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The Surprising Survival—So Far—of the Corporate Contribution Ban

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I. INTRODUCTION

In *Citizens United v. Federal Election Commission*,[1] the Supreme Court invalidated the longstanding ban on the expenditure of corporate funds in federal election campaigns. In so doing, the Court dismissed outright an argument that had long been the foundation for the restriction of corporate money in election campaigns—that, due to the "substantial aggregations of wealth amassed by the special advantages which go with the

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1 *See* Citizens United v. FEC, 558 U.S. 310 (2010).

corporate form[,]" corporate money poses a distinct threat to the integrity of democracy.[2] Instead, viewing corporations as essentially "associations of citizens,"[3] *Citizens United* determined that "the First Amendment does not permit Congress to make . . . categorical distinctions based on the corporate identity of the speaker . . . . Government may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations."[4]

The Court's emphatic language would appear to doom *all* special restrictions on the use of corporate money in elections—contributions as well as expenditures. After all, in *Buckley v. Valeo*,[5] the Court determined that contributions—that is, money given *to* a candidate, political party, or political committee to be used in an election—as well as expenditures *by* a candidate, party, or other campaign participant are protected by the First Amendment. To be sure, contributions are somewhat less protected than expenditures. The Court determined contribution limits are less of a burden on political activity than spending limits,[6] and they can be justified by the substantial government interests in preventing corruption and its appearance. Nonetheless, limits on campaign contributions are subject to constitutional scrutiny and, when found to be unduly burdensome or insufficiently justified, have been invalidated.[7] If, as *Citizens United* indicates, there is no constitutional basis for treating the political spending of corporations differently from that of other campaign participants, then corporations, like other campaign participants, should be able to make contributions subject to constitutionally reasonable dollar limits to candidates, political parties, and political committees.

Yet, *Citizens United* notwithstanding, the 117-year-old federal ban on corporate campaign contributions and similar prohibitions in twenty-one states remain on the books and

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2 *See, e.g.*, FEC v. Nat'l Right to Work Comm., 459 U.S. 197, 207 (1982).

3 *Citizens United*, 558 U.S. at 349, 354, 356.

4 *Id.* at 364–65.

5 *See* Buckley v. Valeo, 424 U.S. 1, 14–23 (1976).

6 *Id.* at 20 (a contribution limit "entails only a marginal restriction upon the contributor's ability to engage in free communication").

7 *See, e.g.*, Randall v. Sorrell, 548 U.S. 230 (2006); McCutcheon v. FEC, 572 U.S. 185 (2014); FEC v. Cruz, 596 U.S. 289 (2022). *See also* Thompson v. Hebdon, 589 U.S. 1 (2019) (vacating and remanding lower court decision dismissing challenge to state's contribution limits).

continue to apply.[8] In the fourteen years since *Citizens United*, at least ten decisions by federal courts of appeals (from six different circuits) or state supreme courts have upheld these federal or state corporate contribution bans.[9] The decisions have relied on a pre-*Citizens United* decision of the Supreme Court, *Federal Election Commission v. Beaumont*,[10] which upheld the federal corporate contribution ban and, especially, on two of the rationales central to *Beaumont*—protecting the interests of dissenting shareholders and preventing donors from circumventing the limits on individual contributions by using corporations as conduits. They have also been grounded in the fundamental principle of modern campaign finance doctrine, which *Citizens United* underscored, that contribution restrictions are subject to a less rigorous standard of review than expenditure restrictions.

It is not clear how long these arguments will continue to have force. In recent cases, the Court has questioned the significance of the anti-circumvention rationale.[11] *Citizens United* itself rejected shareholder protection as a justification for the corporate spending ban,[12] so that argument's survival as a justification for restricting corporate contributions turns on the Court's continued application of a less demanding standard of review to contribution restrictions. Yet, the Court has been ratcheting up review of contribution restrictions even as it has dropped hints that it is considering reconsidering the contribution versus expenditure distinction outright. The Court's increasing skepticism about campaign finance restrictions generally may ultimately prove fatal to the longstanding corporate campaign contribution ban.

For now, at least, the corporate campaign contribution ban remains a part of campaign finance regulation in federal elections and in nearly half the states. This Article examines the history of

8 Nat'l Conf. State Legislatures, *State Limits on Contributions to Candidates, 2023-2024 Election Cycle*, (last updated May 2023), https://perma.cc/T4AU-9YDR.

9 *See, e.g.*, United States v. Emmons, 8 F.4th 454 (6th Cir. 2021); 1A Auto, Inc. v. Dir. of Off. of Campaign & Pol. Fin, 105 N.E.3d 1175 (Mass. 2018); Yamada v. Snipes, 786 F.3d 1182 (9th Cir. 2015); Cath. Leadership Coal. of Texas v. Reisman, 764 F.3d 409, 441–45 (5th Cir. 2014); Iowa Right To Life Comm., Inc. v. Tooker, 717 F.3d 576 (8th Cir. 2013); Minnesota Citizens Concerned for Life, Inc. v. Swanson, 692 F.3d 864 (8th Cir. 2012) (en banc); United States v. Danielczyk, 683 F.3d 611 (4th Cir. 2012); Ognibene v. Parkes, 671 F.3d 174 (2d. Cir. 2011); Thalheimer v. City of San Diego, 645 F.3d 1109, 1124–26 (9th Cir. 2011); Green Party of Connecticut v. Garfield, 616 F.3d 189 (2d Cir. 2010).

10 FEC v. Beaumont, 539 U.S. 146 (2003).

11 *See, e.g.*, *Cruz*, 598 U.S. at 306; *McCutcheon*, 572 U.S. at 221; FEC v. Wisconsin Right to Life, Inc., 551 U.S. 449, 479 (2007).

12 *Citizens United,* 558 U.S. at 361–62.

corporate contribution regulation, its current status, and its potential future. Part II traces the ban's statutory and doctrinal development. Part III analyzes how the courts over the last fourteen years have threaded the needle of sustaining the corporate contribution ban notwithstanding *Citizens United*. Part IV addresses other developments in the Supreme Court's campaign finance jurisprudence that threaten the survival of the corporate contribution ban. Part V provides brief descriptions of possible alternatives to a corporate contribution ban. Part VI concludes with some speculations about the persistence of the corporate contribution ban.

II. History

A. Statutory Framework

Concern about the impact of the "money and power of a great corporation" on American democracy can be seen at least as far back as Andrew Jackson's battle with the Second Bank of the United States,[13] but corporate money in politics did not emerge as a critical issue until the late nineteenth century. Civil service reform constrained the ability of political parties to use patronage to finance their campaigns through assessments on government employees. The rise of the secret ballot further limited the power of the party machines to count on their regular voters, and so contributed to the need for more expensive campaigns to motivate voters.[14] The late nineteenth century was also a period of massive

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13 In his Fifth Annual Message to Congress, President Jackson reported that the Bank, a "great and powerful institution[,]" has been "actively engaged in attempting to influence the elections of the public officers by means of its money . . . ." Andrew Jackson, *Fifth Annual Message, December 03, 1833*, THE AM. PRESIDENCY PROJECT, https://perma.cc/6ZUK-U5JB (last visited Apr. 6, 2024). To combat this "electioneering engine," the government would withdraw its deposits from the Bank:

> In this point of the case the question is distinctly presented whether the people of the United States are to govern through representatives chosen by their unbiased suffrages or whether the money and power of a great corporation are to be secretly exerted to influence their judgment and control their decisions. It must now be determined whether the Bank is to have its candidates for all offices in the country, from the highest to the lowest, or whether candidates on both sides of political questions shall be brought forward as heretofore and supported by the usual means.

Id.

14 *See* Adam Winkler, Citizens United*, Personhood, and the Corporation in Politics*, *in* CORPORATIONS AND AMERICAN DEMOCRACY 359, 368 (Naomi R. Lamoreaux & William J. Novak eds., 2017).

corporate consolidation, producing huge firms in banking, railroads, mining, oil, and manufacturing, with interests in government tax, tariff, and regulatory policies. The combination of the need for new and major sources of campaign revenue in an era of highly competitive elections and large corporations with the resources and the incentive to provide it led to the first significant surge of corporate money into electoral politics.[15] The first laws to restrict corporate money soon followed.

In 1891, Kentucky amended its constitution to ban the use of corporate money to influence any election in the state; that provision is still in the Kentucky constitution.[16] Tennessee, Florida, and Nebraska quickly followed with bans on corporate contributions to candidates and parties.[17] In 1894, New York's constitutional convention debated whether to adopt a ban on corporate campaign money. Although the measure failed to pass, Elihu Root, a leading corporate lawyer and subsequently Secretary of War and Secretary of State, gave a speech, frequently cited in later Supreme Court decisions, denouncing "the great moneyed corporations of the country . . . the great railroad companies, the great insurance companies, the great telephone companies, the great aggregations of wealth" for using campaign contributions to put politicians in their debt.[18] That was "a debt to be recognized and repaid with the votes of representatives in the legislature and in Congress, or by the action of administrative or executive officers who have been elected in a measure through the use of the money so contributed."[19]

Concern about corporate political influence grew in the aftermath of public reports that President Theodore Roosevelt's 1904 reelection campaign received more than a million dollars (around $35 million in 2024 dollars) from corporate sources. Then, in 1905, the New York Legislative Investigating Committee (the Armstrong Committee) revealed that New York's three major insurance committees had contributed hundreds of thousands of dollars to the Republican Party and Republican officeholders in

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15 *See* Margaret M. Blair & Elizabeth Pollman, *The Supreme Court's View of Corporate Rights: Two Centuries of Evolution and Controversy, in* CORPORATIONS AND AMERICAN DEMOCRACY 245, 275 (Naomi R. Lamoreaux & William J. Novak eds., 2017).

16 KY. CONST., § 159.

17 Perry Belmont, *Publicity of Election Expenditures*, 180 THE NO. AM. REV. 166, 176 (1905).

18 Elihu Root, *The Political Use of Money, September 3, 1894*, *in* ADDRESSES ON GOVERNMENT AND CITIZENSHIP 141, 143 (collected and edited by Robert Bacon & James Brown Scott, Harv. Univ. Press 1916).

19 *Id.* at 144.

recent elections. The Armstrong Committee hearings confirmed not only the power of corporations to influence the political process but also that the executives of these businesses used corporate donations to benefit themselves rather than their shareholders (or, for the insurance companies, their policyholders) by pushing for new laws that would make it more difficult for policyholders to sue for breach of fiduciary duty.[20] Not only did corporate wealth threaten to overwhelm the political process, but corporate executives were using "other people's money" for their self-interest.[21]

In his 1905 Annual Message to Congress, President Roosevelt inveighed against the "corruption of the flagrant kind which has been exposed[,]" and proclaimed that "[a]ll contributions by corporations to any political committee or for any political purpose should be forbidden by law . . . ."[22] He opened his Sixth Annual Message in 1906 with a similar call: "Let individuals contribute as they desire; but let us prohibit in effective fashion all corporations from making contributions for any political purpose, directly or indirectly."[23] Shortly thereafter, Congress passed the Tillman Act, which prohibited national banks and federally chartered corporations from contributing to election campaigns at any level, national, state, or local, and prohibited "any corporation whatever" from making contributions in federal elections.[24] Following the Teapot Dome scandal, Congress passed the Federal Corrupt Practices Act of 1925, which, *inter alia*, expanded the definition of "contribution" to include "anything of value," thereby picking up corporate loans, in-kind assistance, and the use of corporate facilities.[25] This is essentially the federal corporate contribution ban still on the books today.[26] Many states adopted similar laws. By 1928, twenty-seven states prohibited all corporate contributions, and nine more states prohibited contributions by certain types of corporations, such as banks, regulated public utilities, and insurance companies.[27]

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20 *See* Winkler, *supra* note 14, at 359.

21 *Id.*

22 Theodore Roosevelt, *Fifth Annual Message to Congress, December 05, 1905*, THE AM. PRESIDENCY PROJECT, https://perma.cc/VSV3-KX7L (last visited Apr. 6, 2024).

23 Theodore Roosevelt, *Sixth Annual Message to Congress, December 03, 1906*, THE AM. PRESIDENCY PROJECT, https://perma.cc/DSJ2-SKNX (last visited Apr. 6, 2024).

24 Tillman Act of 1907, Pub. L. No. 59-36, 34 Stat. 864.

25 Federal Corrupt Practices Act of 1925, 43 Stat. 1070.

26 52 U.S.C. § 30118(a).

27 *See* Earl R. Sikes, STATE AND FEDERAL CORRUPT-PRACTICES LEGISLATION 127–28 (1928).

Subsequent developments in the legislative restriction of corporate campaign money were a response to the growing political role of labor unions. In the aftermath of the New Deal, unions increasingly engaged in electoral politics, and some members of Congress urged that organized labor had become comparable in power and influence to big business.[28] Labor and business were dueling antagonists, with labor supporting the Roosevelt administration and much of big business giving to Republicans, so there was political symmetry—a "balance in the equities"—in subjecting unions to the same campaign finance restrictions that applied to corporations.[29] In 1943, in the War Labor Disputes Act, Congress banned union contributions in federal elections as a temporary measure for the duration of World War II.[30] The Taft-Hartley Act of 1947 made that ban permanent.[31]

Although aimed at unions, the Taft-Hartley Act also applied to corporations. To avoid the wartime ban on union contributions, the Congress of Industrial Organization (CIO) had created an organization named the CIO Political Action Committee or CIO-PAC, the eponymous PAC that is the forerunner of all of today's PACs. As a separate entity with its own officers and a treasury filled with ostensibly voluntary contributions by union members, the CIO-PAC was not itself a union and, so, not subject to the union contribution ban. Moreover, instead of contributing to candidates it spent money rallying support for the Democratic ticket among union members, other employees, and their families and communities.[32] Congress viewed this activity—what we now call independent spending—as an evasion of the union contribution ban, so the Taft-Hartley Act expanded the ban on union contributions to include union expenditures. In the spirit of corporate-labor parity, it applied the expenditure ban to corporations, too, thus creating the law ultimately invalidated in *Citizens United*.

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28 David J. Sousa, *"No Balance in the Equities": Union Power in the Making and Unmaking of the Campaign Finance Regime*, 13 STUD. AM. POL. DEV. 374, 380–83 (1999).

29 *Id.* at 381–85.

30 Pub. L. No. 78-89, 57 Stat. 163 (1943).

31 Pub. L. No. 101-120, 61 Stat. 136 (1947). Many states adopted similar restrictions. Today, twenty states prohibit unions from contributing to candidates for state office. *See* Nat'l Conf. State Legislatures, *supra* note 8.

32 *See* Louise Overacker, *American Government and Politics: Presidential Campaign Funds, 1944*, 39 AM. POL. SCI. REV. 899, 922–23 (1945).

The next major development in campaign finance law—the Federal Election Campaign Act of 1971 (FECA)—focused on candidates and parties generally rather than particular sources of campaign funds, but one provision proved to be quite significant for labor and business campaign participation. In the decades after the enactment of Taft-Hartley, labor unions continued to use PACs to engage in elections, but they relied on the uncertain legal foundation that the ban on union campaign spending did not apply to labor PACs because they used only voluntary union member contributions rather than union treasury funds. FECA resolved the issue by providing that a union may establish a "separate, segregated fund"—that is, a PAC—which can spend money in federal elections. The union can use its own funds to pay the costs of administering the PAC and raising funds for it, select the PAC's personnel, and determine the PAC's campaign spending decisions. But as long as the PAC uses only funds voluntarily donated for campaign spending rather than union treasury funds, PAC electoral activity is permitted.[33] Again, in the spirit of parity, FECA also legalized PACs for corporations and other associations.[34] Corporate PACs may make contributions from funds voluntarily donated by their executive and administrative personnel and stockholders, and unions can make contributions from funds donated by union members and their families.[35] FECA caps donations by a PAC to a candidate at $5,000 per election, and donations by a person associated with a corporation or union to the corporate or labor PAC at $5,000 per election.[36] Although the statutory ratification of the PAC mechanism was intended to benefit unions, a major consequence was the emergence and explosive growth of corporate, trade association, and other business PACs. In the 2021–22 election cycle, PACs established by corporations, trade associations, and other business groups raised and spent in excess of $650 million in federal elections, compared with the roughly $350 million raised and spent by labor PACs.[37]

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33 52 U.S.C. § 30118 (b)(2)(c).

34 *Id.*

35 52 U.S.C. § 30118(b)(4)(A)(i), (ii). The law provides a limited opportunity for a twice-yearly solicitation of contributions by a corporate PAC from all its employees and their families, and by a union PAC of corporate executives and administrative personnel and their shareholders. *Id.* at § 30118(b)(4)(B), (5).

36 52 U.S.C. § 30116 (1), (2).

37 *Federal Elec. Comm'n Summary of PAC Activity, January 1, 2021 - December 31, 2022*, (Mar. 6, 2023), https://perma.cc/2723-D7WE (there were 1,655 corporate PACs, 720 trade association PACs, and 309 membership PACs, compared with 271 labor PACs).

In *Pipefitters Local Union No. 562 v. United States*,[38] handed down in 1972 shortly after FECA's enactment but turning on pre-FECA law, the Supreme Court found the PAC mechanism to be consistent with the legislative purposes driving the restrictions on corporate and labor campaign spending—curbing the power of large corporate and union war chests and protecting the rights of dissenting shareholders and union members. As a PAC's funds consist solely of voluntary contributions, minority rights are protected, while "the aggregated wealth [Congress] plainly had in mind was the general union treasury—not the funds donated by union members of their own free and knowing choice."[39] Nor was it a problem that a union determines how its PAC's funds are spent as long as the money used for campaign purposes consisted of "knowing free-choice donations."[40]

The final step in the evolution of the federal statutes governing corporate electoral activity was the enactment of the Bipartisan Campaign Reform Act of 2002 (BCRA).[41] The two principal goals of BCRA were (i) to close down the so-called "soft money" loophole that enabled political parties to collect contributions that would otherwise violate FECA's dollar limits and source prohibitions (including the ban on the use of corporate and union treasury funds), and (ii) to curtail the use of so-called "issue advocacy" spending—ads that praise or criticize a candidate but do not expressly call for the election or defeat of that candidate—to avoid the ban on corporate and union

38 Pipefitters Loc. Union No. 562 v. United States, 407 U.S. 385 (1972).

39 *Id.* at 416. FECA included other provisions exempting corporations and unions from the statutory limitations on their campaign spending. The law authorizes "communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and families on any subject." 52 U.S.C. § 30118(b)(2)(A). This essentially codified the decision of the Supreme Court in United States v. Cong. of Indus. Orgs., 335 U.S. 106 (1948), finding that applying Taft-Hartley's spending ban to corporate and union communications to their own members would create the "gravest doubt" as to the measure's constitutionality, *id.* at 121, and so reading the law not to apply to such "internal communications." FECA authorized the expenditure of corporate and union treasury funds on nonpartisan voter registration and get-out-the-vote campaigns aimed at, respectively, stockholders and executive and administrative personnel and their families, and union members and their families. 52 U.S.C. § 30118 (b)(2)(B). The Act also created a media exception that excludes any news story, commentary, or editorial by a newspaper, periodical or broadcaster from the definition of "expenditure." 52 U.S.C. § 30101(9)(B)(i). The exemption does not apply if the broadcaster, newspaper, or periodical is owned by a political party, political committee, or candidate.

40 *Pipefitters*, 407 U.S. at 421.

41 Pub. L. No. 107-155, 116 Stat. 81 (2002).

independent spending.[42] To deal with the issue advocacy problem, BCRA extended Taft-Hartley's ban on corporate and union expenditures to a new category of "electioneering communications" consisting of ads that refer to a clearly defined federal candidate—even if they avoid express advocacy—and are broadcast to the candidate's constituency within a defined pre-election period.[43] This was the provision specifically challenged and invalidated in *Citizens United*.[44]

B. The Corporate Contribution Ban in the Courts

i. The pre-*Buckley* Era

Scarcely any cases dealt with restrictions on corporate campaign activity in the seventy years between the enactment of the Tillman Act and the birth of modern campaign finance jurisprudence in *Buckley v. Valeo*. Courts treated corporations as artificial creatures with powers limited to the business purposes spelled out in their charters, so that corporate campaign activity was considered *ultra vires*.[45] In the only case involving a constitutional challenge to the Tillman Act, in 1916, the federal district court easily concluded that "the power of Congress to prohibit corporations of the state from making money contributions in connection with any . . . election [to Congress] appears to follow as a natural and necessary consequence" of Congress's power to prevent "the concerted use of money" from "corrupting the elector and debauching the election . . . ."[46] The court saw little constitutional difficulty with a prohibition against political activities by corporations, "those artificial beings who are merely the creatures of the law."[47] In the only pre-*Buckley* appellate court case dealing with the Taft-Hartley ban on corporate campaign expenditures, the United States Court of Appeals for the Ninth Circuit had no doubt about the constitutionality of the ban, noting the "necessity for destroying the influence over elections which corporations exercise through financial contributions."[48]

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42 *See* McConnell v. FEC, 540 U.S. 93, 132 (2003).

43 *Id.* at 189–209.

44 Citizens United v. FEC, 558 U.S. at 365–66.

45 *See, e.g.*, People *ex rel.* Perkins v. Moss, 187 N.Y. 410, 423 (N.Y. 1907); McConnell v. Combination Min. & Mill. Co., 76 P. 194, 199 (Mont. 1904).

46 United States v. U.S. Brewers' Ass'n, 239 F. 163, 168–69 (W.D. Pa. 1916).

47 *Id.* at 168.

48 United States v. Lewis Food Co., 366 F.2d 710, 712–13 (9th Cir. 1966).

In the pre-*Buckley* era, the Supreme Court discussed the restrictions on corporate campaign money only in cases dealing with unions. In *United States v. CIO*,[49] the Court found that the ban on union campaign expenditures raised serious First Amendment concerns, which the majority managed to avoid by construing the statute not to apply to what later became known as "internal communications," that is, electioneering aimed at union members and their families.[50] Four justices would have invalidated the ban under the First Amendment, although they left open whether they would have sustained the application of the ban to corporations, noting the "important legal and economic differences remaining between corporations and unincorporated associations, including labor unions, which justify large distinctions between them in legal treatment."[51] On the other hand, noting that corporations enjoy some First Amendment protections,[52] they cautioned "it does not follow" from the differences between corporations and unions "that the broadside and blanketing prohibitions here attempted in restriction of freedom of expression and assembly would be valid in their corporate applications."[53]

United States v. Auto Workers[54] considered the indictment of a union for spending treasury funds on television ads endorsing candidates in a congressional election. Justice Frankfurter's opinion for the Court provided a lengthy, sympathetic, and detailed account—dating back to the post-Civil War era and Elihu Root's address to the New York Constitutional Convention of 1894[55]—of public concern about the concentration of corporate wealth, the "felt threat to economic freedom created by enormous industrial combines[,]"[56] and the decades-long efforts by state and federal governments to control first corporate and then union money in electoral politics. Justice Frankfurter urged that these restrictions were intended to protect "the political process from what [Congress] deemed to be the corroding effect of money employed in elections by aggregated power."[57] However, despite

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49 *Cong. of Indus. Orgs.*, 335 U.S. 106 (1948).
50 *Id*. at 121-24.
51 *Id.* at 154.
52 *Id.* at 154–55 (citing Grosjean v. Am. Press Co., 297 U.S. 233 (1936)).
53 *Id.* at 154.
54 United States v. UAW, 352 U.S. 567 (1957).
55 *Id.* at 571.
56 *Id.* at 570.
57 *Id.* at 582.

this apparent endorsement, the Court declined to consider the constitutionality of the statute as the case was on appeal from the dismissal of the indictment and so had not even been tried.[58] Three justices, in an opinion by Justice Douglas, would have invalidated the statute—and not just its application to unions—under the First Amendment.[59]

ii. The *Buckle*y Era

Buckley v. Valeo transformed campaign finance jurisprudence. The Court held for the first time that raising and spending campaign money is protected by the First Amendment's freedoms of speech and association. The Court determined that (i) campaign spending, in contrast to campaign contributions, enjoys the highest level of constitutional protection;[60] (ii) spending may not be limited to promote political equality;[61] (iii) contribution limits may be justified by the government interests in preventing corruption and the appearance of corruption;[62] (iv) corruption means something like quid pro quo corruption, that is, the exchange of dollars for votes, although it is not as narrow as outright bribery;[63] and (v) independent spending, that is, spending undertaken by an individual or group without prearrangement or coordination with a candidate, is not corrupting.[64] *Buckley* struck down FECA's limits on candidate and independent spending but sustained the limits on contributions to candidates, noting that the limits still permitted contributions that can convey a "symbolic expression of support."[65] *Buckley* did not address any restrictions specifically aimed at corporations. But under *Buckley*'s framing of the issues, the Tillman and Taft-Hartley bans on corporate giving and spending would appear to be in trouble—unless there was something special about corporations that either minimized the First Amendment burden or justified the restrictions.

Two years after *Buckley*, in *First National Bank of Boston v. Bellotti*,[66] the Court applied *Buckley*'s logic to invalidate a

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58 *Id.* at 590–93.
59 *Id.* at 593.
60 Buckley v. Valeo, 424 U.S. 1, 44–45 (1976).
61 *Id.* at 48–49.
62 *Id.* at 26–27.
63 *Id.*
64 *Id.* at 47.
65 *Id.* at 21.
66 First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765 (1978).

Massachusetts state constitutional provision that barred corporate spending with respect to ballot measures. *Bellotti* made three key points. First, it dismissed the relevance of the corporation's status as an artificial, as opposed to a natural, person in determining whether the state measure violated the First Amendment. Although a corporation may lack a natural person's "interest in self-expression[,]"[67] its electioneering is valuable because it can inform voters. From a First Amendment perspective, it's not the speaker but the speech that matters: the "inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual."[68]

Second, the Court expressed skepticism about, without flatly rejecting, the traditional argument for the corporate ban that corporate spending threatens the integrity of democratic elections. The Court agreed that the state's argument that campaign spending by "wealthy and powerful" corporations can "drown out other points of view" and thereby undermine active citizen participation and public confidence in government would be worthy of consideration, but only if there were "record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes . . . ."[69] The Court determined there had been "no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts" or posed any threat to public confidence in government, and suggested it was unlikely that such effects could ever be shown.[70] Heavy corporate spending might influence voters' decisions, but, consistent with *Buckley*'s analysis, that did not constitute corruption: "the fact that advocacy may persuade the electorate is hardly a reason to suppress it . . . ."[71] *Buckley* had just rejected the egalitarian argument that the First Amendment permits government to limit the campaign spending of some groups "to enhance the relative voice of others . . . ."[72] In short, equality could not justify restricting spending and quid pro quo corruption was not a concern in a ballot proposition contest.

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67 *Id.* at 777 n.12.
68 *Id.* at 776–77.
69 *Id.* at 789.
70 *Id.* at 789–90.
71 *Id.* at 790.
72 *Id.* at 791 (quoting Buckley v. Valeo, 424 U.S. 1, 48–49 (1976)).

Third, the Court gave short shrift to the other major longstanding justification for barring corporate spending—protecting the interests of shareholders. Although shareholder protection is "an interest that is both legitimate and traditionally within the province of state law[,]" the corporate spending ban was both overinclusive—it would apply even if all shareholders approved spending—and underinclusive, as it applied only to electioneering and not lobbying, and only to corporations and not other organizations, such as business trusts or unions.[73]

Bellotti's reasoning called into question special restrictions on corporate campaign money, but the Court did not clearly rule out such special restrictions. *Bellotti* involved a referendum, not an election in which a candidate could be "corrupted," a point the Court acknowledged in a footnote distinguishing the Massachusetts provision from the "many other state and federal laws regulating corporate participation in partisan candidate elections."[74] The Court left open the possibility that "Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections."[75]

Still, the tenor of the opinion—its focus on the speech not the speaker, its dismissal of the traditional concerns about aggregations of corporate wealth and misuse of shareholder funds—did not bode well for the future of the bans on corporate campaign money. Yet, in five cases over the next two decades, the Court repeatedly sustained special restrictions on corporate campaign finance, repeatedly invoking the traditional arguments about corporate wealth and dissenting shareholders.

Just four years after *Bellotti*, a unanimous Supreme Court, in *FEC v. National Right to Work Committee (NRWC)*,[76] upheld FECA's provisions limiting whom a corporation could solicit to contribute to its PAC. For most corporations, the permissible solicitation targets are executive and administrative personnel and stockholders; the NRWC was a non-stock corporation, so FEC limited it to the solicitation of "members." The case primarily concerned the definition of "member,"[77] but the Court also considered and emphatically rejected NRWC's challenge to the

73 *Bellotti*, 435 U.S. at 792–95.
74 *Id.* at 788 n.26.
75 *Id.*
76 FEC v. Nat'l Right to Work Comm. (NRWC), 459 U.S. 197 (1982).
77 *Id.* at 199–206.

constitutionality of the restriction. In so doing, it resuscitated the two justifications for constraining corporations that *Bellotti* had dismissed: (i) ensuring that "substantial aggregations of wealth amassed by the special advantages which go with the corporate form . . . should not be converted into political 'war chests' which could be used to incur political debts from legislators who are aided by the contributions[,]" and (ii) protecting the "individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed."[78] The Court had no difficulty applying the corporate restrictions to NRWC, a nonprofit political advocacy corporation. It recapitulated the entire "history of the movement to regulate the political contributions and expenditures of corporations and labor unions" from the Tillman Act to the 1925 Federal Corrupt Practices Act, Taft-Hartley, and FECA in concluding "[t]his careful legislative adjustment of the federal electoral laws . . . reflects a legislative judgment that the special characteristics of the corporate structure require particularly careful regulation . . . . [W]e accept Congress's judgement that it is the potential for such influence that demands regulation."[79]

Four years later, in *FEC v. Massachusetts Citizens for Life, Inc.* (*MCFL*),[80] the Court again endorsed the idea that corporate campaign spending poses distinctive dangers that justify its regulation. The Court stressed that corporate resources are:

> [n]ot an indication of popular support for the corporation's political ideas. They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.[81]

In the end, the majority determined that these concerns did not apply to MCFL, an ideological non-profit. MCFL did not engage in business activities or amass capital in the economic marketplace; its funds came entirely from people who supported

78 *Id.* at 207–10.
79 *Id.* at 208–10.
80 FEC v. Mass. Citizens for Life, Inc. (MCFL), 479 U.S. 238 (1986).
81 *Id.* at 258.

the organization's views. MCFL donors had no economic stake in the corporation that would discourage them from disassociating from it if they disagreed with its electioneering. Nor did MCFL accept any business donations, so there was no danger that business corporations were using it as a conduit.[82] But these reasons for granting MCFL an as-applied exception only underscored the constitutionality of applying the ban to business corporations.

In 1990, in *Austin v. Michigan Chamber of Commerce,*[83] the Court for the first time clearly sustained the constitutionality of a ban on a corporation's spending treasury funds—in this case, a Michigan law—to support or oppose a candidate in an election. Drawing on language from *Auto Workers*, *NRWC*, and *MCFL,* the Court found that the traditional argument for barring corporate spending—that the political use of corporate war chests is a threat to democracy—is a compelling justification for banning the use of corporate treasury funds. But the Court had to restructure the argument to fit the *Buckley* framework. Corporate wealth per se could not justify special limits on corporations because *Buckley* and *Bellotti* had ruled out wealth inequality as a basis for limiting campaign money. The problem with corporate money is that (i) corporations derive their wealth from "the unique state-conferred corporate structure . . . such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets" that "facilitates the amassing of large treasuries" (ii) which can then be converted to political uses.[84] This, the Court concluded, fit *Buckley*'s requirement of corruption. To be sure, consistent with *Buckley*, independent spending could not be treated as the kind of quid pro quo corruption that was *Buckley*'s focus. Corporate independent spending is "a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."[85] Moreover, the ban on spending corporate treasury funds was "sufficiently narrowly tailored to achieve its goal" because Michigan allowed corporations to create PACs that could engage

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82 Four justices would have applied the spending ban to *MCFL*, contending that, as in *NRWC*, the Court should defer to Congress's judgment that spending enabled by the corporate form necessarily threatens the political process. *Id.* at 266–71.

83 Austin v. Mich. Chamber of Com., 494 U.S. 652 (1990).

84 *Id.* at 658–60.

85 *Id.* at 660.

in independent spending.[86] Corporations could engage in electoral speech if they used funds specifically provided by individuals for that purpose.[87] Nor was the law overbroad because it applied to non-wealthy corporations; legislatures could decide that the potential for abuse resulting from the corporate form was a sufficient basis for regulation.[88] *Bellotti* was barely acknowledged, with a passing reference to the footnote in that earlier case that had said a legislature might be able to demonstrate that corporate spending poses a danger of real or apparent corruption in candidate elections.[89]

Subsequently, in *FEC v. Beaumont*,[90] the Court upheld the application of the Tillman Act's ban on corporate contributions to a non-profit advocacy organization. The Court recapitulated the century-long history of the regulation of corporations and determined that "the original rationales" for the law still applied.[91] *Beaumont* restated *Austin*'s finding that the special state-created advantages provided by the corporate form created the unique danger of "war-chest corruption."[92] The Court also invoked the interest of shareholders in not having their "money used to support political candidates to whom they may be opposed."[93] *Beaumont* added one new justification resulting from FECA's enactment of a regime of individual contribution limitations—preventing the circumvention of those limits by donors who would use corporations as conduits for individual contributions above the statutory limits.[94] The anti-circumvention justification provided crucial support for the application of the corporate contribution ban to nonprofit advocacy corporations, which, the Court underscored, are "no less susceptible than traditional business companies to misuse as conduits for circumventing the contribution limits imposed on individuals."[95]

Beaumont also determined that *Buckley*'s lower standard of review for contribution restrictions should apply even though the

86 *Id*. at 660-61.
87 *Id*.
88 *Id*. at 661.
89 *Id*. at 659.
90 FEC v. Beaumont, 539 U.S. 146 (2003).
91 *Id*. at 154.
92 *Id*. at 155.
93 *Id*. at 154 (quoting FEC v. Nat'l Right to Work Comm. (NRWC), 459 U.S. 197, 208 (1982)).
94 *Beaumont*, 539 U.S. at 155.
95 *Id*. at 160.

Tillman Act imposes a flat ban on corporations, not just a dollar limitation. The Court explained that the standard of review was "based on the importance of the 'political activity at issue' to effective speech or political association."[96] *Buckley* had determined that "restrictions on political contributions" should be "treated as merely 'marginal' speech restrictions subject to relatively complaisant review under the First Amendment, because contributions lie closer to the edges than to the core of political expression."[97] In sustaining FECA's dollar limits on individual contributions, *Buckley* had noted that FECA allowed "the symbolic expression of support evidenced" by a contribution under the statutory ceiling,[98] and that would-be donors could also engage in independent spending. Neither option is available to a corporation under the Tillman Act. Nonetheless, *Beaumont* concluded the ban was still "closely drawn" and not an undue burden because, given the statutory authorization for PACs, the Tillman Act was not a ban at all: "[t]he PAC option allows corporate political participation without the temptation to use corporate funds for political influence, quite possibly at odds with the sentiments of some shareholders or members."[99]

Shortly after, in *McConnell v. FEC*,[100] the Court upheld BCRA's extension of Taft-Hartley's prohibition on corporate and union independent spending to "electioneering communications"—broadcast ads aired during a defined pre-election period that refer to a candidate by name but do not use the "magic words" of express advocacy.[101] Elihu Root, Theodore Roosevelt, and the long development of the corporate and union restrictions were again invoked.[102] The recent cases reconciling this history with the *Buckle*y framework were all cited.[103] In particular, the Court repeated *Beaumont*'s point that "the ability to form and administer" PACs ameliorated any constitutional difficulty because PACs provide "corporations and unions with a constitutionally sufficient opportunity to engage in express advocacy."[104]

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[96] *Id.* at 161 (quoting FEC v. Mass. Citizens for Life (MCFL), 479 U.S. 238, 259 (1986)).

[97] *Id.* at 161.

[98] Buckley v. Valeo, 424 U.S. 1, 21 (1976).

[99] *Beaumont*, 539 U.S. at 163.

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

[101] *Id.* at 203–09.

[102] *Id.* at 115–17.

[103] *Id.* at 203–05.

[104] *Id.* at 203.

iii. *Citizens United*

Seven years later in *Citizens United v. FEC*,[105] the Supreme Court reversed course, striking down both BCRA's extension of Taft-Hartley's spending ban to electioneering communications and the underlying spending ban itself. Indeed, *Citizens United* seemingly obliterated the conceptual underpinnings of the Court's treatment of corporate and union restrictions from *NRWC* to *McConnell*. The Court dismissed the claim that FECA's authorization of corporate PACs means the spending ban is not really a ban.[106] The Court flatly rejected the idea that any special advantages of the corporate form, or the disconnect between a corporation's ability to amass wealth in the economic marketplace and the extent of popular support for its political ideas, provides a justification for special restrictions on corporate spending.[107] Consequently, "distortion" or "war chest" corruption is simply not "corruption" at all for First Amendment purposes.[108] Although *Bellotti* had left open the possibility that "Congress might well be able to demonstrate the existence of real or apparent corruption in independent expenditures by corporations to influence candidate elections," *Citizens United* shut that down, determining categorically that corporate independent spending, like independent spending generally, does not raise dangers of corruption or appearance of corruption that would justify its restriction.[109]

In two short paragraphs, *Citizens United* also dismissed the dissenting shareholder justification for limiting corporate campaign spending. "[P]otential disagreement" within a corporation could not give the government the power to ban campaign speech.[110] As in *Bellotti*, the Court concluded that the argument is both overinclusive—the ban applies even when there are no dissenting shareholders—and underinclusive, applying only to campaign spending, and not to other forms of corporate political speech, like lobbying.

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105 558 U.S. 310 (2010).
106 *Id.* at 337–39.
107 *Id.* at 351.
108 *Id.* at 349–53.
109 *Id.* at 358–60.
110 *Id.* at 361–62.

III. THE CORPORATE CONTRIBUTION BAN AFTER *CITIZENS UNITED*

Notwithstanding *Citizens United,* over the last fourteen years multiple courts have sustained federal and state corporate contribution bans in cases involving ideological nonprofit advocacy corporations,[111] small closely-held family-owned corporations,[112] and business corporations.[113] These decisions have relied on the survival of the pre-*Citizens United* decision in *Beaumont* as precedent, and on the contention that some of *Beaumont*'s justifications for the constitutionality of the Tillman Act survive as well.

Lower courts must continue to follow governing Supreme Court precedent even if that precedent has been conceptually undermined by a later Supreme Court case.[114] Although *Citizens United*'s treatment of corporate campaign participation is fundamentally at odds with *Beaumont*'s approach, *Citizens United* did not overrule *Beaumont*. Indeed, it scarcely mentioned *Beaumont*. The *Citizens United* majority referred to *Beaumont* exactly twice—once to reject the *Citizens United* dissent's position that *Beaumont* had implicitly upheld the federal corporate expenditure ban[115] and once to note that the *Beaumont* concurring and dissenting opinions had questioned the rationale for the Court's earlier *Austin* decision upholding Michigan's corporate expenditure ban.[116] Moreover, the Supreme Court has continued to decline to reconsider *Beaumont*, denying the petitions for certiorari filed in six of the appellate court decisions upholding federal or state corporate contribution bans.[117]

Moreover, these courts have found that at least some of *Beaumont's* reasoning continues to survive as well. To be sure,

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111 *See, e.g.*, Cath. Leadership Coal. of Tex. v. Reisman, 764 F.3d 409 (5th Cir. 2014); Iowa Right to Life Comm., Inc. v. Tooker, 717 F.3d 576 (8th Cir. 2013); Minn. Citizens for Life, Inc., 692 F.3d 864 (8th Cir. 2012).

112 United States v. Emmons, 8 F.4th 454 (6th Cir. 2021); 1A Auto, Inc. v. Dir. of Off. of Campaign & Pol. Fin., 105 N.E.3d 1175 (Mass. 2018).

113 Yamada v. Snipes, 786 F.3d 1182 (9th Cir. 2015); United States v. Danielczyk, 683 F.3d 611 (4th Cir. 2012).

114 *See* Agostini v. Felton, 521 U.S. 203, 207 (1997) ("lower courts should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions").

115 Citizens United v. FEC, 558 U.S. 310, 377 (2010).

116 *Id.* at 380.

117 *See* Lundergan v. United States, 142 S. Ct. 2676 (2022); 1A Auto, Inc. v. Dir. of Off. of Campaigns & Pol. Fin., 139 S. Ct. 2613 (2019); Iowa Right to Life, Inc. v. Tooker, 134 S. Ct. 1787 (2014); Danielczyk v. United States, 568 U.S. 1193 (2013); Ognibene v. Parkes, 567 U.S. 935 (2012); Green Party of Conn. v. Lange, 564 U.S. 1052 (2011).

one strand of *Beaumont*'s analysis invoked *Austin*'s concern with corporate "war-chest corruption,"[118] which is clearly now a non-starter given *Citizens United*'s express overruling of *Austin*. But *Beaumont* also relied on three other arguments—the dangers of quid pro quo corruption and its appearance posed by contributions generally, [119] the use of donations by corporations to circumvent the limits on individual donations to candidates,[120] and the protection of dissenting shareholders.[121]

The prevention of quid pro quo corruption and its appearance continues to be the fundamental basis for contribution restrictions, and surely corporate contributions, like contributions from individuals, raise the possibility, or the appearance, of the exchange of donations for political favors. As the Massachusetts Supreme Judicial Court emphasized, "[b]oth history and common sense have demonstrated that when corporations make contributions to political candidates, there is a risk of corruption, both actual and perceived."[122] The more difficult question is whether the prevention of corruption justifies a complete ban on corporate contributions rather than a dollar limitation; in other words, whether a ban is "closely drawn" to achieve the anti-corruption goal. That question will be addressed after the more "corporation-specific" arguments for a corporate contribution ban—anti-circumvention and shareholder-protection—are examined.

A. Anti-Circumvention

Beaumont was the first corporate limitation case to rely on the anti-circumvention justification, but the argument that some limits on campaign money are justified to prevent the evasion of previously-accepted limits had been sustained in cases involving the limitation of donations to and spending by political parties,[123] and limits on donations to political action committees to prevent the circumvention of the limits on individual donations to candidates.[124] The post-*Citizens United* Fourth Circuit decision

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118 FEC v. Beaumont, 539 U.S. 146, 154–55 (2003).

119 *Id.* at 155–56.

120 *Id.* at 155.

121 *Id.* at 154–55.

122 1A Auto, Inc. v. Dir. of Off. of Campaign & Pol. Fin., 105 N.E.3d 1175, 1187 (Mass. 2018).

123 *See, e.g.*, McConnell v. FEC, 540 U.S. 93 (2003); FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 456–57, n.18 (2001).

124 Cal, Med. Ass'n v. FEC, 453 U.S. 182, 198 (1981).

rejecting a challenge to the Tillman Act ban agreed that both "[p]revention of actual and perceived corruption and the threat of circumvention are firmly established government interests that support regulations of campaign financing" and that "*Citizens United* did not undercut *Beaumont*'s endorsement of this [anti-circumvention] interest." [125] The Ninth Circuit agreed that *Beaumont*'s use of the anti-circumvention argument remains legally sound because, "the anti-circumvention interest is part of the familiar anti-corruption rationale."[126] The Sixth Circuit also cited to *Beaumont*'s concern about the use of corporate contributions "as conduits for circumvention of valid contribution limits."[127]

Given the ease with which an individual can create a corporation, donors who hit the limit on individual donations could funnel additional contributions through corporations created for that purpose. A single individual could generate multiple corporations that he or she controls and can use to end-run the cap on donations. Dollar limits on individual donations to a candidate could be rendered meaningless if the individual could proliferate new corporations, each of which could separately donate to the same candidate.

Corporate contributions could also facilitate the circumvention of disclosure requirements by enabling a donor to disguise his role in a campaign by creating and putting money in a corporation that contributes to a candidate. In *Western Tradition Partnership (WTP)*, the Montana Supreme Court found that WTP -- despite the word "partnership" in its name, the entity is a corporation — was created "to act as a conduit of funds for persons and entities including corporations who want to spend money anonymously to influence Montana elections." [128] Often little more than "shadow money mailboxes,"[129] these legal persons can facilitate the evasion of disclosure requirements.

As Ann Ravel, the then-chair of California's Fair Political Practices Commission (FPPC) and subsequently chair of the FEC, observed, "people are willing to use circuitous routes to avoid

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125 United States v. Danielczyk, 683 F.3d 611, 618–19 (4th Cir. 2012).

126 Thalheimer v. City of San Diego, 645 F.3d 1109, 1124 (9th Cir. 2011).

127 United States v. Emmons, 8 F.4th 454, 469 (6th Cir. 2021).

128 W. Tradition P'ship, Inc. v. Att'y Gen. of State, 271 P.3d 1, 4 (Mont. 2011).

129 *See, e.g.*, Robert Maguire & Viveca Novak, *Exclusive: Largest Dark Money Donor Groups Share Funds, Hide Links*, OPENSECRETS (Sept. 10, 2013), https://perma.cc/747J-SYXV.

telling the voters who is behind campaigns."[130] Ravel made her statement while announcing the imposition of a record $1 million civil fine as part of the settlement of a case brought by the FPPC and the California Attorney General against two nonprofit corporations that together funneled more than $15 million into a campaign against two ballot propositions on the 2012 California ballot. The money, which ultimately derived from a handful of super wealthy individuals, was channeled from the originating donors to a group called Americans for Job Security, which then transferred the money to the Center to Protect Patients' Rights (the ballot propositions had nothing to do with patients' rights) and then on to the Arizona-based Americans for Responsible Leadership and the Iowa-based American Future Fund. These organizations then further transmitted the funds to the Small Business Action Committee and the California Future Fund for Free Markets, which then finally spent them to oppose the ballot measures.[131] It was, as one news account put it, "a daisy chain of organizations" "that operatives took to skirt disclosure obligations."[132] Similarly, Western Tradition Partnership touted to prospective donors: "'[W]e're not required to report the name or the amount of any contribution that we receive. So if you decide to support this program, no politician, no bureaucrat, and no radical environmentalist will ever know you helped make this program possible . . . . You can just sit back on election night and see what a difference you have made."[133]

B. Shareholder Protection

Shareholder protection is the most uncertain of the remaining *Beaumont* justifications. *Citizens United* dismissed that argument as clearly inadequate to justify a ban on corporate independent *spending*, but the Court's brief discussion of the shareholder-protection rationale did not consider whether that argument would receive more weight in the context of a

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130 Matea Gold & Tom Hamburger, *California Donor Disclosure Case Exposes How Nonprofit Groups Can Play in Politics*, WASH. POST (Nov. 4, 2013), https://perma.cc/25D5-SX2V.

131 *See* Nicholas Confessore, *Group Linked to Kochs Admits to Campaign Finance Violations*, N.Y. TIMES (Oct. 24, 2013), https://www.nytimes.com/2013/10/25/us/politics/group-linked-to-kochs-admits-to-campaign-finance-violations.html.

132 Gold & Hamburger, *supra* note 130.

133 *W. Tradition P'ship*, 271 P.3d at 7.

restriction on corporate contributions.[134] Some of the recent lower court decisions sustaining corporate contribution bans have referred to the shareholder-protection interest in summarizing the elements of *Beaumont* that survive *Citizens United*.[135] Others have explicitly sidestepped this argument, focusing instead on the anti-corruption and anti-circumvention justifications.[136]

Shareholder protection has been a justification for limiting corporate spending at least since the revelations of the Armstrong Committee.[137] The argument has been recognized in two Supreme Court cases—*NRWC* as well as *Beaumont*. In *NRWC,* a unanimous Court noted a purpose of the ban is to "protect the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed" and it "agree[d] with the government" that this was a constitutionally sound justification.[138] *Beaumont* quoted the NRWC language and restated the point.[139] Rejecting the argument would require the Court to repudiate not one but two precedents.

Nor is shareholder protection rooted in the war chest theory of corruption disavowed in *Citizens United*. That theory was a post-*Buckley* attempt to preserve the concern that, since the late nineteenth century, has driven efforts to limit corporate electoral participation—that deployment of corporate economic power in the political realm is inherently a threat to the integrity of democratic elections. *Buckley*'s rejection of wealth inequality as a justification for limiting spending, coupled with *Citizen United*'s dismissal of the role of "state-created advantages" in empowering corporations means that argument is no longer doctrinally available. Shareholder protection, however, is not based on a theory of state-supported corporate power with respect to elections, but is instead concerned about the protection of shareholders *within* the corporate framework. Indeed, *Citizens United'*s recharacterization of a corporation as an "association[]

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134 Citizens United v. FEC, 558 U.S. 310, 361–62 (2010).

135 *See, e.g.*, 1A Auto, Inc. v. Dir. of Off. of Campaign & Pol. Fin., 105 N.E.3d 1175, 1183 (Mass. 2018).

136 *See, e.g.*, United States v. Danielczyk, 683 F.3d 611, 618 (4th Cir. 2012); Ognibene v. Parkes, 671 F.3d 174, 195 n.21 (2d Cir. 2011); Thalheimer v. City of San Diego, 645 F.3d 1109, 1125 (9th Cir. 2011).

137 *See supra* notes 20–21 and accompanying text.

138 FEC v. Nat'l Right to Work Comm., 459 U.S. 197, 208 (1982).

139 FEC v. Beaumont, 539 U.S. 146, 154–55 (2003).

of citizens"[140] is consistent with legislative protection of the rights of those "citizens" within the corporation. Even *Citizens United* acknowledged that corporate political activity can constitute an "abuse" of the funds of dissenting shareholders, although it determined that in the context of corporate spending, that could be "corrected by shareholders 'through the procedures of corporate democracy.'"[141]

Although ruled out as a basis for banning corporate spending, shareholder protection may still be a sufficiently substantial justification for limiting corporate contributions given the less stringent standard of review applicable to contribution restrictions. Yet, even if the justification remains a substantial one, a ban may still be challenged as not "closely drawn" to achieving the shareholder-protection goal.

C. Closely Drawn

Assuming quid pro quo corruption and its appearance, anti-circumvention, and shareholder-protection are substantial government concerns that could justify a ban on corporate contributions, the question becomes whether a ban is "closely drawn,"[142] that is, whether it advances the government's concern without unduly burdening corporate First Amendment rights. That involves consideration of just how burdensome the restriction is on corporate political participation and on the availability of comparably effective alternatives.

Citizens United ameliorated the burden created by the corporate contribution ban by authorizing corporate independent spending. At least two of the post-*Citizens United* lower courts that upheld corporate contribution bans have pointed to the availability of independent spending. The Massachusetts Supreme Judicial Court concluded that the state's ban on corporate contributions is "not 'a complete ban'" because, due to *Citizens United,* Massachusetts permits corporations to engage in a significant form of political expression that was not allowed when *Beaumont* was decided—unlimited independent expenditures.[143] The Ninth Circuit also relied on the availability

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140 558 U.S. at 354, 356.

141 *Id.* at 362 (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 794 (1978)).

142 McCutcheon v. FEC, 572 U.S. 185, 197–98 (2014) (citing and quoting Buckley v. Valeo, 424 U.S. 1, 25, 26–27, 29 (1976)).

143 *See* 1A Auto, Inc. v. Dir. of Off. of Campaign & Pol. Fin., 105 N.E.3d 1188 (Mass. 2018).

of independent spending in rejecting a challenge to the City of San Diego's corporate contribution ban, noting that "[i]n terms of both the fundamental First Amendment interests at stake and actual influence on the political process[,]" limiting the ability of a corporation to contribute to a candidate "pales in significance to its ability to make unlimited independent expenditures."[144] This is consistent with the Supreme Court's analysis in *Buckley*, which pointed to the availability of independent spending in sustaining the constitutionality of limits on individual contributions. The corporate contribution ban was upheld in *Beaumont* even when corporate spending was not an available alternative. With the corporate spending ban now unconstitutional, the corporate contribution ban is arguably more closely drawn than before.

It can be argued that a contribution ban, like the Tillman Act, is not closely drawn given the availability of a less constitutionally burdensome alternative—dollar limits, like FECA places on individual contributions. That would be a persuasive argument if the only justifications for the corporate contribution ban are the prevention of corruption and the appearance of corruption from corporate donations. However, a limit may not be as effective as a ban at attaining the other reasons the Court recognized in *Beaumont*—anti-circumvention and shareholder protection. Even small corporate contributions would undermine the anti-circumvention goal by allowing donors who have "maxed out" on their individual contributions to make additional contributions through corporations. Similarly, even small corporate donations would conflict with the interests of dissenting shareholders. A ban, rather than a dollar limit, is closely drawn to protect these interests.

Citizens United suggested that disclosure may be a less burdensome means of protecting the dissenting shareholder interest: "[P]rompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters."[145] But disclosure is unlikely to be as effective as a contribution ban in protecting the dissenting shareholder interest. Corporations are not required to disclose their election spending to shareholders. To be sure, many major corporations now voluntarily report on their political activities to their

144 Thalheimer v. City of San Diego, 645 F.3d 1109, 1125 (9th Cir. 2011).

145 Citizens United v. FEC, 558 U.S. 310, 370–71 (2010) (internal citations omitted).

shareholders,[146] but these reports vary considerably in scope, with large companies far more inclined to disclose their donations than smaller ones,[147] and most corporations have no self-imposed reporting policies at all. Election laws generally require the reporting of contributions and expenditures, but these reports are made to public agencies, not to shareholders; moreover, it is the recipients of the contributions, not the donors, who are required to disclose, making it difficult for shareholders to keep track of what their corporations are up to.[148]

It is unclear how useful disclosure would be to shareholders. Voluntary corporate disclosures are not timed to elections,[149] and even election law disclosures—though often reported before Election Day—report contributions only after they have occurred. At that point, the damage from the donation of corporate funds to a candidate the shareholder opposes would already be done. A post-disclosure sale of shares might require the shareholder to take a loss or trigger the application of a capital gains tax. Either consequence would operate as a monetary penalty discouraging sale. And, of course, many people do not own shares directly in the corporation that engages in election spending but instead invest through mutual funds or pension plans.[150] Disinvesting would require selling the interest in the mutual fund (thereby potentially disinvesting from dozens of other companies with which the investor has no political quarrel). For many employment-based pension plans, it may not even be possible for the employee- or retiree-investor to change plans.

Nor would disclosure necessarily give shareholders a voice with respect to contribution decisions. The Securities and

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146 *See* CENTER FOR POLITICAL ACCOUNTABILITY, 2023 CPA-ZICKLIN INDEX OF CORPORATE POLITICAL DISCLOSURE AND ACCOUNTABILITY (Oct. 31, 2023), https://perma.cc/F789-7WUW (study of campaign spending practices of companies in S&P 500 Index and the Russell 1000 Index).

147 *Id.* at 14 (78% of the Russell 1000 companies not in the S&P 500 provided no disclosure of their donations to state and local candidates and parties). *See also* Sarah C. Haan, *Shareholder Proposal Settlements and the Private Ordering of Public Elections*, 126 YALE L. J. 262 (2016).

148 *See* Haan, *supra* note 147, at 303–04 (discussing the limited and "highly fragmented" nature of corporate political disclosure).

149 *See* 2023 CPA-ZICKLIN INDEX, *supra* note 146, at 37, 39 (giving highest score to companies that report semiannually and partial positive score to companies that report annually). *See also id.* (giving full credit to companies that provide their political disclosures on an easily accessible dedicated webpage and partial credit to a company that "has a dedicated political webpage [that] is somewhat difficult to find").

150 *See, e.g.*, INVESTMENT COMPANY INSTITUTE, *Majority of American Households Rely on Mutual Funds to Save and Invest* (Nov. 1, 2023), https://perma.cc/CBF4-L5XE.

Exchange Commission (SEC) has required public companies subject to its jurisdiction to place shareholder-initiated resolutions concerning company political spending on the annual meeting proxy statements for a shareholder vote.[151] But under general corporate law principles such a shareholder resolution is only advisory. The closest the shareholders get to having a voice is when they vote for the members of the board of directors, but board elections are only rarely contested. Typically, the board nominates a slate, which it places on the corporation's proxy card, and the slate runs unopposed. As a result, the exercise of "voice," like the exercise of exit through sale, to protest corporate election spending is limited.[152] Disclosure would not be an effective alternative means of protecting dissenting shareholders.

IV. SHIFTING STANDARDS: IMPLICATIONS FROM EVOLVING CAMPAIGN FINANCE DOCTRINE FOR THE CORPORATE CONTRIBUTION BAN

In the fourteen years since *Citizens United*, the Supreme Court has confirmed its skepticism about campaign finance regulation in ways that could ultimately spell the end of the corporate contribution ban.

In *McCutcheon v. FEC*,[153] the Court invalidated FECA's aggregate contribution limit, that is, the limit on the total dollar value of contributions an individual could give to all federal candidates, political parties, and PACs in an election cycle. *Buckley* had upheld the aggregate limit on the theory it prevented circumvention of the just-sustained individual-to-candidate contribution limits.[154] *McCutcheon* overturned *Buckley* on this point, noting first that amendments to FECA after *Buckley* that strengthened limits on individual donations had made circumvention more difficult.[155] Chief Justices Roberts' plurality opinion expressed considerable doubt that the means donors could use to channel over-the-base-limit donations to candidates through other candidates and committees cited by the

[151] *Shareholder Proposal Submitted by Home Depot to NorthStar Asset Management Funded Pension Plan*, U.S. SECURITIES AND EXCHANGE COMMISSION (Mar. 25, 2011), https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2011/northstarasset032511-14a8.pdf.

[152] *See* Thomas W. Joo, *Corporate Governance and the Constitutionality of Campaign Finance Reform*, 1 ELECTION L. J. 361, 367–68 (2002).

[153] McCutcheon v. FEC, 572 U.S. 185 (2014).

[154] Buckley v. Valeo, 424 U.S. 1, 38 (1976).

[155] *McCutcheon*, 572 U.S. at 200–03.

government and accepted by the dissent were likely to occur.[156] He proposed "multiple alternatives" to aggregate limits that could address circumvention while imposing a lesser burden on First Amendment rights, while reserving judgment as to whether those proposed less burdensome alternatives would themselves pass constitutional muster.[157]

The Court's rigorous probing of the anti-circumvention argument, its unwillingness to defer to the judgment of Congress and the FEC about whether and how donors and politicians with the incentive to evade contribution restrictions would be able to do so, and its reliance on untested hypothetical alternatives all cast doubt on the continued force of the anti-circumvention justification. The Chief Justice's rhetoric in particular underscored his doubts about whether anti-circumvention is a constitutionally sufficient justification for campaign finance regulation. In the Chief Justice's words, the individual-to-candidate contribution limits "themselves are a prophylactic measure."[158] That is, a campaign contribution is not necessarily corrupt and most campaign contributions are not quid pro quo transactions with candidates. The dollar restrictions on contributions are "preventative," that is, designed to preclude larger contributions that raise a greater possibility of corruption. "The aggregate limits are then layered on top, ostensibly to prevent circumvention of the base limits. This 'prophylaxis-upon-prophylaxis approach' requires that we be particularly diligent in scrutinizing the law's fit."[159] For restrictions supported by the anti-circumvention justification, the "closely drawn" component of exacting scrutiny appears to require an especially tight fit.

More subtly, *McCutcheon* hinted that the traditionally less exacting standard of review for contribution restrictions may be up for reconsideration. Chief Justice Roberts opened his analysis by referring to the "significant energy" spent by the parties and *amici* "debating whether the line that *Buckley* drew between contributions and expenditures should remain the law."[160] Rather than reaffirm *Buckley,* the plurality opinion determined there was "no need" to revisit *Buckley*'s contribution versus expenditure distinction, as under its "rigorous" application of the "closely

156 *Id.* at 203–18.
157 *Id.* at 221–23.
158 *Id.* at 221.
159 *Id.* (citations omitted).
160 *McCutcheon*, 572 U.S. at 199.

drawn" test, the aggregate contribution restriction was unconstitutional.[161] In his concurring opinion, Justice Thomas would have scrapped the lower standard of review for contribution restrictions and applied strict scrutiny.[162] Without going that far*, McCutcheon* reaffirmed *Citizens United*'s message that the "only legitimate governmental interest for restricting campaign finances is preventing corruption and the appearance of corruption" and "only a specific type of corruption – 'quid pro quo' corruption"[163] meets the constitutional standard. The Court also stressed that disclosure "often represents a less restrictive alternative to flat bans on certain types or quantities of speech."[164]

The 2022 decision in *FEC v. Ted Cruz for Senate*[165] also tightened up the review of contribution restrictions, cast doubt on anti-circumvention, and hinted at a possible reopening of the contribution versus expenditure distinction. *Cruz* addressed a federal rule that limits the ability of a candidate's campaign committee to repay a loan the candidate made to the committee. Specifically, the law caps the amount of money the committee can repay the candidate from *post-election* contributions to the committee; there is no limit on repayment to the candidate from contributions made to the committee before the election. As Justice Kagan explained in her dissent, "[t]he theory of the legislation is easy to grasp. Political contributions that will line a candidate's own pockets, given after his election to office, pose a special danger of corruption."[166] The contributions may fall under the dollar limitation set by FECA to prevent corruption and its appearance, but they will be used not to pay the costs of the candidate's campaign but to make a payment to the candidate or, if the candidate is the winner, to an elected officeholder for his or her personal use.

Nonetheless, the Court determined the measure violated the First Amendment. As in *McCutcheon*, the Court mused about the debate between the parties over whether to apply strict scrutiny or "closely drawn" review before deciding there was no need to resolve the issue—or reaffirm *Buckley* on this point—because the law failed both standards.[167] The Court reasoned that limiting the

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[161] *Id.*
[162] *Id.* at 223–27.
[163] *Id.* at 206–07.
[164] *Id.* at 223.
[165] FEC v. Cruz, 596 U.S. 289 (2022).
[166] *Id.* at 314.
[167] *Id.* at 305.

repayment of loans to a candidate deters candidates from lending to their campaigns, thus burdening their electoral speech.[168] And, the Court concluded, it was not justified by the "only one permissible ground for restricting political speech: the prevention of '*quid pro quo*' corruption or its appearance."[169]

As in *McCutcheon*, the Court focused on the fact that the contributions restricted by the post-election repayment rule are subject to FECA's dollar limits: "[i]ndividual contributions to candidates for federal office, including those made after a candidate has won the election, are already regulated in order to prevent corruption or its appearance."[170] So this was another instance of a precautionary restriction added to an already precautionary restriction, and "[s]uch a prophylaxis-upon-prophylaxis approach . . . is a significant indicator that the regulation may not be necessary for the interest it seeks to protect."[171] The Court determined that the government had failed to provide hard evidence that post-election contributions to repay candidate loans have been a source of corruption.[172] Neither the "common sense" assessment of post-election loan repayment contributions as effectively gifts to winners nor statements by members of Congress to that effect provided sufficient evidence of a danger of corruption or its appearance to satisfy this toughened "closely drawn" standard.[173]

Americans for Prosperity Foundation v. Bonta (*AFP*)[174] is not a campaign finance case, but it has direct implications for the Court's review of campaign finance disclosure requirements and indirectly for the review of contribution restrictions. *AFP* involved a challenge by two advocacy organizations, registered as charities in California, to state regulations that require charities to report the identities of the principal donors. The state contended it needed the information in order to efficiently and effectively discharge its obligation to prevent charitable fraud and self-dealing. The plaintiffs, however, urged that the disclosure of donors violated their First Amendment rights and those of their

168 *Id.* at 302–05.

169 *Id.* at 305 (citations omitted).

170 *Id.* at 306.

171 *Cruz*, 596 U.S. at 306.

172 *Id.* at 311. The dissent argued that the government and amici had presented ample evidence of such corruption. *Id.* at 323–27.

173 *Id.* at 308–13.

174 Ams. for Prosperity Found. v. Bonta, 594 U.S. 595 (2021).

donors by subjecting donors to the possibility of threats and reprisals, thus, making them less likely to contribute.[175]

The central question for the Court was the standard of review. In elections cases, including campaign finance cases, the Court had held that the standard of review of disclosure requirements was "exacting scrutiny," that is, that "there must be a substantial relation between the disclosure requirement and a sufficiently important government interest."[176] This is the same standard that applies to contribution restrictions. One *AFP* plaintiff contended the Court ought to apply strict scrutiny and both urged that even if exacting scrutiny remains the standard of review, the Court ought to require that the disclosure requirement be the "least restrictive means"—the test applied by strict scrutiny—for achieving the government's interest.[177]

The Court did not move all the way to least restrictive means but it did require that the disclosure regulations be "narrowly tailored" to the government's interest,[178] which is considerably tighter than the prior "substantial relation" test. The Court concluded the state had not shown its disclosure requirement was narrowly tailored to its law enforcement interest as, much as in *McCutcheon*, the Court pointed to various means that posed less of a burden on constitutional rights for the state to investigate charitable misconduct.[179] Strikingly, the Court did not simply grant an as-applied exception for the plaintiffs, who had introduced evidence that they and their supporters had been subject to harassment. Instead, even without evidence that disclosure posed similar problems for other organizations, the Court declared the disclosure requirement facially unconstitutional because the state had not considered less intrusive means of gathering information about charitable wrongdoing.[180]

AFP is not a campaign finance case. Conceivably, as the plaintiffs' acknowledged, the government interest in campaign finance disclosure is stronger.[181] And it is certainly not a contribution limitation case. But *AFP* resonates with *McCutcheon*'s emphasis that restrictions be narrowly tailored.

175 *Id.* at 600-02.
176 *Id.* at 607.
177 *Id.*
178 *Id.* at 608–11
179 *Id.* at 611–19
180 *Id.* at 618.
181 *Id.* at 607.

Indeed, it expressly invokes *McCutcheon* for this point.[182] So, too, *AFP* tracks *McCutcheon* and *Cruz* in placing an increased burden on regulators to justify restrictions that arguably impinge on First Amendment activity. As these cases indicate, even when the Court is nominally applying something less than strict scrutiny it is doing so increasingly strictly, with less deference to previously accepted justifications for regulation. This does not bode well for the future of the corporate contribution ban.

V. AFTER THE CORPORATE CONTRIBUTION BAN?

What could replace the corporate contribution ban if it were struck down? This Part explores three possibilities. None would really replace the ban, but each could address some of the concerns that have justified the ban.

A. Pay-to-Play

One approach is to build on the "pay-to-play" laws that restrict donations from government contractors or other entities that have especially close relationships with government. By one count, fifteen states and multiple local governments either prohibit or tightly limit campaign contributions by, or impose enhanced disclosure requirements on, entities that hold or bid for government contracts and individuals closely associated with them.[183] The United States Court of Appeals for the District of Columbia rejected a constitutional challenge to the federal contractor contribution ban in *Wagner v. FEC*[184] in 2015. *Wagner* relied on both the government interest in preventing corruption and its appearance, and a second substantial interest in "protection against interference with merit-based public administration."[185] In determining that the ban, not just a limit, was closely drawn, the court combined a detailed review of instances of bribery, kickbacks, and other corrupt behavior connected to government contracting[186] with a recognition that

182 *Id.* at 609.

183 *See* Craig Holman & Kyung Rok Wi, *Pay-to-Play Restrictions on Campaign Contributions from Government Contractors, 2016*, PUBLIC CITIZEN, https://perma.cc/7PW3-TFLR.

184 Wagner v. FEC, 793 F.3d 1 (D.C. 2015), cert. den. sub nom. Miller v. FEC, 577 U.S. 1102 (2016).

185 *Id.* at 8.

186 *Id.* at 14–21.

"the contracting context greatly sharpens the risk of corruption and its appearance."[187] As the court noted:

> Unlike the corruption risk when a contribution is made by a member of the general public, in the case of contracting there is a very specific quo for which the contribution may serve as the quid . . . . Moreover, because of that sharpened focus, the appearance problem is also greater: a contribution made while negotiating or performing a contract looks like a quid pro quo, whether or not it truly is.[188]

Other courts that sustained contractor contribution bans or very low limits on contractor donations also relied on histories of corrupt arrangements between contractors and public officials to sustain their determinations that the restrictions were closely drawn to achieve an important government interest.[189] Conversely, where a court found that a ban went too far and applied to donations in settings without evidence of corruption, the ban was invalidated.[190]

To be sure, *Wagner* also relied heavily on *Beaumont*, as have other appellate court decisions sustaining state laws banning contributions by government contractors.[191] If *Beaumont* is overturned these decisions could be called into question. Yet, where a government can provide evidence of contractor corruption, *Wagner*'s common sense understanding that contractor donations raise an especially acute potential for corruption and its appearance and pose a distinct threat to "merit-based public administration" should be sufficient to sustain such pay-to-pay restrictions. Government contractor bans also have the advantage of focusing on a particular type of relationship between donors and government rather than the nature or identity of the donor. That is, they apply to individuals and business entities generally, including partnerships, and

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187 *Id.* at 22.

188 *Id.*

189 *See, e.g.*, Yamada v. Snipes, 786 F.3d 1182, 1204–07 (9th Cir. 2015); Ognibene v. Parkes, 671 F.3d 174, 182–93 (2d Cir. 2011); Green Party of Conn. v. Garfield, 616 F.3d 189, 199–205 (2d Cir. 2010).

190 *See* Dallman v. Ritter, 225 P.3d 610 (Colo. 2010).

191 *See, e.g.*, *Green Party of Conn.*, 616 F.3d; *Yamada*, 786 F.3d.

other associations, as well as corporations, and so do not rely on currently unacceptable assumptions about the corporate form.[192]

At the federal level, additional pay-to-play rules have been applied to certain participants in the municipal finance industry. Rule G-37 of the Municipal Securities Rulemaking Board, adopted in 1994, prohibits brokers, dealers, or municipal securities dealers from engaging in municipal securities business with an issuer within two years of making a campaign contribution to an official of the issuer who can influence the awarding of municipal securities business.[193] More recently, the SEC adopted similar rules for investment advisors and certain officials associated with them, and for placement agents—individuals and firms that investment agents hire to help them secure contracts advising a government entity.[194]

In *Blount v. SEC*,[195] the D.C. Circuit concluded that the MSRB rule was narrowly tailored to preventing the "self-evident[]" "conflict of interest in state and local officials who have power over municipal securities contracts and a risk that they will award the contracts on the basis of benefit to their campaign chests rather than to the governmental entity."[196] The court rejected the idea that disclosure would have been a less constitutionally burdensome way of achieving the rule's goals of protecting the bond market from fraud and manipulation and preventing corruption,[197] and found the rule narrowly tailored as it restricted only a narrow range of political activities and only for a limited period of time.[198] Twenty-five years later, in 2019, the D.C. Circuit in *New York Republican State Committee v. SEC*[199] rejected a similar constitutional challenge to the placement agent pay-to-play ban. The petitioners argued, *inter alia*, that *Blount* had been fatally undermined by *McCutcheon*'s condemnation of

[192] *Green Party of Conn.,* 616 F.3d at 194 (Connecticut contractor contribution ban applies to any "person, business entity or nonprofit corporation that enters into a state contract"); *Yamada*, 786 F.3d at 1204 (Hawaii contractor contribution ban applies to "any person" who enters into a contract with the state or other specified governmental entities).

[193] 59 Fed. Reg. 17621 (Apr. 13, 1994). The rule has an exemption permitting a contribution of up to $250 to any official for whom the donor is eligible to vote. *Id.*

[194] *See* 81 Fed. Reg. 60053/1, 60057/2 (placement agents) 17 C.F.R. § 275.206(4)95(a)(i) (investment advisers). The rules permit a contribution of $350 to a candidate for whom the donor is eligible to vote, and a $150 contribution to other candidates.

[195] 61 F.3d 938 (D.C. Cir. 1995).

[196] *Id.* at 944–45.

[197] *Id.* at 947.

[198] *Id.* at 947–48.

[199] 927 F.3d 499 (D.C. Cir. 2019).

"prophylaxis-upon-prophylaxis" regulation.[200] But, noting the evidence of corrupt connections between state officials responsible for pension fund investments and the political contributions they had received, the court concluded that the SEC restriction did in fact closely fit the corruption problem it was intended to address.

Some states have applied the pay-to-play model to donations from certain industries, such as those associated with vice like alcohol,[201] gambling,[202] and cannabis,[203] or those that are highly regulated by the state, such as insurance[204] or banking.[205] Courts have divided over just how much evidence is needed to show that donations from a particular industry present such a distinct and unusual danger of corruption that their donations can be barred.[206] Some jurisdictions have also applied pay-to-play contribution restrictions to lobbyists. Two federal courts of appeals and one state supreme court determined that lobbyist contributions "create special risks of corruption because of the lobbyist's special role in the legislative system."[207] By contrast, the Second Circuit decision sustaining Connecticut's ban on contributions by government contractors invalidated another provision of Connecticut law that would have prohibited contributions by lobbyists. The court explained that "the recent corruption scandals" that justified the contractor ban "had

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200 *Id.* at 510–11.

201 Schiller Park Colonial Inn, Inc. v. Benz, 349 N.E.2d 611 (Ill. 1976).

202 *See, e.g.*, Casino Ass'n of La. v. Foster, 820 So.2d 494 (La. 2002); Soto v. N.J., 565 A.2d 1088 (N.J. 1989). *But see* Deon v. Barasch, 960 F.3d 152 (3d Cir. 2020) (finding not closely drawn a Pennsylvania law preventing individuals holding interests in businesses with gaming licenses from making political contributions).

203 Ball v. Madigan, 245 F.Supp.3d 1004 (N.D. Ill 2017) (finding Illinois law banning medical cannabis cultivation centers and dispensers from making campaign contributions not closely drawn).

204 *See* Gwinn v. State Ethics Comm'n, 426 S.E.2d 890 (Ga. 1993).

205 *See* N.J. Bankers Ass'n v. Grewal, 2021 WL 2525762 (D.N.J. 2021).

206 *Compare Deon*, 960 F.3d, *with Casino Ass'n*, 820 So.2d. *See also Ball*, 245 F.Supp.3d at 1016 (calling into question the 1976 Illinois Supreme Court decision in *Schiller Park*, 349 N.E.2d).

207 State v. Alaska Civil Liberties Union, 978 P.2d 597, 619 (Ak. 1999). *Accord* Preston v. Leake, 660 F.3d 726, 737 (4th Cir. 2011); Schickel v. Dilger, 925 F.3d 858, 871 (6th Cir. 2019) ("history confirms that contributions from lobbyists, their employers, and PACs as well as gifts from lobbyists, suggest quid pro quo corruption"). *Accord* Inst. of Governmental Advocs. v. Fair Pol. Pracs. Comm'n, 164 F.Supp.2d 1183, 1194 (E.D. Cal. 2001) (lobbyists' contributions present a special danger of corruption because their "continued employment depends on their success in influencing legislative action").

nothing to do with lobbyists" and so there was no concrete basis for singling out contributions by lobbyists for prohibition.[208]

Pay-to-play restrictions are far from a complete replacement of a corporate contribution ban. Most corporations are not government contractors or participants in distinctly highly regulated industries. Moreover, pay-to-play restrictions rely on *Buckley*'s less-than-strict scrutiny of contribution restrictions, which is increasingly uncertain.[209] Still, as *Wagner* stressed, pay-to-play conceptually focuses on entities that as a group pose a categorically greater danger of making quid pro quo donations—assuming the regulating jurisdiction can demonstrate that the targeted group in fact has a record of engaging in corrupting practices. If so, pay-to-play restrictions may have a chance of survival even if the Court ratchets up the standard of constitutional review of contribution limits.

B. Foreign Corporations

Citizens United made a point of saying that it did not reach the question of whether there is a compelling government interest "in preventing foreign individuals or associations from influencing our Nation's political process."[210] Two years later in *Bluman v. FEC,*[211] the Court summarily affirmed a three-judge court decision, authored by then-Judge Kavanagh, rejecting a constitutional challenge to the federal statutory ban on foreign financial participation in American elections.[212] As a result, foreign corporations can be—and are—barred from making contributions to candidates in American elections. But what makes a corporation foreign? A corporation incorporated abroad is a foreign corporation, as is one with its principal place of business abroad.[213] An FEC regulation further prohibits foreign

208 Green Party of Conn. v. Garfield, 616 F.3d 189, 206 (2010). *But cf* Ognibene v. Parkes, 671 F.3d 174 (2d Cir. 2011) (upholding New York City law sharply lowering the permissible limit on contributions by lobbyists as part of broader restriction on contributions to city officials by persons doing business with the city).

209 *But cf.* Blount v. SEC, 61 F.3d 938, 944–48 (MSRB Rule 37-G survives strict scrutiny). Subsequently, in N.Y. State Republican State Comm. v SEC, the D.C. Circuit applied the less exacting "closely drawn" standard instead of strict scrutiny. 927 F.3d at 511–12.

210 558 U.S. 310, 362 (2010).

211 565 U.S. 1104 (2012).

212 Bluman v. FEC, 800 F. Supp. 2d 281 (2011).

213 The Federal Election Campaign Act prohibits a "foreign national" from directly making a contribution in connection with a federal, state, or local election. 52 U.S.C. § 30121(a). The Act's definition of a "foreign national' includes an individual who is not a

nationals from participating in the decision-making process of an American entity with respect to making a contribution or expenditure in an American election. This would bar a foreign officer or director from being involved in a corporation's campaign finance decisions.[214] However, neither the FECA nor the FEC has addressed whether substantial foreign ownership of an American corporation makes it "foreign" for purposes of the federal ban on foreign financial participation in American campaigns.

Some states and local governments have sought to fill the gap with laws addressing foreign corporate spending in their elections.[215] Their definitions of what makes a corporation foreign have sometimes been quite aggressive, providing that very small percentages of foreign ownership render a corporation "foreign" or "foreign-influenced."[216] The recently-enacted Minnesota Fair Campaign Practices Act defines a "foreign-influenced corporation," prohibited from making contributions and independent expenditures in Minnesota elections, as a corporation or limited liability company in which a single foreign investor controls one percent or more of the entity's voting shares or other ownership interest, two or more foreign investors together have five percent of the share or ownership interest, or a single foreign investor "participates directly or indirectly in the

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citizen of the United States and a "foreign principal" which, in turn, includes a corporation "organized under the laws or having its principal place of business in a foreign country." 52 U.S.C. § 30121(b). *See also* 11 C.F.R. § 110.20(a)(3).

[214] *See* 11 C.F.R. § 110.20(i). This provision also bars foreign nationals from "involvement in the management of a political committee." *See* FEC, Contribution Limits and Prohibitions, 67 Fed. Reg. 69928, 69946 (Nov. 19, 2002). *See generally*, Ellen L. Weintraub, *Draft Interpretive Rule Concerning Prohibited Activities Involving Foreign Nationals*, FEDERAL ELECTION COMMISSION (Sept. 26, 2019), https://perma.cc/H8LQ-YGUL.

[215] *See, e.g.*, Jason Abel, Adie J. Olson & Elizabeth Goodwin, *Growing List of States and Localities Prohibit Foreign Political Spending*, STEPTOE (Jan. 5, 2024), https://perma.cc/7Z9Z-QHHD; Ki Hong & Sam Rothbloom, *States and Localities Take on Foreign-Influenced Political Spending*, REUTERS (May 30, 2023), https://www.reuters.com/legal/legalindustry/states-localities-take-foreign-influenced-political-spending-2023-05-30/.

[216] *See, e.g.*, Greg Scruggs, *Seattle Passes Campaign Finance Curbs on 'Foreign-Influenced' Firms*, REUTERS (Jan. 13, 2020), https://www.reuters.com/article/us-usa-politics-seattle/seattle-passes-campaign-finance-curbs-on-foreign-influenced-firms-idUSKBN1ZD04T/ ("The Seattle City Council voted unanimously on Monday to approve campaign finance legislation banning political donations in local elections from companies with at least 5% foreign ownership."); *San Jose Bans City Election Contributions from Multinational Corporations*, OJAI VALLEY NEWS, (Dec. 13, 2023), https://perma.cc/7LPE-4N8B ("The new city legislation will prohibit corporations from spending money in San Jose's elections if they are foreign-influenced, defined as 1 percent or more ownership by a single foreign investor or five percent or more ownership by multiple foreign investors.").

corporation's decision-making process with respect to [its] political activities in the United States."[217] Given the uncertainty of what share of corporate stock may be owned by foreign investors at any given time, Minnesota, like other jurisdictions that have sought to prohibit foreign corporate participation, requires the corporation to certify to the state's campaign finance regulator that it is not "foreign-influenced" within the meaning of the statute each time it makes a contribution.

In December 2023, a federal district court issued a preliminary injunction barring enforcement of the Minnesota law.[218] Acknowledging that a one percent foreign owner "*could* exercise influence" over corporate decision-making, the court determined that the state had failed to show any evidence that "minority foreign shareholders have even once exercised influence or control over a corporation's election expenditures in Minnesota or elsewhere."[219]

In February 2024, the Maine federal district court issued a preliminary injunction against the enforcement of that state's recently adopted ban on campaign spending by "foreign government-influenced" entities.[220] The Maine law defined "foreign government-influenced entity" broadly to include: (i) a foreign government; (ii) an entity in which a foreign government or foreign government-owned entity "[h]olds, owns, controls, or otherwise has direct or indirect beneficial ownership of 5% or more" of "applicable ownership interests"; or (iii) an entity in which a foreign government or foreign government-owned entity "[d]irects, dictates, controls or directly or indirectly participates in the decision-making process" of the entity with respect to decisions concerning campaign contributions and expenditures.[221] The court concluded that although under *Bluman* Maine has a compelling government interest in limiting foreign government influence in candidate elections,[222] the law was not narrowly tailored.

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217 Minn. Stat. § 211B.15

218 Minn. Chamber of Com. v. Choi, ___ F. Supp. 3d ___, 2023 WL 8803357 (D. Minn. Dec. 20, 2023).

219 *Id.* at *7.

220 Central Me. Power Co. v. Me. Comm'n on Governmental Ethics and Election Practices, ___ F. Supp. 3d ___, 2024 WL 866367 (D. Me. Feb. 29, 2024).

221 *Id.* at *2.

222 *Id.* at *12. The court assumed without deciding that limiting foreign government interest in referendum elections is also a compelling government interest. *Id*. The court also found that FECA preempted the application of the state law to federal elections but

The five percent foreign ownership threshold was overbroad. It "would prohibit a substantial amount of protected speech" and seemed "arbitrarily chosen."[223] The inclusion of foreign government-owned entity participation in the domestic entity's campaign finance decision-making was also held to "cast[] an overly broad net," as the implementing regulations proposed by the state left open the possibility that a domestic entity would be restricted "not based on its own conduct, but based on unsolicited communications from a foreign government-owned entity even when no actual influence is shown."[224]

These two decisions are certainly not the last word in the effort to regulate foreign or foreign-influenced corporations. But they confirm that although in principle foreign corporations can be barred from participating in United States elections, defining what makes a corporation foreign is far from clear and that aggressive efforts to find define foreign influence risk being struck down as an excessive restriction on corporate election participation.

C. Disclosure

Citizens United placed great weight on disclosure as the appropriate means of regulating corporate participation in elections, contending that "disclosure permits citizens and shareholders 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."[225] As previously discussed, disclosure would be less effective than a contribution ban in protecting the interests of dissenting shareholders,[226] but disclosure could at least partially advance the interest in shareholder protection as well as anti-corruption and anti-circumvention goals. Effective disclosure of corporate campaign activity could also play an

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that it did not prohibit state regulation of foreign government campaign expenditures in state and local candidate elections or referenda. *Id.* at *5–11.

[223] *Id*. at *13–14. The court left open the possibility that during discovery the state could provide evidence of foreign government influence over campaign spending by domestic entities with only a small ownership share. *Id.* at *14.

[224] *Id.* at *15. The court had found the ban on foreign government campaign participation narrowly tailored to the state's interest, *id.* at *13, but concluded that at least at the preliminary injunction stage that provision could not be severed from the rest of the law. *Id*. at *16.

[225] 558 U.S. 310, 371 (2010).

[226] *See supra* notes 145–52 and accompanying text.

important role in educating the public and voters as well as shareholders about the role corporations play in elections. The increasing willingness of some corporations to report their political activities to their shareholders may signal a recognition within the business community of shareholder concern about corporate campaign money. However, the scope of voluntary corporate disclosure varies considerably,[227] and many corporations do not make any disclosures at all.[228] Voluntary corporate disclosure is unlikely to provide effective disclosure.

In 2011, the Committee on Disclosure of Corporate Political Spending submitted a petition for rulemaking to the SEC asking "that the Commission develop rules to require public companies to disclose to shareholders the use of corporate resources for political activities."[229] Although the petition ultimately garnered at least 1.2 million comments,[230] SEC action has been repeatedly stymied by Congressional budget riders which bar the SEC from using its funds to "finalize, issue, or implement any rule, regulation, or order regarding the disclosure of political contributions, contributions to tax exempt organizations, or dues paid to trade associations."[231] Even if the hurdle of Congressional opposition to SEC regulation is overcome, a corporate political disclosure rule would require the resolution of multiple complex questions of what types of political spending must be disclosed, when (and how often) should disclosure occur, how the disclosed information should be made available to shareholders, and enforcement in the event of non- or false disclosure. The existing voluntary disclosure resolutions can provide some guidance for

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[227] *See supra* notes 146–47 and accompanying text.

[228] *See* Haan, *supra* note 147.

[229] Letter from Commission on Disclosure of Corporate Political Spending to Elizabeth M. Murphy, Sec'y, U.S. SECURITIES AND EXCHANGE COMMISSION (Aug. 3, 2011), https://perma.cc/4QL8-P8P6.

[230] Bebchuk et al., *The Untenable Case for Keeping Investors in the Dark*, 10 HARV. BUS. L. REV. 1, 3 (2020).

[231] Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, § 633, 136 Stat. 4459, 4703 (2022). The same wording was included in the 2017 and 2018 versions of the Act. Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, § 635, 131 Stat. 135, 376 (2017); Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, § 631, 132 Stat. 348, 584 (2018). The 2016 version had slightly different wording. Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 707, 129 Stat. 2242, 3029-3030 (2015) ("None of the funds made available by any division of this Act shall be used by the Securities and Exchange Commission to finalize, issue, or implement any rule, regulation, or order regarding the disclosure of political contributions, contributions to tax exempt organizations, or dues paid to trade associations.").

the resolution of these questions, but the variation in their requirements indicates these issues may not be easy to resolve.

Government-mandated disclosure would also raise constitutional issues. The Supreme Court has consistently supported campaign finance disclosure, including, most prominently, in *Citizens United* itself.[232] However, the Court's recent decision in *AFP v. Bonta* suggests it may be on the verge of tightening up its review of disclosure requirements.[233] A requirement that corporations disclose their contributions would depart from traditional campaign finance regulation by requiring disclosure by donors rather than the recipients of those donations who then turn them into campaign expenditures. Moreover, a disclosure requirement for corporate *political* spending—but not other forms of corporate spending—would be subject to the contention that it is a content-based regulation of corporate speech, subject to strict judicial scrutiny. On the other hand, any requirement that corporations disclose their contributions to their shareholders would likely apply to contributions already subject to public disclosure, thus minimizing any new constitutional burden.

Given the Congressional blockade against SEC action on corporate disclosure, it would be premature, and well beyond the scope of this article, to consider the constitutional issues that would be raised by a corporate contribution disclosure requirement. Suffice it to say that at least in the near term, disclosure is unlikely to be an effective replacement for the corporate contribution ban should that ban be held unconstitutional.

VI. CONCLUSION

What accounts for the surprising survival—so far—of the corporate contribution ban? It is a mystery. The corporate contribution ban is almost entirely out-of-sync with modern campaign finance doctrine. Corporations, recharacterized as "associations of citizens,"[234] can no longer be treated as a distinctive threat to the integrity of the democratic process. Campaign spending by corporations is constitutionally protected and part of the campaign finance system. Yet the ban continues

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232 558 U.S. 310, 366–71 (2010).

233 *See supra* notes 174–82 and accompanying text.

234 Citizens United v. FEC, 558 U.S. 310, 354, 356 (2010).

to be a part of federal campaign finance law and the laws of twenty-one states.

For most corporations, it may not matter. Given the availability of both the PAC option and independent spending—along with issue advocacy, general voter education campaigns, and lobbying—corporations have ample opportunities to make their interests known and their voices heard in the political process.

However, this is not a completely satisfactory answer. As *Citizens United* pointed out, setting up a PAC entails administrative costs and requires the solicitation of donations from corporate personnel.[235] It would be cheaper just to make a donation from corporate treasury funds. Although independent spending can be helpful to candidates, most candidates would rather have contributions to their campaigns so they can control how the money is used. Public advocacy and lobbying are certainly crucial ways for corporations to advance their political agendas, but advocacy efforts and especially lobbying often benefit from accompanying campaign contributions.

Nor is it clear why the Supreme Court has declined to address the issue. The Court has denied certiorari in at least six corporate contribution cases since 2010.[236] Perhaps the blowback from *Citizens United* has discouraged the Court from taking on corporate campaign finance cases; indeed, it has heard relatively few campaign finance cases of any kind in the last ten years.[237]

On the other hand, this would likely not be a hard issue for the current Court. In the nearly two decades since Chief Justice Roberts and Justice Alito joined the Court, the Court has consistently ruled against every challenged campaign finance rule—federal or state, statute or regulation. Two of those cases, *Citizens United* and *McCutcheon*, overruled campaign finance precedents, so *Beaumont* would not be much of a barrier to action if the Court decided to take up the issue.

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[235] *See id.* at 337–38.

[236] *See supra* note 117 and accompanying text.

[237] In addition to *McCutcheon* and *Cruz*, discussed in the text, the only other campaign finance decided by the Court in the last fourteen years is *Thompson v. Hebdon*, 589 U.S. 1 (2019), a brief per curiam decision vacating and remanding a Ninth Circuit decision affirming a lower court's dismissal of Alaska's contribution limits. The case broke no new ground, finding only that the lower courts had failed to adequately consider the Court's earlier decision in *Randall v. Sorrell*, 548 U.S. 230 (2006), in assessing the Alaska contribution limits.

So, judicial inaction remains a mystery, and the corporate contribution ban surprisingly continues to survive—for now.