NOTE

Fighting Foreign-Corporate Political Access: Applying Corporate Veil-Piercing Doctrine to Domestic-Subsidiary Contributions

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Campaign finance regulations limit speech. The laws preclude foreign nationals, including foreign corporations, from participating in U.S. politics via campaign contributions. The unusual characteristics of corporations, however, may allow foreign corporations to exploit a loophole in the regulatory regime. A foreign corporation may contribute to political campaigns by acquiring a domestic subsidiary and dominating it. This Note addresses how these unusual corporate behaviors enable foreign corporations to illegally corrupt the political process. This Note concludes that to close the loophole without violating the free speech rights of domestic subsidiaries, Congress should enact legislation which would apply corporate veil-piercing theory to the campaign finance system, reinforcing its legislation with qui tam provisions.

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Introduction

In 1996, as President Clinton sought reelection, scandal threatened him and the Democratic Party. Many accused the Democrats of illegally selling political influence to foreigners. The following is an example of the type of

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illegal conduct alleged. In late February, a South Korean electronics company, Cheong Am Business Group, established a California subsidiary, Cheong Am America.[1] The next month, the South Korean parent corporation capitalized the California subsidiary with a $1.3 million bank transfer.[2] Shortly thereafter, John H.K. Lee, a South Korean citizen and the chairman of both the parent and subsidiary corporations, attended a Democratic National Committee (DNC) fundraiser and met Clinton.[3] Within days, Lee directed Cheong Am America to contribute $250,000 to the DNC.[4] Prior to the contribution, Cheong Am America did not operate and had no income.[5] This contribution violated the Bipartisan Campaign Reform Act of 2002 (BCRA), also known as the McCain-Feingold Act,[6] which prohibits foreign nationals from contributing to U.S. elections or candidates.[7] Following media scrutiny, the DNC quickly admitted the contribution was illegal and returned it.[8]

These events prompted outrage and led to extensive investigation. A special Department of Justice task force, comprised of ninety prosecutors, FBI agents, and support staff, investigated millions of documents relating to the scandal.[9] Congress also investigated. The Senate Committee on Governmental Affairs published a report alleging that

> The President and his aides demeaned the offices of the President and Vice President, took advantage of minority groups, pulled down all the barriers that would normally be in place to keep out illegal contributions, pressured policy makers, and left themselves open to strong suspicion that they were selling not only access to high-ranking officials, but policy as well. Millions of dollars were raised in illegal contributions, much of it from foreign sources.[10]

The investigations uncovered evidence of illegal foreign efforts to influence the U.S. political process.[11] They determined that although some foreign efforts seemed "innocuous," there was likely also "a broad array of [foreign]

1. S. Rep. No. 105-167, at 1702 (1998).
2. *Id.*
3. Alan C. Miller, *Democrats Return Illegal Contribution; Politics: South Korean Subsidiary's $250,000 Donation Violated Ban on Money from Foreign Nationals*, L.A. Times, Sept. 21, 1996, at A16.
4. S. Rep. No. 105-167, at 37.
5. *See id.* at 1702.
6. 2 U.S.C. § 431 (2012) (recodified at 52 U.S.C. § 30101).
7. *Id.* § 441e (recodified at 52 U.S.C. § 30121).
8. Miller, *supra* note 3.
9. Roberto Suro, *Justice Did Not Review Legality of Gore White House Solicitations; Report of 'Hard Money' Deposits Prompted Reno to Act*, Wash. Post, Sept. 6, 1997, at A1.
10. S. Rep. No. 105-167, at 3 (1998).
11. *E.g.*, *id.* at 46–49 ("[T]he DNC's heedless pursuit of contributions allowed wealthy and well-connected foreign nationals to arrange almost unlimited access to the President and other top U.S. policymakers. Time after time, [people] used access to the President to advance [their] private business interests . . . .").

efforts designed to influence U.S. policies and elections through . . . financing election campaigns."[12] Ultimately, the investigations met dead ends and the public lost interest.[13]

Congress has worried about corrupting influences invading politics since the country's founding and continues to worry about them today.[14] As early as 1867, Congress regulated campaign finance to that end.[15] These regulations restrict the marketplace to prevent people from buying influence. In the Cheong Am scandal, for example, the regulatory net caught the illegal foreign contribution and forced the DNC to return the contribution.[16]

Recently, however, the Supreme Court overruled some campaign finance regulations in the name of free speech.[17] In doing so, the Court ripped holes in the regulatory net designed to protect politics from corruption. The system that remains allows domestic subsidiaries of foreign corporations to contribute to campaigns almost without limits.[18] In the 2014 election cycle alone, domestic subsidiaries, through their Political Action Committees (PACs), contributed over $19 million to various campaigns or causes.[19] That much money has the potential to corrupt elections by significantly impacting their outcomes.

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12. *Id.* at 47.

13. Marc Lacey, *House Probe of Campaign Fund-Raising Uncovers Little, Piles Up Partisan Ill Will; Congress: GOP Insults, Democratic Ridicule Are Low-lights of Costly Investigation That Has Spawned 600 Subpoenas but Led Mostly to Dead Ends*, L.A. Times, May 2, 1998, at A14 ("Despite issuing a flurry of 600 subpoenas, committee investigators have largely run into dead end after dead end . . . . The media have largely moved on, and some Republicans who had regarded the donation scandal as their party's political battering ram now have lost interest in the complicated web of allegations.").

14. Zephyr Teachout, *The Anti-Corruption Principle*, 94 Cornell L. Rev. 341, 347 (2009) ("The Framers of our Constitution considered political corruption a key threat—if not the key threat—to the young country.").

15. *See* Matthew A. Melone, Citizens United *and Corporate Political Speech: Did the Supreme Court Enhance Political Discourse or Invite Corruption?*, 60 DePaul L. Rev. 29, 33 n.24 (2010) (explaining early attempts at regulating campaign finance).

16. *See* Miller, *supra* note 3.

17. Citizens United v. FEC, 130 S. Ct. 876 (2010).

18. Many well-known domestic subsidiaries of foreign corporations like UBS Americas (subsidiary of Switzerland-based UBS AG); BAE Systems (subsidiary of United Kingdom-based BAE Systems); Sprint Communications (subsidiary of Japan-based Softbank Corp.); and Teva Pharmaceuticals USA (subsidiary of Israel-based Teva Pharmaceuticals Industries) have their own Political Action Committees (PACs) and contribute to campaigns. *Foreign-Connected PACs*, OpenSecrets.org, http://www.opensecrets.org/pacs/foreign.php (last updated Mar. 9, 2015).

19. *Id.* One commentator argues this is but a drop in an immense bucket. Scott L. Friedman, Note, *First Amendment and "Foreign-Controlled" U.S. Corporations: Why Congress Ought to Affirm Domestic Subsidiaries' Corporate Political-Speech Rights*, 46 Vand. J. Transnat'l L. 613, 625 (2013) ("Domestic subsidiaries' contributions comprise only a sliver of the magnitude of money spent on electoral politics."). The numbers, however, include only contributions made by domestic subsidiaries' PACs and do not chart other contributions. *See id.* at 624.

If a domestic subsidiary contributes with its parent's foreign interests in mind, the contributions are illegal,[20] potentially corrupting, and should be cause for alarm. This Note does not suggest that all domestic subsidiaries of foreign corporations are incapable of separating their interests from the foreign interests of their parents when they contribute to campaigns, as is required by law. In many cases, however, a parent company will dominate a subsidiary to pursue its own interests.[21] This Note argues that Congress must balance free speech rights with the potential for corruption by allowing domestic subsidiaries to contribute in their own interests while precluding them from doing so in their foreign parents' interests.

Part I introduces the history of the campaign finance regulatory environment and examines the cases that have chipped away at the regulations and their protections. Part II explains how corporations, through mergers and acquisitions, may enable foreign corporations to illegally access U.S. politics. Finally, Part III concludes that adopting legislation that applies a corporate veil-piercing theory, enforced in part by qui tam provisions, to the campaign finance system will prevent foreign corporations from accessing U.S. politics without infringing the free speech rights of domestic companies.

I. Contributing to the Campaign Finance System

This Part examines the history of campaign finance regulations and introduces the current legal framework regarding corporate and foreign participation in campaign finance. Section I.A examines the development of doctrine on corporate participation in campaigns. Section I.B discusses the longstanding prohibition on foreign participation in campaign finance. Section I.C explains the aftermath of *Citizens United*.

A. *A History of Corporate Campaign Finance Law*

U.S. leaders have been particularly concerned with political corruption since the country's founding.[22] The framers worried that the country's infancy and size rendered it especially susceptible to corrupting influence.[23] They eased their concerns by peppering the Constitution with several anticorruption clauses.[24]

20. 2 U.S.C. § 441e (2012) (recodified at 52 U.S.C. § 30121) (preventing indirect contributions in connection with elections).

21. *See, e.g.*, United States v. Bestfoods, 524 U.S. 51 (1998) (holding that a corporate parent that actively participated in and exerted control over the operations of a subsidiary could be directly liable for the actions of the subsidiary).

22. *See, e.g.*, Teachout, *supra* note 14, at 347.

23. *Id.* at 353.

24. For example, the framers wrote provisions about the size of the legislature with corruption specifically in mind. *See id.* at 354 ("One of the most extensive and recurring discussions among the delegates about corruption concerned the size of the various bodies."). For a detailed discussion on anticorruption provisions throughout the Constitution, see *id.* at 354–69.

Specifically, the framers worried that corporate influences would corrupt U.S. politics. Though there were few corporations in the United States, the colonists loathed interacting with domineering corporations.[25] Corporate monopolies, for example, prohibited colonists from trading with Native Americans and other countries' companies.[26] In a memorandum that reflects early American perceptions, James Madison wrote, "there is an evil which ought to be guarded ag[ain]st in the indefinite accumulation of property from the capacity of holding it in perpetuity by . . . corporations. The power of all corporations ought to be limited in this respect."[27] With the colonial experience in mind, the framers empowered the states to regulate corporations.[28] States prohibited corporations from engaging in any conduct not expressly provided for in their corporate charters, prevented them from operating in other states, limited their ability to raise capital, and threatened to revoke their charters, which would force a corporation to dissolve.[29]

The framers did not foresee that states would be ill-suited to address the problems. Eventually, as states competed with each other for corporate tax revenues, they chipped away at the restrictions and safeguards against corporate powers in a race to the bottom.[30] By the end of the nineteenth century, the less-restricted corporations were multiplying and enjoying soaring revenues.[31] Increased revenues enabled corporations to spend more on federal, state, and local elections.[32]

Fearing corporate corruption, Congress began an enduring fight to reform campaign finance laws comprehensively.[33] The first attempt, the Tillman Act of 1907, banned direct corporate contributions.[34] Corporations could easily evade the ban because it lacked disclosure requirements and allowed them to reimburse directors who made personal contributions.[35] Within a few years, Congress enacted, and later amended, the Publicity Act

25. *See* Matt A. Vega, *The First Amendment Lost in Translation: Preventing Foreign Influence in U.S. Elections After* Citizens United v. FEC, 44 Loy. L.A. L. Rev. 951, 966 (2011) (explaining colonial response to restrictive trade agreements).

26. *Id.*

27. James Madison, Detached Memoranda (c. 1817), *reprinted in Madison's "Detached Memoranda"*, 3 Wm. & Mary Q. 534, 556 (Elizabeth Fleet ed., 1946).

28. *See* Dale Rubin, *Corporate Personhood: How the Courts Have Employed Bogus Jurisprudence to Grant Corporations Constitutional Rights Intended for Individuals*, 28 Quinnipiac L. Rev. 523, 526–27 (2010).

29. *Id.* at 532.

30. Louis K. Liggett Co. v. Lee, 288 U.S. 517, 557–60 (1933) (Brandeis, J., dissenting).

31. Vega, *supra* note 25, at 967.

32. *Id.* ("As these corporations became wealthier, they increased their spending in federal, state, and local elections to further their own interests.").

33. For comprehensive coverage of early congressional attempts at campaign finance reform, see *id.* at 967–71. For a useful timeline of events in campaign finance law, see *A Century of U.S. Campaign Finance Law*, NPR (Jan. 21, 2010, 10:02 AM), http://www.npr.org/templates/story/story.php?storyId=121293380.

34. Pub. L. No. 59-36, 34 Stat. 864 (1907).

35. Vega, *supra* note 25, at 968.

to remedy the Tillman Act's shortcomings.[36] The Publicity Act required candidates to disclose information relating to funds but it brought little practical change.[37] The Act did not include enforcement measures, so candidates "almost universally" ignored its requirements.[38] Congress needed new comprehensive legislation to close these loopholes; it would take over half a century.

Congress next attempted to overhaul campaign finance with the Federal Election Campaign Act of 1971 (FECA).[39] "FECA remains the foundational law of the system: It sets contribution limits, requires disclosure of contributions and spending, and institutes public financing for presidential elections."[40] A contribution limit caps what one gives to a particular candidate or committee, while an expenditure limit caps what one can spend overall on a given election.[41] Meanwhile, an independent expenditure may advocate for or against a candidate, but must not be connected to any candidate's campaign.[42] Although the law was imperfect, subsequent amendments remedied some of the issues.[43] For example, these amendments created the Federal Election Commission (FEC) as a watchdog and enforcer.[44]

Finally facing a comprehensive and capable campaign finance law, campaign-spending advocates took their cause to the courts.[45] In *Buckley v. Valeo*, the foundational campaign finance case, the Supreme Court upheld FECA's limits on direct contributions to candidates but struck down limits on expenditures and independent expenditures.[46] The Court reasoned, "although the Act's contribution and expenditure limitations both implicate fundamental First Amendment interests, its expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do its limitations on financial contributions."[47]

36. Publicity Act of 1910, ch. 392, 36 Stat. 822 (repealed 1972), *amended by* 1911 Amendments to the Publicity Act, ch. 33, 37 Stat. 25.

37. *Id.*; *see* Justin A. Nelson, Note, *The Supply and Demand of Campaign Finance Reform*, 100 Colum. L. Rev. 524, 534 (2000).

38. Nelson, *supra* note 37, at 534–35.

39. Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. §§ 431–455 (2012) (recodified at 52 U.S.C. §§ 30101–30145)).

40. *A Century of U.S. Campaign Finance Law*, *supra* note 33.

41. Buckley v. Valeo, 424 U.S. 1, 12–60 (1976) (per curiam).

42. *See* 2 U.S.C. § 431(17) (2012) (recodified at 52 U.S.C. § 30101(17)). For example, someone advertising to attack a candidate on her own initiative is an independent expenditure. *See id.* Meanwhile, if that candidate's opponent solicited the advertisement, it would not be an independent expenditure. *See id.*

43. Vega, *supra* note 25, at 971.

44. *See id.* at 973.

45. *E.g.*, Buckley v. Valeo, 519 F.2d 821 (D.C. Cir. 1975) (en banc) (per curiam), *rev'd in part*, 424 U.S. 1 (1976). FECA, as amended, was "the latest, and by far the most comprehensive, reform legislation passed by Congress concerning the election of the President, Vice-President and members of Congress." *Id.* at 831.

46. 424 U.S. 1, 143 (1976) (per curiam).

47. *Buckley*, 424 U.S. at 23.

Critics lament that *Buckley*'s reasoning was predicated on an assumption that money equaled speech.[48] Although *Buckley* did not address corporate speech, it laid the groundwork for future constitutional challenges to campaign finance reforms. Should the Court find corporate speech warranted the same protection as individual speech, *Buckley* would make corporate expenditure limits unconstitutional.[49]

In *First National Bank of Boston v. Bellotti*, the Court directly addressed corporate speech.[50] Massachusetts had criminalized corporate expenditures that influenced votes on referendum proposals.[51] Reasoning that individuals could unquestionably seek to influence these referendum proposals through expenditures, the Court considered whether corporate speech was entitled to less protection than individual speech: "The question in this case, simply put, is whether the corporate identity of the speaker deprives th[e] proposed speech of what otherwise would be its clear entitlement to protection."[52] The Court held that the Massachusetts criminal statute "amount[ed] to an impermissible legislative prohibition of speech based on the identity of the [speaker's] interests."[53] It did not matter whether the speech came from a "corporation, association, union, or individual."[54] Although the Court admitted that corruption is possible with corporate contributions to particular candidates or committees, it held that those problems do not exist with respect to referendum proposals.[55] *Bellotti* opened the door for more corporate political involvement.

After *Bellotti*, Congress amended FECA to codify a soft-money exception.[56] Soft money funds "'party-building' activities," as opposed to direct candidate advocacy.[57] "In addition to grassroots campaign activity, soft

48. Brittany Morgan Albaugh, Note, *Two Paths to Preventing Foreign Influence: Reforming Campaign Finance and Lobbying Law*, 13 J. Int'l Bus. & L. 283, 287 (2014). *But see* Michael Cummins, *Money Is Not Speech*, Found. for Econ. Educ. (Nov. 30, 2011), http://www.fee.org/the_freeman/detail/money-is-not-speech (explaining that it is a "widespread mischaracterization" to say that *Buckley* equated money and speech). Even Justice White, in dissent, suggested that the majority was equating money with speech. *Buckley*, 424 U.S. at 262 (White, J., concurring in part and dissenting in part).

49. *See Buckley*, 424 U.S. 1.

50. 435 U.S. 765 (1978).

51. *Bellotti*, 435 U.S. at 767–68.

52. *Id.* at 777–78.

53. *Id.* at 784.

54. *Id.* at 777.

55. *Id.* at 788 n.26 ("The overriding concern behind the enactment of [campaign-finance regulations prohibiting corporate speech] was the problem of corruption of elected representatives through the creation of political debts. . . . The case before us presents no comparable problem, and our consideration of a corporation's right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office." (citations omitted)).

56. Federal Election Campaign Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1980).

57. Bill Mears, *Where the Money Is: A Campaign Spending Primer*, CNN (Jan. 23, 2012, 7:19 PM), http://www.cnn.com/2012/01/23/politics/campaign-spending-primer.

money also funds voter registration drives, phone banks, and get-out-the-vote efforts conducted by parties."[58] As a consequence of the FECA amendment and *Bellotti*, corporations could give to parties as long as the money was soft.

In *Austin v. Michigan State Chamber of Commerce*, the Court retreated from its expansion of corporate speech rights.[59] Contrary to the rationale of *Bellotti* that corporate money could not corrupt public referenda, only elected officials, the Court stated in *Austin* that corporate independent expenditures did raise concerns regarding the corrupting influence of accumulated corporate wealth on elections.[60] Specifically, the Court realized, "[c]orporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions."[61] The Court recognized that this rationale provided a compelling reason, sufficiently tailored, to restrict corporate expenditures.[62] Based on this anticorruption rationale, *Austin* held that bans based on corporate speaker identity could be constitutional.[63]

Although *Austin* undid some of the damage from *Bellotti*, Congress found corporate soft-money abuse remained a problem. In the 1996 election, soft-money use tripled as both parties used it to essentially, if not exactly, advocate for or against specific candidates.[64] In light of these abuses, Congress enacted the Bipartisan Campaign Reform Act of 2002 (BCRA), also known as the McCain-Feingold Act.[65] BCRA attempted to improve the system by limiting soft money.[66] Campaign-spending advocates challenged BCRA in *McConnell v. FEC*, but the Court upheld it based on the same anticorruption reasoning in *Austin*.[67]

In *Citizens United v. FEC*, the Court flipped its position on corporate campaign speech again.[68] *Citizens United* overruled *Austin* and the relevant part of *McConnell*, returning to the principles established in *Buckley* and *Bellotti*.[69] In doing so, the Court rejected the anticorruption rationale and

58. *Campaign Finance Revision: Soft Money: Hearing Before S. Comm. on Rules and Admin.*, 105th Cong. (1997) (statement of Bradley A. Smith, Adjunct Scholar, Cato Institute), 1997 WL 2551155.

59. 494 U.S. 652 (1990).

60. *Austin*, 494 U.S. at 659–60.

61. *Id.* at 660.

62. *Id.* at 660–61.

63. *Id.*

64. *Soft Money - A Look at the Loopholes*, Wash. Post (1998), http://www.washingtonpost.com/wp-srv/politics/special/campfin/intro4.htm. The DNC paid for months of television ads that mirrored Clinton's campaign ads with soft money. *See id.* The Republican National Committee (RNC) used soft money for a commercial made by Senator Dole using footage shot for his campaign. *Id.*

65. 2 U.S.C. § 431 (2012) (recodified at 52 U.S.C. § 30101).

66. *Id.*

67. 540 U.S. 93, 142–69 (2003).

68. 130 S. Ct. 876, 912–14 (2010).

69. *Citizens United*, 130 S. Ct. at 913–14.

gutted the corporate restrictions in the BCRA.[70] Essentially, *Citizens United* diluted the governmental interest to solely an interest in preventing quid pro quo corruption.[71] Because there was no record of quid pro quo corruption stemming from independent expenditures, the Court found that provisions limiting those expenditures were unconstitutional.[72] The Court reiterated, "the First Amendment stands against attempts to disfavor certain subjects or viewpoints. Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others."[73] Consequently, legislation that disfavors corporate speech may not stand.

B. *No Foreigners Allowed*

The framers were similarly concerned with corruption by foreign influences, as evidenced by the anticorruption provisions in the Constitution.[74] The Nobility Clause, for example, prevents congressmen from accepting gifts from foreign governments.[75] Fear of foreign corruption even engendered bitter bipartisanship in the first Congress; Federalists accused Republicans of being influenced by the radical French and Republicans accused Federalists of allying with the British.[76]

Congress often enacted legislation to allay these concerns. The Foreign Agents Registration Act, for example, required that agents of foreign governments disclose their affiliation when participating in politics.[77] During the World War II era, Congress strengthened the Act, providing more stringent rules against foreign political participation to prevent the spread of Nazi and Communist propaganda.[78] Further amendments criminalized the foreign use of domestic agents for political contribution.[79] As in the corporate context, reform efforts addressing foreign participation in campaign finance

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70. *Id.*

71. *See id.* at 908–09.

72. *Id.* at 910–11.

73. *Id.* at 898 (citation omitted).

74. Teachout, *supra* note 14, at 357–58, 361–62, 366–67 ("[C]oncern about foreign power . . . was often intermingled with the fears of corruption.").

75. U.S. Const. art. I, § 9, cl. 8 ("[N]o person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.").

76. Richard Hofstadter, The Idea of a Party System: The Rise of Legitimate Opposition in the United States, 1780-1840, at 89–90 (1969).

77. An Act to Amend the Foreign Agents Registration Act of 1938, Pub. L. No. 89-486, §§ 2(4), (6), 80 Stat. 244, 245–46 (1966) (codified as amended at 22 U.S.C. §§ 612(a)(6), (8) (2012)).

78. An Act to Amend the Foreign Agents Registration Act of 1938, ch. 236, § 4, 56 Stat. 248, 255–56 (1942) (codified as amended at 22 U.S.C. § 614 (2012)). For an overview of the history of the Foreign Agents Registration Act of 1938, see Vega, *supra* note 25, at 968–71.

79. Pub. L. No. 89-486, § 8, 80 Stat. 244, 248–49 (repealed 1976). For example, this prevented foreign individuals from hiring U.S. citizens as agents to make contributions on their behalf.

were littered with loopholes and setbacks.[80] Finally, Congress enacted FECA and later BCRA, which directly prohibited any "foreign national, directly or indirectly, [from] mak[ing] a contribution . . . or an expenditure."[81]

According to federal courts, the foreign prohibition is more constitutionally sound than the corporate prohibitions. The Supreme Court expressly avoided reaching the constitutionality of section 441e of the BCRA[82] in *Citizens United* when it gutted the BCRA's corporate provisions.[83] Although the Court did not directly review section 441e, the Court "never cast doubt on laws that place special restrictions on campaign spending by foreign nationals."[84]

Nonetheless, section 441e still faced a challenge in court. In *Bluman v. FEC*, Bluman, a Canadian associate at a U.S. law firm, and Steiman, a dual Israeli and Canadian medical resident, wished to contribute money to various American political candidates.[85] Although they had lawfully resided in the United States for years and planned to stay several more years, their desired contributions were barred by section 441e.[86] In their complaint they alleged that they were legally authorized to be in the United States—they were subject to the laws, paid taxes, and "robustly participate[d] in civic life."[87] They argued that section 441e criminalized forms of expression that "constitute[d] core political speech entitled to the strongest protection under the First Amendment."[88]

The D.C. District Court upheld section 441e and dismissed the case.[89] The court believed that the constitutionality of section 441e "raise[d] a preliminary and foundational question about the definition of the American political community and, in particular, the role of foreign citizens in the U.S. electoral process."[90] The court balanced two competing ideas. First,

80. *See* Vega, *supra* note 25, at 970–71. For example, when the Foreign Agents Registration Act criminalized the foreign use of agents for political participation, the law only sanctioned the agent and not the foreign principal. *Id.* at 971. Foreign nationals and corporations could contribute directly to campaigns. *Id.*

81. 2 U.S.C. § 441e (2012) (recodified at 52 U.S.C. § 30121). This section is implemented by regulation. 11 C.F.R. § 110.20 (2014).

82. References in this Note to "section 441e" are to section 441e of title 2 of the 2012 version of the U.S. code. Section 441e is being relocated, along with several other sections of titles 2 and 42, to a newly created title 52. *See Editorial Reclassification, Title 52, United States Code*, Off. L. Revision Couns., U.S. House Representatives, http://uscode.house.gov/editorialreclassification/t52/index.html (last visited Aug. 17, 2015).

83. Citizens United v. FEC, 130 S. Ct. 876, 911 (2010) ("We need not reach the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation's political process.").

84. *Id.* at 947 (Stevens, J., concurring in part and dissenting in part).

85. 800 F. Supp. 2d 281, 285 (D.D.C. 2011).

86. *Bluman*, 800 F. Supp. 2d at 285.

87. Complaint ¶ 2, *Bluman*, 800 F. Supp. 2d 281 (No. 110-cv-01766), 2010 WL 4236439.

88. *Id.* ¶ 28.

89. *Bluman*, 800 F. Supp. 2d at 285–86, 292.

90. *Id.* at 286.

aliens enjoy many constitutional rights in the United States.[91] But, the United States may also deny aliens certain rights and privileges that U.S. citizens enjoy.[92] As long as activities are "intimately related to the process of democratic self-government," it is acceptable to exclude foreign citizens.[93] The court found the issue straightforward and reasoned that aliens do not have a right to participate in U.S. elections.[94] The Supreme Court's affirmation of *Bluman*'s dismissal without opinion solidified section 441e's constitutionality as applied to foreign citizens.[95]

Moreover, the district court acknowledged that foreign corporations "are likewise barred from making contributions and expenditures prohibited by [section] 441e(a)."[96] The court, however, quickly backed off that sentiment in the very next sentence: "Because this case concerns individuals, we have no occasion to analyze the circumstances under which a corporation may be considered a *foreign* corporation for purposes of First Amendment analysis."[97]

The *Bluman* court probably backed off for a logistical reason: it is difficult to determine which corporations are foreign. Long gone are the days when most corporations existed in a single state; now, extremely wealthy international corporations proliferate.[98] A corporation that does not do business in the United States is indisputably a foreign corporation, but the classification gets murky when a foreign-owned corporation conducts business in the United States—and murkier still when a foreign corporation parents a domestic subsidiary. *Citizens United*, nonetheless, created this questionable legal landscape.

C. *Disunited Citizens: The Fallout*

Citizens United provoked the public; some applauded the decision as a victory for speech rights while others condemned it for opening U.S. politics to foreign corruption. Senator McConnell said the decision "struck a blow

91. *Id.* at 286–87 (collecting cases).

92. *Id.* at 287 (collecting cases).

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

94. *Id.* at 288 ("It is fundamental to the definition of our national political community that foreign citizens do not have a constitutional right to participate in, and thus may be excluded from, activities of democratic self-government. It follows, therefore, that the United States has a compelling interest for purposes of First Amendment analysis in limiting the participation of foreign citizens in activities of American democratic self-government, and in thereby preventing foreign influence over the U.S. political process.")

95. *See* 132 S. Ct. 1087 (2012).

96. *Bluman*, 800 F. Supp. 2d at 292 n.4. Congress is reasonably concerned about both foreign and corporate corruption individually, so the worry escalates when those two concerns combine.

97. *Id.*

98. Nayan Chanda, *Globalinc: An Atlas of the Multinational Corporation*, YaleGlobal Online (2003) (book review), http://yaleglobal.yale.edu/about/globalinc.jsp. Not only are fifty-three of the top 100 companies multinational corporations, but also there are over 63,000 multinational corporations with 821,000 subsidiaries. *Id.*

for the First Amendment."[99] Former Federal Election Commissioner Hans von Spakovsky agreed, "[t]he Supreme Court has restored a part of the First Amendment that had been unfortunately stolen by Congress and a previously wrongly-decided ruling of the [C]ourt."[100] Others did not see the decision as such a victory. Although the decision leaves section 441e facially intact,[101] critics feared otherwise. In his 2010 State of the Union address, President Obama explained, "last week the Supreme Court reversed a century of law that I believe will open the floodgates for special interests—including foreign corporations—to spend without limit in our elections."[102] Obama added, "I don't think American elections should be bankrolled by America's most powerful interests, or worse, by foreign entities."[103] Justice Alito, in response, famously suggested Obama was wrong, mouthing "not true."[104] Analysts "cautioned that the fear was being overblown" because, although now possible, "foreign companies would be reluctant to dabble in U.S. politics."[105] Nonetheless, partially driven by the fear of foreign corruption in the aftermath of the *Citizens United* ruling, Obama and Congress sought to pass campaign finance reform legislation.

Congress has attempted to combat the effects of *Citizens United* several times. For example, Congress drafted the sweeping Democracy is Strengthened by Casting Light on Spending in Elections (DISCLOSE) Act.[106] Congress intended the Act to generally boost disclosure requirements.[107] It would have banned domestic subsidiaries from contributing in certain circumstances: (1) if a foreign national owns 20 percent or more of the voting shares, (2) if foreign nationals comprise a majority of the board of directors, or (3) if a foreign national controls the corporation's decisionmaking process with respect to its interests in the United States or its activities in

99. Greg Stohr, *Corporate Campaign Spending Backed by U.S. High Court*, Bloomberg (Jan. 21, 2010, 1:37 PM), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aU.fsorJbt3E.

100. Stephen Dinan, *Divided Court Strikes Down Campaign Money Restrictions*, Wash. Times, (Jan. 21, 2010), http://www.washingtontimes.com/news/2010/jan/21/divided-court-strikes-down-campaign-money-restrict/.

101. *See* Citizens United v. FEC, 130 S. Ct. 876, 911 (2010).

102. President Barack Obama, State of the Union Address (Jan. 27, 2010), https://www.whitehouse.gov/the-press-office/remarks-president-state-union-address.

103. *Id.*

104. Neil Nagraj, *Justice Alito Mouths 'Not True' When Obama Blasts Supreme Court Ruling in State of the Union Address*, N.Y. Daily News (Jan. 28, 2010, 11:09 AM), http://www.nydailynews.com/news/politics/justice-alito-mouths-not-true-obama-blasts-supreme-court-ruling-state-union-address-article-1.194197.

105. Josh Gerstein, *Decision May Mean More Foreign Cash*, Politico (Jan. 21, 2010, 10:28 PM), http://www.politico.com/news/stories/0110/31845.html. Moreover, some argue that foreign participation in U.S. politics would not be problematic. *See id.* (quoting Professor Dorf); *see also* Friedman, *supra* note 19.

106. *See* DISCLOSE Act, H.R. 5175, 111th Cong. (2010).

107. *Id.*

connection with elections.[108] When Republicans blocked the bill from passing,[109] Democrats annually reintroduced the bill.[110] Another effort involved dropping the most contested provisions from the bill to ensure that at least the foreign corporation loophole would be closed.[111] Congress, however, did not adopt any of these measures.[112]

Since those measures were not enacted, an FEC advisory opinion issued prior to *Citizens United* best illustrates the current state of campaign finance law on domestic subsidiaries of foreign corporations. Subsidiaries of foreign corporations that are incorporated and have principal places of business domestically are not foreign nationals under section 441e.[113] The FEC "found no evidence of Congressional intent to broaden the prohibition on foreign national involvement in U.S. elections to cover U.S. subsidiaries of foreign corporations."[114] Thus, domestic subsidiaries may participate.[115] The advisory opinion nonetheless set forth two conditions that remain good law. Domestic subsidiaries of foreign parents may donate if "(1) the donations and disbursements derive entirely from funds generated by the [domestic subsidiary's] operations; and (2) all decisions concerning the donations and disbursements will be made by individuals who are U.S. citizens or permanent residents."[116] Unfortunately, other than good faith, little prevents corporations from skirting these requirements and illegally participating in U.S. politics.

II. Acquiring Political Access

Just as campaign finance law loosened over time in relation to corporations, corporate law became increasingly more relaxed, and as a consequence, increasingly transnational. As early as 2006, experts predicted

108. *Id.* § 102. The DISCLOSE Act passed in the House but the Senate blocked its passage. Albaugh, *supra* note 48, at 290.

109. Albaugh, *supra* note 48, at 290–91.

110. *See* S. 2516, 113th Cong. (2014); H.R. 148, 113th Cong. (2013); S. 2219, 112th Cong. (2012).

111. *See* Ethics in Foreign Lobby Act, H.R. 195, 113th Cong. (2013) (proposing prohibiting PACs with majority foreign ownership); American Elections Act, S. 2959, 111th Cong. (2010) (proposing similar foreign prohibitions as the original DISCLOSE Act); America is for Americans Act, H.R. 4510, 111th Cong. (2010) (proposing similar foreign prohibitions as the original DISCLOSE Act); Prohibiting Foreign Influence in American Elections Act, H.R. 4522, 111th Cong. (2010) (proposing harsher restrictions prohibiting any subsidiary of a foreign parent from contributing).

112. *See* Albaugh, *supra* note 48, at 291.

113. *See* Fed. Election Comm'n, Advisory Opinion 2006-15, at 4 (May 19, 2006), http://saos.fec.gov/aodocs/2006-15.pdf.

114. *Id.* at 3.

115. *See id.* at 2–3.

116. *Id.* at 2.

increasing "cross-border deals as a result of an increasingly supportive regulatory, political and market environment."[117] Transaction costs for international mergers and acquisitions[118] have drastically declined.[119] Unsurprisingly, global deal volume has reached the highest level since 2007.[120] As global transactions explode, and the campaign finance law governing domestic subsidiaries remains untouched, the prohibition on foreign-corporate campaign participation is subject to loopholes. This Part explains how corporations may behave through mergers and acquisitions, with few organizational checks or external barriers, enabling foreign corporations to illegally participate in U.S. politics.

Corporations are not free to merge and acquire as their boards see fit. Although the legal environment is increasingly supportive of these transactions,[121] the law does not take a completely laissez-faire approach. Mergers and acquisitions are complex, and they can implicate areas of law like securities, tax, compensation, and competition.[122] In the case of public corporations, although boards have tremendous power, some mergers and acquisitions must be approved by a shareholder vote.[123]

Although shareholder approval may seem like a major check against mergers and acquisitions, the requirement does little to prevent a potential politically motivated transaction.[124] A substantial collective action problem hinders shareholders from voting against board-suggested transactions.[125] Consequently, shareholder passivity is almost inevitable.[126] Consider, for example, a shareholder with a 1 percent stake in a corporation. The corporation is considering a politically motivated transaction that will ultimately decrease corporate wealth. Assume it will cost the shareholder $10,000 to inform herself and the other shareholders that the transaction is bad. If she cannot convince a majority of the shareholders to vote the transaction

117. Jonathan Feiler, *International Mergers & Acquisitions*, *in Developments in Banking and Financial Law: 2005*, 25 Ann. Rev. Banking & Fin. L. 1, 81, 81 (2006).

118. This Note does not attempt to distinguish between different types of mergers and acquisitions. The loophole exists regardless of how the corporations conduct the transaction.

119. *See* Michael S. Jacobs, Symposium, *Foreword: Mergers and Acquisitions in a Global Economy: Perspectives from Law, Politics, and Business*, 13 DePaul Bus. L.J. 1, 3 (2001).

120. *See* Soyoung Kim & Greg Roumeliotis, *Global M&A at Seven-Year High as Big Corporate Deals Return*, Reuters (June 30, 2014, 12:06 AM), http://www.reuters.com/article/2014/06/30/us-deals-m-a-idUSKBN0F50A920140630 ("Year-to-date global deal volume as of June 26 surged to $1.75 trillion, up 75 percent from the year-ago period . . . . That was the highest level since 2007, when deal volume reached $2.28 trillion.").

121. *See* Jacobs, *supra* note 119, at 3.

122. William T. Allen et al., Commentaries and Cases on the Law of Business Organization 453 n.2 (4th ed. 2012).

123. *Id.* at 153, 460 ("Today, the merger is the most prominent among a handful of corporate decisions that require shareholder approval.").

124. This Note uses "politically motivated transaction" as a term of art to mean any corporate transaction designed to enable a foreign corporation access to U.S. politics.

125. Allen et al., *supra* note 122, at 154.

126. *Id.* at 154–55.

down, she loses her $10,000 investment and her 1 percent share of the corporate loss from the bad transaction. Even if she can convince the shareholders to vote it down, it would have to save the corporation at least $1,000,000 before she would even recuperate her investment. If it might save less, like $500,000, even though there will be a large corporate loss, the 1 percent shareholder would rather bear her share of the loss ($5,000) than spend $10,000 in an effort to prevent it.

Additionally, corporations can typically skirt shareholder affirmation. A triangular merger can "be used to circumvent the voting and appraisal rights of the acquiring company's shareholders."[127] In such a merger, the acquirer capitalizes a subsidiary and merges its subsidiary with the target corporation.[128] Generally, because the acquirer is not a party to the merger, the acquirer's shareholders do not get to vote on the merger.[129] Moreover, if the target corporation is small enough that the cost of the merger is below certain thresholds, there need not be a shareholder vote.[130]

The above hypothetical assumed that the transaction would be bad for corporate wealth. But corporations seeking to influence politics almost inevitably do so in their corporate self-interest.[131] Influencing politics is a way for corporations to seek economic advantage and increase wealth. Transactions that increase corporate wealth should not worry the shareholders.[132] Even if shareholders are presented with a politically motivated transaction, they are likely more interested in maximizing their profits than preventing their organization from corrupting the political process.[133] Because the organizational checks are meant to protect shareholders and politically motivated transactions benefit shareholders, these checks will not prevent a corporation from participating in the political process.

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127. 1 Robert B. Thompson, O'Neal and Thompson's Oppression of Minority Shareholders & LLC Members § 5:6 (Supp. 2014).

128. *Id.*

129. *Id.*

130. *See, e.g.*, Del. Code Ann. tit. 8, § 251(f) (2011).

131. *Cf.* Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 Wash. & Lee L. Rev. 1423, 1423 (1993) ("Shareholder wealth maximization long has been the fundamental norm which guides U.S. corporate decisionmakers.").

132. *See id.* ("A business corporation is organized and carried on primarily for the profit of the stockholders. . . . The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes." (quoting Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919))).

133. *Cf. Inverse Logic*, The Economist, Sept. 20, 2014, at 71. A new trend called tax inversions finds that some U.S. corporations merge with foreign corporations to reduce their U.S. tax obligations. *Id.* While the U.S. taxes income regardless of where it is earned, "every other large rich country taxes only income earned within its borders." *How to Stop the Inversion Perversion*, The Economist, July 26, 2014, at 12. By merging and moving their headquarters abroad, former U.S. corporations become domestic subsidiaries of foreign corporations to reduce taxes. *See Inverse Logic*, *supra*. Shareholders welcome their increased wealth in the form of lower taxes, even though it comes at the cost of what some believe to be corporations "renounc[ing] their U.S. 'citizenship.'" *E.g.*, Americans for Tax Fairness, Corporate Tax

Corporations must also pass external barriers to conduct a politically motivated transaction. Although external barriers to international mergers and acquisitions exist, they were not designed to prevent politically motivated transactions. Competition law bars "corporate behavior that might undermine consumer welfare."[134] Foreign-corporation involvement in the political process could easily undermine consumer welfare. Foreign involvement might lead, for example, to lax regulations on imports from the foreign corporation that ultimately injure consumers. Competition law, however, is entirely uninterested in campaign finance.[135] Rather, competition law focuses on whether a transaction will undermine consumer welfare by causing diminished competition.[136] To that end, in the United States the Hart-Scott-Rodino Antitrust Improvements Act of 1976 requires notification and premerger approval.[137] Notification and approval requirements allow regulators to find and prevent any transactions that undermine consumer welfare.[138]

Yet in practice, preventing a transaction for anticompetitive reasons is very difficult.[139] As the number of transactions occurring continues to increase, monitoring transactions for potential competition issues has become harder.[140] Even if competition law cared about politically motivated transactions, regulators are so overloaded with applications that they would not have the resources to prevent such transactions.

Inversions 10, http://www.americansfortaxfairness.org/files/7-ATF-Corporate-Tax-Inversions-fact-sheet.pdf. If shareholders applaud tax inversions even though they reduce the government's budget, it is not a stretch to say they would not mind the potential corruption of the political process if it means more wealth.

134. Aditi Bagchi, *The Political Economy of Merger Regulation*, 53 Am. J. Comp. L. 1, 5 (2005).

135. Although the hypothetical example fits—corporate behavior that undermines consumer welfare—the transaction would not necessarily facially implicate competition law. A politically motivated transaction can easily avoid competition law issues. For example, a foreign oil corporation seeking access to U.S. politics can acquire a domestic subsidiary in a different industry to eschew anticompetitive concerns. Although subsequent corruption could enable anticompetitive practices in the oil industry and undermine consumer welfare, the transaction itself was not anticompetitive. Perhaps the connection between the transaction and the anticompetitive consequences is too attenuated. Compare the above transaction to a monopolistic merger designed to decrease consumer choice and increase corporate control of the market; the latter directly implicates competition law.

136. *See* Bagchi, *supra* note 134, at 5.

137. Pub. L. No. 94-435, § 201, 90 Stat. 1383, 1390 (codified as amended at 15 U.S.C. § 18a (2012)).

138. *See* Kenneth J. Hamner, Comment, *The Globalization of Law: International Merger Control and Competition Law in the United States, the European Union, Latin America and China*, 11 J. Transnat'l L. & Pol'y 385, 392 (2002).

139. *See* Bagchi, *supra* note 134, at 19–20 ("[T]he advanced economic integration of the United States, as well as the truly national structure of the federal government, limit both the incentive and the ability of states to push a highly interventionist merger policy that would work to the advantage of various local interests.").

140. Jacobs, *supra* note 119, at 5–6.

Few extra barriers to international transactions exist. International transactions almost doubled from 1992 to 2001, and the value of those transactions increased almost tenfold.[141] In 2001, 31.9 percent of closed deals involved both a U.S. and a foreign company.[142] Cross-border transactions inherently involve multiple jurisdictions, requiring them to comply with multiple regulatory regimes.[143] Nonetheless, a politically motivated transaction can avoid running afoul of competition laws no matter how many jurisdictions' laws apply.[144]

While competition law can halt cross-border transactions based on anticompetitive outcomes, Congress also empowers the executive to prohibit unwanted foreign influence and investment and even reverse completed transactions.[145] President Reagan delegated the authority to the Committee on Foreign Investment in the U.S. (CFIUS).[146] The CFIUS has broad discretionary authority to preclude international transactions that threaten or impair national security.[147] Although the CFIUS could find that foreign political corruption meets that standard, it is similarly uninterested in protecting campaign finance.[148] Instead, the CFIUS focuses almost exclusively on national defense.[149] Even though the CFIUS is a logical fit to protect against politically motivated transactions, the transactions are likely to be ignored unless they involve issues like defense or energy.[150] A politically motivated transaction can thus evade CFIUS review, just as it evades review under competition law. Because these external barriers were not designed to prevent politically motivated transactions, corporations can transact with relative ease.

As barriers are virtually nonexistent for politically motivated transactions, clever foreign corporations can access the campaign finance marketplace at will.[151] Only nominal barriers exist for a foreign corporation to

141. Matthew C. Franker, Note, *Restoration: International Merger Review in the Wake of General Electric/Honeywell and the Triumphant Return of Negative Comity*, 36 Geo. Wash. Int'l L. Rev. 877, 879 (2004).

142. *Id.*

143. *Id.* ("Currently, more than ninety states have enacted some form of competition law regime and more than twenty are in the process of drafting such laws."). *See generally* Hamner, *supra* note 138 (providing overview of different competition law regimes).

144. *See supra* note 135.

145. 50 U.S.C. app. § 2170 (2012).

146. Exec. Order No. 12,661, 54 Fed. Reg. 779 (Dec. 27, 1988).

147. Kristy E. Young, *The Committee on Foreign Investment in the United States and the Foreign Investment and National Securities Act of 2007: A Delicate Balancing Act that Needs Revision*, 15 U.C. Davis J. Int'l L. & Pol'y 43, 46 (2008).

148. *Cf. supra* note 135 and accompanying text.

149. Young, *supra* note 147, at 47–48.

150. *See id.* at 57–60.

151. Meanwhile, people do not have these same abilities. Take, for example, the plaintiffs in *Bluman*. Although they lived and worked in the U.S., they had no right to contribute. Obviously they could not merge with a U.S. citizen to participate in politics. *See supra* notes 87–90 and accompanying text.

merge with or acquire a domestic subsidiary. All domestic corporations (including those subsidiaries) can participate in campaign finance as a consequence of *Citizens United*. Should a foreign parent guide a domestic subsidiary toward political participation in the parent's interest, it could corrupt U.S. politics. And although the law technically prohibits parent companies from influencing campaign contributions made by subsidiaries,[152] the practice remains prevalent throughout corporate law.[153] If a foreign parent dominates a domestic subsidiary's decision to donate, this creates a loophole—law is broken and politics corrupted, but voters are none the wiser.

III. Fighting Foreign-Corporate Influence

As described in Part II, foreign corporations can easily acquire and influence domestic subsidiaries with little accountability or supervision. As described in Part I, the current campaign finance regime allows those domestic subsidiaries to spend on U.S. politics and elections with few limits. Thus, a loophole in the BCRA results: foreign corporations can influence U.S. politics through their domestic subsidiaries. Justice Stevens sarcastically feared that the law "appear[s] to afford the same protection to multinational corporations controlled by foreigners as to individual Americans: To do otherwise, after all, could 'enhance the relative voice' of some (*i.e.*, humans) over others (*i.e.*, nonhumans)."[154] Although merely ridiculing the potential of equal protection for foreign-controlled multinational corporations and individual Americans, Justice Stevens envisioned that *Citizens United* would enable foreign corporations to access U.S. politics. Discourse alone will not resolve this issue; Congress must successfully legislate in this area. Although several congressional efforts to close this loophole have recently failed,[155] campaign finance reform is one of few areas in politics in which bipartisan support may be possible.[156] Congress should attack this problem from a different angle to achieve bipartisan support.

This Part proposes legislation that closes the loophole and provides enforcement measures. Congress should enact a law that prohibits domestic subsidiaries of foreign parent corporations from participating in campaign finance when the subsidiaries are dominated by the foreign parents. Section

152. *See supra* text accompanying note 116.

153. *See* John H. Matheson, *Why Courts Pierce: An Empirical Study of Piercing the Corporate Veil*, 7 Berkeley Bus. L.J. 1, 29–32 tbl.8A (2010) (finding hundreds of cases involving domination). Professor Matheson's conclusions are limited to corporations that got caught and sued. *See id.* at 10. It is impossible to ascertain how often wrongful subsidiary domination goes unnoticed or unpunished.

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

155. *See supra* Section I.C.

156. For example, the last major overhaul of campaign finance was called the Bipartisan Campaign Reform Act of 2002. Republican Senator John McCain and Democrat Senator Russell Feingold proposed and sponsored the Act. Pub. L. No. 107-155, 116 Stat. 81.

III.A analyzes how corporate veil-piercing theory should apply to the campaign finance system. Section III.B argues that qui tam provisions would reinforce the legislation by encouraging whistle-blowing to mitigate the enforcement difficulties that arise from inadequate resources and incentives.

A. *Independence Equals Admission*

Veil piercing is when a court rejects shareholders' attempts to limit liability by hiding behind an intricate corporate structure.[157] A clear understanding of the limited-liability rule is crucial to comprehend veil-piercing doctrine. Limited liability is an important, historical function of corporate law. The rule promotes investment by limiting liability to nothing more than an investor's original contribution.[158] If liability (and risk) were unlimited, growth would be stifled.[159] Capitalist societies prefer policies that promote investments rather than those that stifle growth. Thus, courts do not typically force shareholders to satisfy the unpaid debts of their corporations.

The limited-liability rule, however, has negative consequences. Some experts even argue that limited liability should not be the general rule.[160] This limited-liability-for-shareholders rule not only protects the individuals who tinker in the stock market in their free time, but it also protects corporate shareholders.[161] Aspects of corporations allow for abuses: there is substantial concern that companies "externalize the risks of their more jeopardous undertakings by establishing subsidiaries" to shield themselves from liability.[162] To remedy such concerns, scholars suggest imposing liability on entire enterprises, rather than just individual entities.[163] Under such a liability theory, for example, large enterprises would be unable to hide behind corporate structure to avoid liability. Nevertheless, theories of enterprise liability advance slowly: state legislatures fear enacting such changes will negatively impact business in their states, so they "provide[ ] the greatest degree of limited liability" to avoid "corporate flight across state lines."[164] For states wishing to compete in the race to the bottom, adopting new theories of liability is not plausible.[165]

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157. *See, e.g.*, William J. Rands, *Domination of a Subsidiary by a Parent*, 32 Ind. L. Rev. 421, 429–33 (1999).

158. *E.g.*, Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. Chi. L. Rev. 89, 89–90 (1985).

159. *Id.* at 90.

160. Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 Yale L.J. 1879, 1896–99 (1991) (advocating for a rule of pro rata shareholder liability for tort damages a corporation fails to satisfy).

161. *See* Easterbrook & Fischel, *supra* note 158, at 110–11.

162. Christopher D. Stone, *The Place of Enterprise Liability in the Control of Corporate Conduct*, 90 Yale L.J. 1, 71 (1980).

163. *E.g.*, Phillip I. Blumberg, Symposium, *The Transformation of Modern Corporation Law: The Law of Corporate Groups*, 37 Conn. L. Rev. 605, 605 (2005).

164. Rands, *supra* note 157, at 430.

165. *Cf. supra* text accompanying note 30.

Veil-piercing doctrine allows courts to negate the limited-liability rule and impose liability on shareholders in unusual cases.[166] The doctrine primarily applies in cases involving corporate shareholders.[167] "[C]ourts regularly disregard the entity when its separateness is used for illegitimate purposes."[168] Prior to 1991, courts pierced the corporate veil in 237 of 637 cases (37.21 percent).[169] The courts pierced the veil in 314 of 551 cases (56.99 percent) in which the courts found the parent company dominated the subsidiary.[170] In a more efficient study from 2010, statistics demonstrated that "[w]here courts found owner control/dominance . . . they pierced 76.4% of the time and refused to pierce in the remaining 23.6% of cases."[171] Veil piercing is a prevalent remedy to the limited-liability rule.

The doctrine, admittedly, remains maddeningly confusing.[172] The most notable formulation of the rule is the instrumentality test formulated by Frederick J. Powell:

> When the privilege of transacting business in corporate form has been illegally abused to the injury of a third party, he may disregard the corporate entity to the extent of holding the stockholders liable for the corporate obligations to him. In this way a civil remedy is provided for an unjust wrong or injury caused by the legal fiction of corporate entity.[173]

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166. *E.g.*, Rands, *supra* note 157, at 429–33. Imagine, for example, that a corporation finds a high-risk, high-reward business opportunity making a product. It creates a wholly owned subsidiary to pursue the opportunity. To keep costs low, the parent barely capitalizes the subsidiary and guides it toward cutting corners in production. If the business is successful, the parent, as full owner of the subsidiary, reaps the rewards. If, on the other hand, the cost-cutting production measures cause a design defect in the product, severely injuring many consumers, the subsidiary could face massive tort liability. Because the parent undercapitalized the subsidiary, it could not afford the liability and would go bankrupt. Courts would be loath to let the parent hide behind the veil of its corporate structure and the limited-liability rule. This is especially true when the parent caused the problem in the first place by pressuring the subsidiary to cut corners and undercapitalizing it. In this hypothetical, a court might pierce the corporate veil to allow the tort victims to recover from the parent.

167. This Note's discussion on corporate veil piercing is limited to parent and subsidiary corporations.

168. Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 Cornell L. Rev. 1036, 1041 (1991).

169. *Id.* at 1055.

170. *Id.* at 1063.

171. Matheson, *supra* note 153, at 32.

172. Thompson, *supra* note 168, at 1036–37 ("Legal writers have described judicial decisions to pierce the veil as 'irreconcilable and not entirely comprehensible,' 'defy[ing] any attempt at rational explanation,' and occurring 'freakishly.'" (alteration in original) (quoting Phillip I. Blumberg, The Law of Corporate Groups: Procedural Problems in the Law of Parent and Subsidiary Corporations 8 (1983); then quoting Jonathan M. Landers, *A Unified Approach to Parent, Subsidiary & Affiliate Questions in Bankruptcy*, 42 U. Chi. L. Rev. 589, 620 (1975); and then quoting Easterbrook & Fischel, *supra* note 158, at 89)).

173. Frederick J. Powell, Parent and Subsidiary Corporations 6 (1931). An alternative approach uses the California jurisprudence on "alter ego." *See* Rands, *supra* note 157, at 430–31. Adding to the confusion, if one tried to distinguish the two rule formulations, she would likely be unsuccessful. *Id.* at 433 ("It is possible to try to draw distinctions between [the 'alter ego' test] and Powell's 'instrumentality' analysis, but the consensus is that there is little

Powell created a three-part test: (1) the "mere 'instrumentality'" test, (2) the injustice test, and (3) the "unjust loss or injury" test.[174] The first part determines whether the parent completely controlled and dominated the subsidiary.[175] The second part determines whether the parent dominated the subsidiary to commit a wrong.[176] Finally, the third part determines whether the wrong proximately caused an injury to the plaintiff.[177] Powell listed several factors relevant to determining whether the mere-instrumentality test is satisfied.[178]

In applying veil-piercing doctrine to a situation in which a foreign parent corporation required its domestic subsidiary to make campaign expenditures, the test would have to be slightly modified. The third part should be presumed if the first and second parts are satisfied. The second part would be simple: assuming a parent dominated a subsidiary to make an expenditure, the second part would be satisfied because the parent would illegally gain indirect access to U.S. politics in violation of the BCRA.[179] This illegal access corrupts the electoral process, injuring the entire voting body. Although the wrong does not injure any individual, a wrong against the government or the people should rationally substitute for an individual, satisfying part three.[180] This leaves part one of the test as the most salient—has the parent completely dominated the subsidiary corporation to make an expenditure?

Many courts and commentators have tried to identify how to determine whether a parent controlled or dominated a subsidiary—the first prong of the tripartite test.[181] Professor Blumberg, a leading opponent of corporate limited liability, lists several factors that frequently result in piercing the corporate veil: the parent's participation in day-to-day operations, the parent's role in making important policy or business decisions, instructions from the parent company to the subsidiary, or use of parent personnel to conduct

difference between them. The verbal formulations are virtually indistinguishable as to analysis, application, and result. They are often used by courts in the same sentence and should be regarded as interchangeable." (footnotes omitted)). This Note focuses solely on the instrumentality analysis.

174. Powell, *supra* note 173, at 4–6.

175. *Id.* at 4–5.

176. *Id.* at 5–6.

177. *Id.* at 6.

178. The factors are: (1) the parent owns all or most of the subsidiary's capital stock; (2) the parent and subsidiary have interlocking directorates; (3) the parent finances the subsidiary; (4) the parent incorporates the subsidiary or subscribes to all of its stock; (5) the subsidiary is inadequately capitalized; (6) the parent pays the expenses of the subsidiary; (7) the subsidiary only conducts business with the parent and has none of its own assets; (8) the parent describes the subsidiary as a department or division in its papers; (9) the parent uses the subsidiary's property as its own; (10) the subsidiary's directors take orders from the parent and act in the parent's interest; and (11) the parent and subsidiary do not observe the formal legal requirements of the subsidiary. *Id.* at 9.

179. *See* 2 U.S.C. § 441e (2012) (recodified at 52 U.S.C. § 30121).

180. Qui tam provisions obviate the need for part three of the test. *See infra* Section III.B.

181. *See, e.g.*, *supra* note 178.

subsidiary affairs.[182] Each court applies veil-piercing doctrine differently. For example, the Second Circuit considers ten different factors,[183] while the Seventh Circuit considers eleven.[184] This creates an incredibly volatile veil-piercing regime. Professor Bainbridge seeks to abolish veil piercing altogether, arguing that the "present state of veil piercing doctrine allows judges to impose their own brand of rough justice without being overly concerned with precedent or appellate review."[185]

Corporate veil-piercing doctrine nonetheless provides a useful analytical framework for determining whether the subsidiary or the parent company is actually making an expenditure. Unlike the failed legislation that formalistically sought to preclude subsidiaries from making expenditures based on a foreign-involvement percentage threshold, veil-piercing doctrine would preclude only the expenditures actually made by the foreign parent. Moreover, in the campaign finance context, a veil piercing would not subject the parent to the debts of the subsidiary; the doctrine would not butt its head against the rule of limited liability. Instead, courts could use the doctrine, and particularly the domination test, to preclude foreign participation in domestic elections. Prohibiting foreign participation in campaign finance is dramatically different than unexpectedly applying liability to shareholders. Thus, Bainbridge and others' criticism of the doctrine is inapplicable.[186]

Additionally, the test will be easier to apply to campaign finance than it is in most traditional veil-piercing contexts. In the campaign finance context, the domination test need not incorporate all of the factors of the various existing tests. For example, mere ownership does not show domination.[187] A foreign parent with 80 percent ownership of a domestic subsidiary might have no interest in U.S. politics. Meanwhile, a foreign parent with a small ownership stake might nonetheless seek to dominate the subsidiary to make expenditures. Again, "the use of the same work force and business offices for both corporations"[188] would not be a relevant concern.

182. *See* Phillip I. Blumberg, The Law of Corporate Groups: Problems of Parent and Subsidiary Corporations Under Statutory Law of General Application 42–46 (1989).

183. Freeman v. Complex Computing Co., 119 F.3d 1044, 1053 (2d Cir. 1997) ("In determining whether 'complete control' exists, we have considered such factors as: (1) disregard of corporate formalities; (2) inadequate capitalization; (3) intermingling of funds; (4) overlap in ownership, officers, directors, and personnel; (5) common office space, address and telephone numbers of corporate entities; (6) the degree of discretion shown by the allegedly dominated corporation; (7) whether the dealings between the entities are at arms length; (8) whether the corporations are treated as independent profit centers; (9) payment or guarantee of the corporation's debts by the dominating entity, and (10) intermingling of property between the entities.").

184. *See* C M Corp. v. Oberer Dev. Co., 631 F.2d 536, 539 (7th Cir. 1980).

185. Stephen M. Bainbridge, *Abolishing Veil Piercing*, 26 J. Corp. L. 479, 515 (2001).

186. *See id.* at 506–14.

187. *See* Rands, *supra* note 157, at 435.

188. *See* Johnson v. Flowers Indus., Inc., 814 F.2d 978, 981 (4th Cir. 1987).

If, on the other hand, the parent controls the subsidiary's bank account, out of which an expenditure is paid, the veil-piercing framework would suggest that the parent dominates the subsidiary and that the expenditure should be precluded.[189] Some of the most relevant factors would be "disregard of corporate formalities," "inadequate capitalization," "intermingling of funds," or "payment or guarantee of the corporation's debts by the dominating entity."[190] Other circumstances surrounding the parent–subsidiary relationship would also be salient. For example, if a foreign parent acquires a domestic subsidiary in the midst of an election and the subsidiary immediately contributes to a campaign, that could indicate that the foreign parent directed the contribution.[191] Courts can trim and strengthen the test, looking only to the relevant factors.

B. *Blowing the Whistle on Foreign Corruption*

Qui tam, short for *qui tam pro domino rege quam pro se imposo sequitur*, means "who brings the action as well for the king as for himself."[192] In a qui tam action, a "right to recover the penalty or forfeiture granted by statute is frequently given to the first common informer who brings the action, although he has no interest in the matter whatever except as such informer."[193] Qui tam provisions authorize citizens to litigate issues and share in the recovery to supplement actions by federal officials.[194]

To provide for effective enforcement of the veil-piercing doctrine in campaign finance, the proposed legislation should include a qui tam provision. Congress should model the legislation after the False Claims Act (FCA), which introduced qui tam.[195] The FCA, enacted during the Civil War, combated fraud in defense procurement during a time in which the Union was outnumbered.[196] Like defense spending, potential for fraud in corporate campaign finance has significantly grown since the Civil War.[197] To combat this ever-present issue, Congress designed the FCA to allow private attorneys general to bring suit, warning the government of fraud.[198] Then, the government proceeds with the action, dismisses the action, or

189. *See* Consol. Sun Ray, Inc. v. Oppenstein, 335 F.2d 801, 806–08 (8th Cir. 1964).

190. Freeman v. Complex Computing Co., 119 F.3d 1044, 1053 (2d Cir. 1997).

191. *See* Miller, *supra* note 3.

192. Bass Anglers Sportsman's Soc'y of Am. v. U.S. Plywood-Champion Papers, Inc., 324 F. Supp. 302, 305 (S.D. Tex. 1971).

193. Marvin v. Trout, 199 U.S. 212, 225 (1905).

194. Evan Caminker, Comment, *The Constitutionality of* Qui Tam *Actions*, 99 Yale L.J. 341, 350 (1989).

195. *See* 31 U.S.C. §§ 3729–33 (2012).

196. Brian D. Howe, Note, *Conflicting Requirements of Notice: The Incorporation of Rule 9(b) into the False Claims Act's First-to-File Bar*, 113 Mich. L. Rev. 559, 560 (2015).

197. *See* Ni Qian, Note, *Necessary Evils: How to Stop Worrying and Love Qui Tam*, 2013 Colum. Bus. L. Rev. 594, 606–07. Likewise, potential for fraud rapidly increases along with government spending on healthcare. *See id.* at 625.

198. *See* Howe, *supra* note 196, at 563.

allows the private citizen to proceed.[199] As an award for whistle-blowing, the original plaintiff wins a percentage of the civil remedy, depending on the effort contributed to prosecuting the claim (that is, whether the government or original plaintiff proceeds with the action).[200]

The FCA has exposed corporate frauds for over a century. In past years, it has returned three billion dollars to the federal government annually.[201] From October 1987 to September 2013, plaintiffs brought more than 9,000 new qui tam cases under the FCA.[202] During that time the government and private citizens recovered almost $39 billion.[203] Now that number has almost certainly been eclipsed. The qui tam provisions were instrumental; given limited resources, the government could not have been as successful if it had to prosecute these claims alone. About 70 percent ($27 billion) of the recovery came from qui tam actions.[204] Without these provisions to incentivize whistle-blowing, the government would have recovered only about $12 billion.[205] For their assistance, the private citizens were rewarded handsomely, earning over $4 billion.[206]

In the foreign-corporate campaign contribution context, a qui tam provision would allow enforcement, despite a lack of resources and incentives. Unlike the typical veil-piercing case, in which a private litigator has been wronged in contract or tort and brings the action to recover damages, in a campaign finance case, the general public is injured. The wrong would not necessarily motivate private attorneys to litigate it. Admittedly, the beneficiary's opponents would be motivated to litigate questionable donations, and the FEC, charged with enforcing the campaign finance laws, would also be motivated to litigate. Due to limited resources, however, neither is likely to attempt to understand the corporate structure involved, much less pierce the corporate veil.[207] Many consider the FEC a "weak and ineffective agency unable to fulfill its mandate."[208] And while potential scandals might incentivize the benefited campaign to reject these expenditures, lackadaisical disclosure requirements[209] significantly reduce the threat of scandals.

199. 31 U.S.C. § 3730(c).

200. *Id.* § 3730(d).

201. David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 Colum. L. Rev. 1244, 1246 (2012).

202. U.S. Dep't of Justice, Fraud Statistics - Overview (2013), http://www.justice.gov/sites/default/files/civil/legacy/2013/12/26/C-FRAUDS_FCA_Statistics.pdf.

203. *Id.*

204. *See id.*

205. *See id.*

206. *See id.*

207. *Cf.* Amanda S. La Forge, Comment, *The Toothless Tiger—Structural, Political and Legal Barriers to Effective FEC Enforcement: An Overview and Recommendations*, 10 Admin. L.J. Am. U. 351, 352, 357 (1996).

208. *Id.* at 352.

209. *See supra* text accompanying notes 107–112.

Despite the tremendous success of qui tam, many still worry about it. "Critics . . . paint qui tam as a litigation regime run amok."[210] Congress intentionally designed qui tam recoveries to include high penalties so bringing the actions would be attractive to plaintiffs, but these penalties "place[ ] great pressure on defendants to settle even meritless suits."[211] Unsurprisingly, there is a whistleblower bar with about 200 lawyers.[212] The penalties also make it better for potential whistleblowers to "report[ ] on bad behavior" "after silently watching it take place under their noses," instead of remedying it, which incentivizes bad conduct.[213] The FCA essentially created a new career: the professional whistleblower.[214] But these evils appear necessary to remedy greater evils.[215]

In the campaign finance context, qui tam provisions similar to those in the FCA would help stifle illegal involvement in politics by foreign corporations. If the FEC is unable to investigate an expenditure made by a subsidiary, a private citizen may take up the prosecution, allowing better enforcement of the prohibition. This provision would provide underpaid campaign staff a better incentive to report. Qui tam provisions would also increase the threat of scandals, forcing campaigns to be more careful about accepting donations. Although politics might never be completely free from the possibility of corruption, this legislation would make great strides toward restoring political protections and closing one of the most evasive loopholes in campaign finance law.

Conclusion

The Supreme Court determined that the First Amendment bars Congress from prohibiting corporate speech in political campaigns. Although prohibitions on foreign speech remain constitutional, foreign corporations can skirt this prohibition and illegally donate to politics by acquiring and dominating a domestic subsidiary. This type of corruption is prevalent. Take for example, Cheong Am, a foreign corporation that used a domestic subsidiary to attempt to influence President Clinton.[216] To combat this potential corruption without destroying domestic subsidiaries' free speech rights, Congress should apply the corporate veil-piercing framework to domestic subsidiary contributions and enforce the legal regime with a qui tam provision.

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210. Engstrom, *supra* note 201, at 1247.

211. John T. Boese & Beth C. McClain, Symposium, *Why* Thompson *Is Wrong: Misuse of the False Claims Act to Enforce the Anti-Kickback Act*, 51 Ala. L. Rev. 1, 18 (1999).

212. Neil Weinberg, *The Dark Side of Whistleblowing*, Forbes (Mar. 14, 2005, 12:00 AM), http://www.forbes.com/forbes/2005/0314/090.html.

213. *Id.*

214. *See* Engstrom, *supra* note 201, at 1249–50.

215. *See* Qian, *supra* note 197, at 601–02; *see also* Engstrom, *supra* note 201, at 1249–50 ("Critics . . . it seems, have it mostly wrong.").

216. *See supra* text accompanying notes 1–8.