

## **EXECUTIVE SUMMARY**

**Testimony of Professor Heather K. Gerken**

**J. Skelly Wright Professor of Law**

**Yale Law School**

**Submitted to the United States Senate Committee on Rules and Administration**

**February 2, 2010**

While the Supreme Court's decision in *Citizens United v. FEC* cut back on Congress's power to regulate campaign finance, several regulatory paths remain open. This submission discusses three avenues for congressional action:

First, Congress may strengthen disclaimer and disclosure rules for corporations' independent expenditures. This strategy stands on the strongest constitutional footing. Congress's power to regulate here is well established, and the Court believes such regulations promote rather than undermine First Amendment values.

Second, Congress may take steps to ensure that shareholders exert meaningful control over corporate spending. Such regulations will be subject to rigorous constitutional scrutiny, as they raise both First Amendment and federalism concerns. They must be designed to empower shareholders, not to suppress corporate speech; they must be appropriately tailored; and Congress must build a record establishing the effects of corporate political spending on interstate commerce in order to justify entering an area traditionally, but not exclusively, regulated by the states.

Finally, Congress may take steps to protect U.S. elections from foreign influence. While the Court has provided no guidance as to the constitutionality of this approach, constitutional tradition suggests that the Court will allow Congress to regulate provided that the law is appropriately tailored and supported by adequate factual findings.

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Chairman Schumer, Senator Bennett, and distinguished members of this committee:

My name is Heather Gerken. I am the J. Skelly Wright Professor of Law at Yale Law School. I teach and write in the area of election law and constitutional law. I am honored to have the opportunity to testify before you today and would ask that my written testimony be entered into the record.

**Introduction**

During the last few years, the United States Supreme Court has gradually dismantled key campaign-finance provisions that were designed to protect our democratic system from the damaging effects of money and undue influence. Two weeks ago, the Supreme Court went so far as to jettison its own precedent on independent corporate expenditures in *Citizens United v. FEC*. In striking down the federal ban on independent expenditures funded from a corporation's general treasury, the Court overruled two of its decisions: *Austin v. Michigan Chamber of Commerce*, decided in 1990, and portions of *McConnell v. FEC*, decided a scant 7 years ago. It also suggested new limits on legislative power in this area by embracing a narrow conception of corruption.<sup>1</sup>

While the Supreme Court's decision cuts back on Congress's power to regulate campaign finance, several regulatory paths remain open. I will discuss three avenues for congressional action. First, Congress may strengthen disclaimer and disclosure rules for corporations' independent expenditures. This strategy stands on the strongest constitutional footing. Congress's power to regulate here is well established, and the Court believes such regulations promote rather than undermine First Amendment values.

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<sup>1</sup> Heather K. Gerken, "The Real Problem with *Citizens United*," *The American Prospect Online* (Jan. 22, 2011).

Second, Congress may take steps to ensure that shareholders exert meaningful control over corporate spending. Such regulations will be subject to rigorous constitutional scrutiny, as they raise both First Amendment and federalism concerns. They must be designed to empower shareholders, not to suppress corporate speech; they must be appropriately tailored; and Congress must build a record establishing the effects of corporate political spending on interstate commerce in order to justify entering an area traditionally, but not exclusively, regulated by the states.

Finally, Congress may take steps to protect U.S. elections from foreign influence. While the Court has provided no guidance as to the constitutionality of this approach, constitutional tradition suggests that the Court will allow Congress to regulate provided that the law is appropriately tailored and supported by adequate factual findings.

## **I. Disclosure and Disclaimer Requirements.**

There was only one issue on which the Court achieved near unanimity in *Citizens United*: transparency matters. Democratic debate works best when voters have information about the source of the political messages they receive, and Congress may take steps to provide that information. *Citizens United v. FEC*, slip. op at 55 (U.S. Sup. Ct., Jan. 21, 2009). Indeed, *Citizens United* offered a ringing endorsement of the role that disclaimer and disclosure rules can play in a healthy democracy. So enthusiastic was the majority about transparency that it went so far as to propose a new model of campaign finance, one that “pairs corporate independent expenditures with effective disclosure” so that “shareholders can determine whether their corporation’s political speech advances the corporation’s interest” and “citizens can see whether elected officials are “‘in the pocket’ of so-called moneyed interests.” Slip op. at 55 (citations omitted).

Background. *Disclaimer rules* generally require the sponsor of the political message to be clearly identified within the message itself. A well known example is the “stand by your ad” rule created by the Bipartisan Campaign Reform Act of 2002 (BCRA), which requires a candidate running a television ad to appear on camera and say that she/he approves of the advertisement. *Disclosure rules* require those who fund electioneering to disclose their identity and the amount they spent. According to campaign-finance expert Richard Briffault, disclosure rules in the United States date back more than 100 years.<sup>2</sup> Further, “disclosure appears to be the

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<sup>2</sup> Richard Briffault, “Campaign Finance 2.0,” at 1 (unpublished paper, January 29, 2010) (on file with the author).

most widely adopted form of campaign finance regulation in democracies around the world . . . and is probably the most successful element of our campaign finance system.”<sup>3</sup>

The Court’s decision. Plaintiff Citizens United challenged the constitutionality of both types of requirements. It challenged a federal disclaimer requirement (that a televised electioneering communication identify its funder) and a federal disclosure requirement (requiring certain disclosures from those who spend more than \$10,000 on electioneering communication during a calendar year). *Citizens United*, slip op. at 52 (discussing challenge to BCRA §§ 201 & 311).

The Justices in the majority and those who joined Justice Stevens’ dissent<sup>4</sup> agreed that while disclaimer and disclosure rules place some burdens on corporate speech, they “help citizens ‘make informed choices in the political marketplace,’” *Citizens United*, slip op. at 52 (quoting *McConnell v. FEC*), and thus represent a constitutional alternative to the regulations the Court struck down in *Citizens United*, *id.* at 53. The Court also reaffirmed its holding in *McConnell v. FEC* that Congress may take steps to prevent groups from “running election-related advertisements ‘while hiding behind dubious and misleading names.’” *Id.* at 51. Indeed, the Court even rebuffed Citizens United’s attempt to limit disclosure requirements to speech that is the functional equivalent of express advocacy, noting that “the public has an interest in knowing who is speaking about a candidate shortly before an election.” Slip op. at 54. As the Court observed, disclosure requirements are constitutional even when Congress lacks the power to ban the activity itself. Slip op. at 54 (discussing disclosure requirements for lobbying).

The Court also signaled its willingness to accept the type of “rapid and informative” disclosures made possible by the Internet. Indeed, it encouraged reliance on the Internet to guarantee the “prompt disclosure of expenditures” to “provide shareholders and citizens with the information they need to hold corporations and elected officials accountable for their positions and supporters.” Slip op. at 55. Similarly, in *McConnell* the Court emphasized that “given the relatively short timeframes in which electioneering communications are made, the interest in assuring that disclosures are made promptly and in time to provide relevant information to voters is unquestionably significant.” *McConnell*, 540 U.S. at 200.

Policy implications. For disclosure and disclaimer requirements to be effective, they must be timely and accessible. Information disclosed after the election and giant data dumps do little to help citizens or shareholders. Moreover, there may be at some point a limit to the efficacy of disclosure rules; if too much information is disclosed, it becomes difficult for the

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<sup>3</sup> *Id.* at 1-2.

<sup>4</sup> Justice Thomas wrote a solitary dissent to this portion of the Court’s opinion.

media, advocacy groups, and citizens to find an effective way to sort the wheat from the chaff.<sup>5</sup> This may counsel in favor of raising the threshold limits for disclosure, which began fairly low and have not been indexed to inflation,<sup>6</sup> or creating a disclaimer rule identifying the top funders of an advertisement, as with the Washington rule discussed below. Finally, Congress may wish to consider how to balance citizens' privacy interests against their interest in obtaining information about political spending, something that may again favor raising disclosure thresholds.<sup>7</sup>

Disclosure and disclaimer requirements will fail if they are easy to evade. One common method of evasion is for corporations to hide behind vaguely named shell organizations to shield their identity. Another common evasion strategy is for corporations to give money to a multipurpose organization (one that engages in political and nonpolitical activities) without specifying whether the money is specifically designated for political activities. In some instances, the corporation knows that the money will be used for electioneering but the donation nonetheless falls outside of existing disclosure requirements as they have been interpreted by the Federal Election Commission.

Here Congress might look to state sources for guidance in dealing with these sources of evasion. Washington State, for instance, has addressed the first type of problem. It prevents corporations from using vaguely named fronts to shield their identity by requiring disclosure of the sponsor or the "top five contributors" of a political advertisement within the advertisement itself. Wash. Rev. Code § 42.17.510. If a group of companies wanted to run a radio advertisement, for instance, the advertisement must clearly state that the ad was "paid for" by those companies. *Id.* Although the provision has not to my knowledge been subjected to constitutional challenge, it has been cited with approval by Justice Scalia in dissent.

Similarly, California has offered a solution to the second kind of problem – efforts to evade disclosure rules by failing to earmark donations to multipurpose organizations. *See* California Gov't Code § 84211; 2 CCR § 18215(b)(1). The regulation identifies the conditions under which a non-earmarked donation to a multipurpose organization will be deemed a form of political contribution for disclosure purposes. That rule was recently deemed constitutional by

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<sup>5</sup> Richard Briffault raises an important set of questions about the purposes and efficacy of disclosure in Briffault, *supra* note 2.

<sup>6</sup> *Id.* at 65 (noting that the \$200 federal threshold for disclosure would now be \$585 if it were indexed for inflation and that the *first* federal disclosure requirement – the \$100 threshold established by the Publicity Act of 1910 – would now be \$2150 if it were indexed for inflation).

<sup>7</sup> *Id.*

the Ninth Circuit Court of Appeals. *California Pro-Life Council, Inc. v. Randolph*, 507 F.3d 1172 (2007).

Alternatively, Congress might require disclosure of funds received by multipurpose and other intermediary groups in response to solicitations indicating that the funds received would be spent on electioneering. Imagine, for instance, that an intermediary group asks a corporation for money to run a political ad, and the corporation immediately responds with a large donation. A solicitation-triggered disclosure rule would address this scenario.<sup>8</sup>

Constitutional considerations. Of all the types of reform discussed here, disclosure and disclaimer rules stand on the firmest constitutional footing. Congress's power to adopt such rules is well established. *Burroughs v. United States*, 290 U.S. 435 (1934) (upholding congressional power to create disclosure rules for federal elections and take other steps to “preserve the departments and institutions of the general government from impairment.”). Moreover, while the First Amendment constrains what Congress can do in this arena, the Court believes that transparency rules *promote* First Amendment values:

The First Amendment protects political speech; and 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.

*Citizens United*, slip op. at 55

Indeed, if anything, *Citizens United* strengthened the constitutional case for disclaimer and disclosure rules. It not only confirmed that citizens have an important interest in knowing who funds campaign speech, but identified a new justification for such rules in the context of corporate speech: helping shareholders hold management accountable. Further, *Citizens United* eliminated any lingering doubt over the constitutionality of disclaimer and disclosure rules that existed in the wake of *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995).

For disclosure requirements to be constitutional, there must be a “‘substantial relation’ between the disclosure requirement and a ‘sufficiently important governmental interest.’” Slip op. at 51 (quoting *Buckley v. Valeo*). Congress may impose disclosure requirements for many reasons, including “providing the electorate with information, deterring actual corruption and

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<sup>8</sup> The FEC enacted a regulation that would treat such funds as “contributions,” but the regulation was recently invalidated by the D.C. Circuit for reasons unrelated to disclosure. See *Emily’s List v. FEC*, 551 F.3d 1 (D.C. Cir. 2009) (invalidating 11 C.F.R. § 100.57 because “donations subject to such solicitations are subject to a \$5000 cap” and because “[t]his may require a non-profit to decline or return funds it receives for purely state and local elections”).

avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions.” *McConnell*, 540 U.S. at 196; *see also Citizens United*, slip op. at 53-55. As noted above, *Citizens United* has added one more justification to that list: providing shareholders information on corporate spending. Slip op. at 55. In pursuing these goals, however, Congress must be sure its regulations are appropriately tailored and do not unduly burden corporate speech. Imagine, for instance, a requirement that 9 seconds of a 10-second advertisement be taken up with a disclaimer. The Court would likely invalidate such a rule as insufficiently tailored.

Finally, while the Court has routinely approved disclosure and disclaimer requirements, it has warned that disclosure rules would be unconstitutional as applied to a specific organization “if there were a reasonable probability that the group’s members would face threats, harassment, or reprisals if their names were disclosed.” *Citizens United*, slip op. at 54. Indeed, the roots of the Court’s doctrinal test for disclosure rules date back to *NAACP v. Alabama*, 357 U.S. 449 (1958), which involved just this sort of harassment.

It is not clear that Congress needs to write this exception directly into the legislation, however, as this is a matter that can be addressed through administrative guidelines or at the initiative of the affected organizations, which can bring as-applied challenges where such a threat exists. *Citizens United*, slip op. at 54-55. Nonetheless, Congress should take this set of concerns into account in tailoring its legislation. Now that the Internet makes it easy to obtain information about the political spending of even small donors, Congress should be sure that the thresholds it chooses comport with the informational goals it is pursuing. For example, Congress may wish to consider whether the disclosure of small donations has sufficient informational value to justify public disclosure given the privacy interests that exist on the other side.<sup>9</sup>

My analysis here comes with one caveat. The Supreme Court has recently granted certiorari in a case called *Doe v. Reed*, where citizens who signed a petition in support of a controversial referendum proposal sought to prevent the public release of the list of signatories because they feared retaliation and harassment. Although *Doe* is not a campaign finance case, Justice Thomas in his dissent to *Citizens United* drew explicit parallels between the two types of cases, and I would expect the Court’s opinion in *Doe* to provide additional guidance about the constitutional relationship between public disclosure and political activities. If the Court does so, it may raise additional questions about disclosure of political spending, particularly with regard to small donors. This again may suggest that Congress should think seriously about the disclosure thresholds it creates.

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<sup>9</sup> For further development of this argument, *see* Briffault, *supra* note 2.

## II. Protecting Shareholders

One of the main reasons that the Court enthusiastically endorsed disclaimer and disclosure rules was protecting corporate shareholders. The Court recognized that corporate managers may be tempted to fund their pet political projects or simply waste corporate money on unnecessary political expenditures.<sup>10</sup> *Citizens United* thus identified another potential path for reform: regulation that protects shareholders from abuse.

A law to protect shareholders in this area raises more substantial constitutional challenges than disclosure rules for two reasons. First, the Court is likely to look askance at any statute that seems to target only political speech or particular forms of electioneering, as the Court may infer that Congress is simply using shareholder democracy as an excuse to suppress speech. Second, states have typically been the primary – but certainly not the exclusive – source of corporate regulation in the United States. Because this regulation would fall naturally under Congress’s Commerce Clause powers, Congress should provide an adequate factual record showing the effect of corporate political spending on interstate commerce.

Policy implications. There is, nonetheless, room for Congress to act. As the debate over executive compensation has made clear, shareholders sometimes lack a dependable means of controlling executive decisions. Campaign expenditures may thus fall into the same category as executive pay or charitable giving.<sup>11</sup> In each instance, there is a potential principal-agent problem if it is too easy for executives to use corporate funds to further their personal interests rather than the interests of shareholders. While state-law actions in theory should correct this problem, they have often proved to be ineffective.<sup>12</sup>

If Congress concludes that shareholders require additional protections, it might demand that companies provide accessible, real-time public accounting of any money spent on political issues to allow shareholders to monitor the firm’s spending. A stronger response would be to require management to obtain the approval of a majority of shareholders before spending on political races.

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<sup>10</sup> For a survey of the extant research, see Ciara Torres-Spelliscy, “Corporate Campaign Spending: Giving Shareholders a Voice” (Brennan Center for Justice, 2010). For a historical analysis showing that federal efforts to regulate corporate expenditures have long been rooted in a desire to protect shareholders, see Adam Winkler, “‘Other People’s Money’: Corporations, Agency Costs, and Campaign Finance Laws,” 92 *Georgetown L. J.* 871 (2004).

<sup>11</sup> See, e.g., Victor Brudney & Allen Ferrell, “Corporate Charitable Giving,” 69 *U. Chi. L. Rev.* 1191 (2002).

<sup>12</sup> See Torres-Spelliscy, *supra* note 10.

Constitutional considerations. While I will leave the details of such provisions to an expert in corporate law, let me emphasize the constitutional constraints that the Court is likely to impose on such efforts.

*The First Amendment:* It is imperative that Congress keep in mind the real source of the problem. The problem Congress would be addressing is not a weakness in American democracy, but a weakness in shareholder democracy. The only thing that shareholder democracy has to do with federal elections is this: *Citizens United* vindicated the right of corporations to speak, and shareholders *are* the corporation. No one, for instance, would argue that managers of for-profit companies enjoy a free-standing First Amendment right vis-à-vis their shareholders<sup>13</sup>; management works for the shareholders. Any regulation in this area, then, must be directed toward vindicating the interests of shareholders to ensure that the speech paid for by the corporation is genuinely what the shareholders intend.

In order to make clear that Congress is not using shareholder protection as an excuse to deter political expenditures – something that would surely result in more rigorous constitutional scrutiny and likely invalidation – Congress should address this issue comprehensively. For instance, *Citizens United* explicitly warned Congress not to focus only on “corporate speech in only certain media or within 30 to 60 days before an election,” slip op. at 46, lest the Court infer that Congress’s real goal is to deter political speech rather than protect shareholders.

In my view, Congress should do more to ensure that its legislation withstands constitutional scrutiny. Any regulation should be part of a broader package of reforms that protect shareholders from comparable principal-agent threats. As noted above, executive pay and corporate charitable giving may fit into this category. Alternatively, Congress might consider this issue when it takes up Senator Schumer’s and Senator Cantwell’s “shareholder bill of rights.”

While congressional regulation must be aimed at protecting shareholders, not deterring corporate speech, Congress must nonetheless pay attention to the fact that its regulations will shape the decision-making process used by companies considering whether to engage in political spending. First Amendment concerns, then, must be taken into account. For instance, Congress should tailor its shareholder protection provisions by exempting corporations where the shareholder problem does not exist. The Supreme Court, for instance, has singled out “nonprofits and for-profit corporations with only single shareholders” as obvious candidates for exemption. Slip op. at 46. Congress should similarly consider whether media corporations raise unique First Amendment concerns that require a different form of regulation, perhaps applying the media exemption typically used in such instances. Finally, Congress must ensure that it does not impose such cumbersome requirements that corporations cannot act expeditiously to

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<sup>13</sup> Here I set aside unusual cases, like for-profit media companies or whistle-blower statutes.

influence a political debate. For instance, Congress should not require corporate managers to go through a full-blown voting process every time they wish to purchase airtime or run an advertisement.

Congress must establish an adequate evidentiary record to support any regulation that relates to political speech. That record should clearly establish that a genuine principal-agent problem exists with regard to political expenditures.

Finally, Congress must convince the Court that it is not using a blunderbuss to kill a flea. It is essential that Congress justify not just the need for protection, but the scope of the regulation it enacts, lest the Court suspect that Congress's real purpose is to suppress corporate speech.

*Federalism.* An adequate evidentiary record is necessary for a separate and independent constitutional reason. Regulation in this area has traditionally been left largely, but not entirely, to the states. For this reason, Congress must also be attentive to federalism concerns. Because this regulation would fall naturally under Congress's Commerce Clause powers, the record must clearly establish that independent corporate expenditures have a substantial effect on interstate commerce. *See, e.g., Lopez v. United States*, 514 U.S. 549 (1995); *Gonzalez v. Raich*, 545 U.S. 1 (2005). I would not expect Congress to encounter any difficulty in satisfying this standard.

### **III. Protecting U.S. Elections From the Influence of Foreign Nationals.**

A final consideration for Congress is whether *Citizens United* makes it possible for foreign nationals<sup>14</sup> to use independent corporate expenditures to influence federal, state, or local

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<sup>14</sup> The FEC defines a foreign national as either "an individual who is not a citizen of the United States and who is not lawfully admitted for permanent residence," 11 C.F.R. § 110.20(a)(3)(ii), or a "foreign principal," which is defined under the Foreign Agents Registration Act as follows:

- (1) a government of a foreign country and a foreign political party;
- (2) a person outside of the United States, unless it is established that such person is an individual and a citizen of and domiciled within the United States, or that such person is not an individual and is organized under or created by the laws of the United States or of any State or other place subject to the jurisdiction of the United States and has its principal place of business within the United States; and
- (3) a partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country." 22 U.S.C. § 611(b).

11 C.F.R. § 110.20(a)(3)(i).

elections. The United States has sought to shield its elections from foreign influence since 1966, after Senator Fulbright conducted hearings that revealed efforts by foreign nationals to influence U.S. policy on such issues as import quotas.<sup>15</sup> Through a series of amendments to the Foreign Agents Registration Act and the Federal Election Campaign Act, Congress prohibited foreign nationals from directly contributing to campaigns, making soft money contributions to political parties, and making independent expenditures on electioneering. 22 U.S.C. §441(e). The FEC has issued regulations implementing this provision. 11 C.F.R. §110.20.

Policy implications. Congress may wish to ensure that foreign nationals do not use independent corporate expenditures to bypass existing prohibitions on foreign participation in U.S. elections. It might, for instance, use disclosure and disclaimer rules to prevent undue foreign influence. Or it might codify existing FEC regulations on the subject or place additional restrictions on companies controlled by foreign nationals.

Constitutional implications. Efforts to prevent foreign nationals from influencing U.S. elections are not without constitutional doubt. That is largely because there is no direct precedent on the question. To my knowledge, no federal court has issued a written opinion addressing the constitutionality of Section 441(3). In *Citizens United*, the majority explicitly reserved the question, slip op. at 46-47, although Justices Stevens' dissent suggested that such restrictions would pass constitutional muster. Slip op. at 29 (Stevens, J., dissenting). As a result of this judicial silence, we have relatively little guidance as to whether preventing foreign influence on elections is a legitimate state interest or what level of scrutiny would be used to evaluate such regulations.

While it is possible that the Court will hold that companies controlled by foreign nationals – like domestic firms – enjoy a robust First Amendment right to engage in independent expenditures, is it more likely that the Court will find that protecting U.S. elections from the influence of foreign nationals is a legitimate state interest, sufficient to justify appropriately tailored regulations. The Court has long licensed distinctions between citizens and noncitizens in constitutional law as long as the government offers an adequate justification for the distinction. Moreover, the distinction between citizens and noncitizens is firmly established in the elections arena. Foreign nationals, for instance, are prohibited from voting in federal, state, and most local elections, and that prohibition has never raised a judicial eyebrow.

Nonetheless, any effort to prevent foreign nationals from using independent corporate expenditures to influence U.S. elections must be properly tailored. First, as per the discussion above, disclosure and disclaimer rules are likely to pass constitutional muster provided they do not impose undue burden on corporations. For instance, Congress might require corporations

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<sup>15</sup> See Lori F. Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence Over Domestic Affairs*, 83 Am. J. Int'l L. 1, 21-25 (1989).

funding independent expenditures to disclose what percentage of its shares are owned by foreign nationals. (Here I will note one potential source of constitutional concern: corporations often find it difficult to identify their own shareholders. Any congressional regulation must take into account what sort of disclosure can be reasonably expected of corporations lest the Court find that Congress is trying to chill speech. It may be necessary to target certain regulations at foreign shareholders rather than corporations as such.)

Second, while the *Citizens United* majority refused to say what type of regulation would satisfy the Constitution, it did indicate that any regulation aimed at foreign nationals should be appropriately tailored. In its brief discussion of the issue, the Court noted that an outright ban on all corporate independent expenditures could not be justified as a protection against foreign influence because it was not “limited to corporations or associations that were created in foreign countries or funded predominantly by foreign shareholders.” Slip op. at 47.

The Court’s intention is clear: it does not want to license too broad a ban on independent corporate expenditures when there is no reason to think that foreign nationals exercise control over the decision in question. Imagine, for instance, a company where only one percent of the shareholders were foreign nationals. Any rule that banned such a company from engaging in independent political expenditures is unlikely to pass constitutional muster.

The question, then, is whether the Court would accept other indicia of foreign control. For instance, Congress might be able to show that management by foreign nationals over a corporation posed a sufficient risk of foreign influence to justify regulation.

A more difficult question goes to what percentage of a company’s shares foreign nationals must control for there to be a legitimate risk of undue foreign influence. The Court used the word “predominantly,” which seems to indicate that foreign nationals must own at least 50% of company’s shares, perhaps substantially more than 50%.

Given that this statement is dictum and made without the benefit of any congressional findings on the subject, I believe that the Court would be open to revising its seat-of-the-pants example if presented with adequate evidence. For instance, imagine that the Chinese or Russian government controlled 49% of the shares in a company. Surely the Court would entertain the possibility that a 49% voting bloc could exercise control, especially given that not all shareholders vote in any given election.

Much depends, then, on the evidence Congress amasses. If Congress can provide sufficiently convincing evidence to show that shareholders can exercise controlling influence even when they control less than 50% of the company’s shares, the Court should accept that finding. As I am not an expert in corporate law, I cannot testify as to the correct number. For these purposes, I will simply note several constitutional considerations that might play a role in the Court’s assessment of such a bill.

First, the Court may deem it relevant whether the shares in question are owned by a single entity or widely dispersed among a variety of owners.

Second, Congress should keep in mind the Court's concern for simplicity in this context. The Court plainly signaled its worry that complex regulatory standards in this area chill corporate speech because they make it hard to determine in advance whether a company is covered by a given rule. *Citizens United*, slip op. at 18-19. Congress may thus face a regulatory challenge in addressing the question of foreign control. Corporate law experts may, for instance, believe that the best way to determine what constitutes a controlling share is to take into consideration a variety of contextual factors. But the Court is likely to prefer a bright-line rule to a flexible standard in this context, something that would push Congress toward a clear-cut ceiling, like the one Congress has chosen in the context of the air cargo industry. There, Congress's worries about foreign ownership led it to forbid foreign nationals from owning more than a 25% interest in an air cargo company.<sup>16</sup> Congress might similarly look to its efforts to prevent foreign control of the U.S. media in the Communications Act, which prohibits foreign governments, individuals, and corporations from owning more than 20% of the stock of a broadcast, common carrier, or aeronautical radio station licensee and includes a similar prohibition to prevent foreign influence through corporate subsidiaries.<sup>17</sup>

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<sup>16</sup> 49 U.S.C. § 40102(a)(15).

<sup>17</sup> The Communications Act provides:

No broadcast or common carrier or aeronautical en route or aeronautical fixed radio station license shall be granted to or held by--

- (1) any alien or the representative of any alien;
- (2) any corporation organized under the laws of any foreign government;
- (3) any corporation of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof or by any corporation organized under the laws of a foreign country;
- (4) any corporation directly or indirectly controlled by any other corporation of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license.

47 U.S.C § 310(b). This provision was upheld against an equal protection challenge in *Moving Phones Partnership, LLP v. FCC*, 998 F.2d 1051 (D.C. Cir. 1993).

Whatever standard Congress chooses, it must be backed by strong empirical evidence and expert testimony in order to withstand the Court's scrutiny. While the Supreme Court generally defers to Congress on issues that relate to foreign policy or the protection of American interests, here the First Amendment interests at stake will likely lead the Court to scrutinize Congress's actions more closely.

## **Conclusion**

*Citizens United* left a number of regulatory paths open to Congress. Disclosure rules stand on the firmest constitutional footing, but other strategies – including regulations to protect shareholders and efforts to prevent foreign nationals from influencing U.S. elections – are likely to withstand constitutional scrutiny if the regulations are properly tailored and backed by a well developed legislative record.

## **Biographical Information:**

### **Heather K. Gerken, J. Skelly Wright Professor of Law, Yale Law School**

Professor Gerken specializes in election law and constitutional law. She has published numerous articles on these subjects in the *Harvard Law Review*, the *Stanford Law Review*, the *Yale Law Journal*, the *Columbia Law Review*, *Roll Call*, *Legal Affairs*, *Legal Times*, *The New Republic*, and elsewhere. She has served as a commentator on election controversies for a number of media outlets, including *The New York Times*, *The New Yorker*, the *L.A. Times*, the *Chicago Tribune*, the *Boston Globe*, NPR, the Lehrer News Hour, CNN, MSNBC, and NBC News. She has won the teaching awards at Harvard Law School and Yale Law School. In 2007 and 2008, she served as a senior adviser to the national election protection team for Obama for America.

Professor Gerken's proposal that Congress establish a "Democracy Index" – a national ranking system of state election performance – has been incorporated into separate bills by Senator Hillary Clinton, Senator Barack Obama, and Congressman Israel. The proposal has also been the subject of a conference sponsored by the Pew Foundation, the Joyce Foundation, and AEI-Brookings. Mayor Bloomberg announced in September that New York City would create the nation's first Democracy Index. The proposal is the subject of her new book, *The Democracy Index: Why Our Election System is Failing and How to Fix It*.

Professor Gerken's research centers on questions of applied democratic theory, including the role groups play in a democratic system, the translation of institutional design choices into manageable legal doctrine, and the values associated with minority-dominated institutions. Her most recent scholarship explores questions of election reform, diversity, and dissent.