are uniquely able to motivate their leaders to construct effective solutions to political problems, including the problem of foreign influence in American elections. As Thomas Jefferson wrote, "wherever the people are well informed they can be trusted with their own

²²² See *supra* Part III.A.

²²³ See *supra* Part III.

government . . . whenever things get so far wrong as to attract their notice, they may be relied on to set them to rights.²²⁴

²²⁴ Letter from Thomas Jefferson to Richard Price, LIBRARY OF CONGRESS (Jan. 8, 1789), <http://www.loc.gov/exhibits/jefferson/60.html>.