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Citizens United against Dissenting Shareholders

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CITIZENS UNITED AGAINST DISSENTING SHAREHOLDERS

In *Citizens United v. Federal Election Commission*[1] the Supreme Court struck down the portion of the Bipartisan Campaign Reform Act of 2002 ("BCRA")[2] that prohibited corporations and trade unions from making direct contributions to political candidates or making any indirect "expenditures that expressly advocate [for] the election or defeat of [any] candidate."[3] In the majority opinion, Justice Kennedy rejected four grounds that the government had offered in support of the statute: 1) that corporate campaign financing distorted the election marketplace by favoring wealthy corporations;[4] 2) that corporate campaign financing fostered corruption or its appearance by creating an opportunity for corporations and politicians to trade campaign expenditures for political favors;[5] 3) that corporate campaign expenditures in effect compelled dissenting shareholders to fund political speech that they disagreed with;[6] and 4) that corporate campaign financing allowed foreign individuals and associations to influence American elections.[7]

While Justice Kennedy spent eight pages of his opinion discussing these arguments, he dedicated less than half of a page to discussing the issue of compelled speech by dissenting shareholders.[8] This essay addresses that topic. In this essay I will evaluate compelled political advocacy by corporations using principles from free speech theory. Part I discusses the theory to be applied, Part II introduces Justice Kennedy's opinion and describes the issue under free speech theory principles, Part III describes the plight of the dissenting shareholder, Part IV illustrates the dilemma that dissenting shareholders face when forced to choose between having their speech compelled or being denied access to a wide range of investment opportunites, Part V demonstrates that compelled corporate election expenditures are analogous to the type of government compelled speech that the Supreme Court has found to violate the First Amendment, Part VI argues that Congress should have a role in protecting the self-realization values of dissenting shareholders, and Part VII summarizes and concludes.

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1. Citizens United v. Fed. Election Comm'n. 130 S. Ct. 876 (2010).
2. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 203, 116 Stat. 91 (codified as 2 U.S.C. § 441(b)).
3. 130 S. Ct. at 887.
4. *Id.* at 904-08.
5. *Id.* at 908-11.
6. *Id.* at 911.
7. *Id.*
8. *Citizens United*, 130 S. Ct. at 904-11.

I. DEMOCRATIC FREE SPEECH THEORY

I begin this essay with the proposition that the individual, not the collective, is the fundamental element of society. In an ideal world each individual would be at liberty to determine his own actions, beliefs, and modes of expression. In a world of limited space and scarce resources, however, the choices that individuals make come into conflict with each other, and those conflicts must be resolved. The goal of democracy is to maximize individual liberty within the constraints of a resource limited society.

A compatible view of the importance of individual choice has been well developed by Professor Martin Redish. Professor Redish proposes that *individual* self-realization is the primary goal of a true participatory democracy.[9] Democracy exists to secure "individuals control [of] their own destinies and to enable them to develop their human faculties through participation in the democratic process.[10]

According to Professor Redish, individual self-realization is an intentionally ambiguous term that is meant to encompass the values liberty, autonomy, individual self-fulfillment, and human development.[11] In order to encourage self-realization, free speech protection must do two things. First, it must "evaluate speech from the perspective of the [listener]."[12] Speech is valuable in this context because it provides information that the listener can use to make self-governing decisions.[13] The listener receives information and uses it to determine what he believes and why he believes it. He uses information to help him determine how he feels about a particular issue and to develop what he thinks is the best course of action to effectuate his beliefs and interests. In this way, speech is valuable in helping the listener to develop his human faculties and identity.

Second, free speech protection must evaluate speech from the perspective of the speaker.[14] Speech is valuable in this context because it provides the speaker with a way to facilitate self-governing decisions.[15] The speaker uses speech to make his preferences known and to influence his fellow democratic citizens and legislators. In this way, the speaker gains a measure of control over his own destiny by speaking. Because individuals require speech to further their own self-realization, the government should have no role in regulating speech unless there is a compelling interest in doing so.[16]

Professor Redish's theory of free speech (the "self-realization theory") provides the framework that I will use to evaluate the government's argument that preventing compelled speech of dissenting shareholders justifies regulation of corporate campaign financing.[17]

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9. Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 601-11 (1982) (arguing that democracy exists to enable individual self-realization).

10. *Id.* at 602-03.

11. *Id.*

12. Martin H. Redish & Abby Marie Mollen, *Understanding Post's and Meiklejohn's Mistakes: The Central Role of Adversary Democracy in the Theory of Free Expression*, 103 NW. U. L. REV. 1303, 1315 (2009).

13. *Id.* at 1315-16.

14. *Id.* at 1316.

15. *Id.*

16. Redish, *supra* note 9, at 625.

17. Justice Stevens, in his dissent, makes reference to this theory in stressing the importance of *individual* free speech rights. Citizens United v. Fed. Election Comm'n., 130 S. Ct. 876, 972 (2010) (Stevens, J.,

II. *CITIZENS UNITED* AND THE THEORY OF FREE SPEECH

In *Citizens United*, Justice Kennedy quickly dismissed the government's argument that regulation of corporate campaign financing is necessary to protect dissenting shareholders from being forced to fund political speech.[18] He offered three reasons to support this rejection. First, Justice Kennedy believed that if the regulations were allowed, nothing would prevent them from being applied to corporate owned newspapers and other media companies, a result he deemed prohibited by the First Amendment.[19] Second, he found the BCRA to be under-inclusive because it only barred corporate campaign financing within a specified time before the election, but allowed the same potentially coerced expenditures outside of the specified time window.[20] Finally, he stated that the BCRA was over-inclusive because it barred expenditures by corporations owned by single individuals, when such expenditures were clearly not coerced.[21]

While Justice Kennedy states legitimate concerns about the BCRA, they are not dispositive to the issue of protecting dissenting shareholders. His first objection — that the BCRA could be applied to newspaper — while valid, does not argue against limiting coerced political expenditures. Rather, it argues for recognizing an exception for the press. One could argue that protection of the op-ed pieces and news stories that he fears the BCRA would prohibit could be provided by exempting the press from regulation because of its historical checking function on the government,[22] or because the press is expressly protected by the First Amendment's prohibition against abridging the freedom of the press.[23]

His second objection — that the BCRA is underinclusive — could be cured (oddly) by barring even more corporate campaign financing. His third objection — that the BCRA would improperly regulate individually owned corporations — could be easily cured by creating an exception for closely held corporations. In fact, Justice Kennedy's third objection is overstated because the BCRA does permit corporations to make political expenditures using shareholder approved funds, just not with funds from the general treasury.[24] Under the BCRA, corporations can form political action

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dissenting) (noting that individual self-realization is one of the fundamental concerns that the First Amendment seeks to protect).

18. *Id.* at 911.

19. *Id.*

20. *Id.*

21. *Id.*

22. *See* C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 225-49 (1989).

23. U.S. CONST. amend. I. ("Congress shall make no law . . . abridging the freedom of speech, *or of the press* . . . .") (emphasis added).

24. 2 U.S.C. § 441b(b)(4)(B) (2006).

> It shall not be unlawful under this section for a corporation, a labor organization, or a separate segregated fund established by such corporation or such labor organization, to make 2 written solicitations for contributions during the calendar year from any stockholder, executive or administrative personnel, or employee of a corporation or the families of such persons. A solicitation under this subparagraph may be made only by mail addressed to stockholders, executive or administrative personnel, or employees at their residence and shall be so designed that the corporation, labor organization, or separate segregated fund conducting such solicitation cannot determine who makes a contribution of $50 or less as a result of such solicitation and who does not make such a contribution.

Id.

committees ("PACs"). Individual shareholders can then make personal contributions to the PAC which can make unrestricted campaign expenditures. Overall, Justice Kennedy's concerns support some "as applied" judicial exceptions to the BCRA, but not a blanket invalidating of the entire statute.

More important for the purposes of this essay, however, Justice Kennedy did not analyze the dissenting shareholder argument from the perspective of both the listener and the speaker. The listener perspective offers no support for government regulation of corporate speech. Corporate funded political advertisements provide information that the electorate can use to make decisions, and clearly has value for First Amendment purposes. It is the perspective of the speaker, however, that presents the more difficult First Amendment issues.

If an individual made political campaign expenditures, the speech would certainly be valuable in furthering that speaker's self-governing decisions. Corporations, however, are owned by a collective of individual shareholders. If all of the shareholders held the same political beliefs, then corporate political expenditures would be unproblematic and such unified speech would further the shareholders' self-governing goals. The problem is that it is unlikely that all shareholders in a corporation, particularly a large corporation, will share the same set of political beliefs.[25] When they do not all share the same set of political beliefs, corporate expenditures of shareholder funds for political purposes can be viewed as compelling dissenting shareholders to fund political views that they disagree with.

This analysis will proceed in four parts. First, it will illustrate how a shareholder could choose to invest in a corporation for the purpose of making a return on his investment, yet dissent from the corporation's decision to spend money on political advertisements for a particular candidate. Second, it will argue that tailoring investment choices to avoid this compelled speech is not a viable option for most investors. Third, it will demonstrate that under modern Supreme Court jurisprudence, spending of dissenting shareholder funds on candidate advocacy is analogous to prohibited government compelled speech. Finally, it will argue that the government has a role to play in protecting the First Amendment rights of investors through the BCRA.

III. THE DISSENTING SHAREHOLDER

Determining the place of political speech in a corporation first requires an examination of the purpose of corporations. Some argue that the government sanctioned the creation of the corporate form[26] as an egalitarian mechanism to allow the working class to participate in equity ownership.[27] Others argue that corporations were created in

25. *See Citizens United*, 130 S. Ct. at 912. Admittedly, this may not always be the case. As Justice Kennedy notes, some corporations owned by a small group of individuals or a single individual, may share the same set of political beliefs. *Id.* at 911.

26. Defined as an artificial legal personality that can own property, is divided into transferable shares, has limited liability, and perpetual life.

27. *See, e.g.*, Martin H. Redish & Howard M. Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235, 252-53 (1998) (positing that corporations arose as an egalitarian tool to democratize economic power and allow common citizens access to investment opportunities).

order to stimulate the kind of large scale investment that a national economy would require; one that would enable old-money capitalists to get resources shipped from their large western holdings to lucrative eastern markets.[28] Both sides illustrate, however, that corporations exist primarily to generate profit for shareholders, not as a vehicle for expressing unified political opinion. Thus, it is reasonable to assume that the vast majority of corporations are owned by shareholders whose only common motivation is the desire for a return on their investment.

The fact that shareholders share a common motivation for profit supports corporate lobbying activity and political speech that are narrowly tailored to issues affecting the corporation's business. It does not, however, support the type of direct candidate advocacy or opposition that the BCRA attempts to prevent. A short example helps to illustrate this point.

Suppose that Shareholder A owns 100 shares of Corporation X, a tire manufacturer. Shareholder A is passionately anti-abortion, desires a ban on stem-cell research, and does not want to pay for universal health care. Candidate 1 campaigns to outlaw abortion, ban stem-cell research, preserve private health insurance, *and* reduce tariffs on imported tires. Candidate 2 campaigns to preserve the woman's right to choose, promote funding for stem-cell research, nationalize health insurance, *and* increase tariffs on imported tires. While Shareholder A would likely appreciate the marginal increase in corporate profits that might accrue from increased tariffs on tires, it is unlikely that this marginal increase would be enough to get him to support Candidate 2. In other words, Shareholder A would likely be willing to forgo a small increase in his return on investment in order to support Candidate 1 who is more aligned with his political views. Nonetheless, any political expenditure by Corporation X is likely tosupport Candidate 2 in order to increase corporate profits. In this example, Corporation X has used the funds of Shareholder A to support the election of a candidate that he vehemently disagrees with on nearly all issues.

If campaign financing by an individual is the equivalent of political speech that furthers his interest in self-government, then compelled use of his funds by the corporation to finance political speech that he disagrees with must be viewed as interfering with his interest in self-government. While it is perhaps a reasonable assumption that when they invest, individual shareholders are implicitly agreeing to fund the type of advocacy that is narrowly tailored to advance corporate profits — for example funding an advertisement that informs the electorate of the benefits of raising tariffs on imported tires — it is not reasonable to assume that the shareholder has agreed

28. *See, e.g.*, HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES: 1492-PRESENT 219-21, 254-57 (1980). Zinn states that during the "opening of the West . . . capitalists of the East were conscious of the need for . . . security [in their] own property. . . [M]ore capital was needed, more risks had to be taken, and a big investment needed stability." *Id.* at 219. Thus, "government played its traditional role . . . of helping the business interests," in part by "[giving] charters to corporations giving them legal rights to conduct business, [and] raise money. . . ." *Id.* Zinn notes that while "Jacksonian Democracy" had attempted to build a popular consensus for this new economic system, the system continued to exclude "[b]lacks, Indians, women," "foreigners," and working whites. *Id.* at 221. *See also* George Henry Evans, *The Working Men's Declaration of Independence*, WORKINGMAN'S ADVOCATE (1829) ("The laws [of] private incorporations are all partial . . . favoring one class of society to the expense of the other. . . ."); WORKINGMEN'S PARTY OF ILLINOIS, DECLARATION OF INDEPENDENCE (1876) ("The present system has enabled capitalists to make laws in their own interests to the injury and oppression of the workers.").

to fund election advocacy of a candidate that he strongly opposes. From the speaker perspective, this form of compelled speech has inhibited his path to self-realization.

IV. THE INVESTING DELIMMA

Individuals unsympathetic to the predicament faced by the dissenting shareholder are likely to respond with something along the lines of "So what, tell him to sell his damn shares if he disagrees," or "It's very easy to buy stock in individual companies that you do agree with." In *Citizens United*, Justice Kennedy offered a similar rebuttal, stating: "There is . . . little evidence of abuse that cannot be corrected by shareholders 'through the procedures of corporate democracy.' "[29] The procedures that he refers to are presumably the ability of shareholders to vote out boards of directors that they disagree with or to file lawsuits against management.[30] The flaw in these responses is that they ignore the reality of modern investing.

These responses would have been highly relevant in the 1950s, when retail investors directly owned over 90% of the stock in United States companies.[31] Today, retail investors directly own less than one-third of the outstanding corporate equity in the United States. The vast majority of shares in American corporations are held by institutional investors and money managers.[32] Shareholder investments today are primarily held in institutional investment vehicles such as pension plans, deferred compensation plans, 401(k)'s, 403(b)'s, Roth IRA's, individual IRA's, managed mutual funds, and index funds. These investment vehicles are typically comprised of a diverse array of investments including treasury bills, government bonds, municipal bonds, corporate bonds, and corporate equity. The corporate equity component could consist of shares of hundreds or thousands of individual companies. These institutional investments are operated by professional money managers. Individual shareholders no longer significantly participate in the "selection of individual stocks and engagement in the process of corporate governance."[33]

The reason for this shift in investing is that significant participation in active investing is not feasible for the average investor. Modern portfolio theory teaches that to maximize their return on risk, investors should diversify their investment choices across a broad range of asset classes, industries, and companies.[34] No longer is it considered prudent for the investor to pick a handful of stocks that he or she considered "winners." Instead, a wise investment strategy requires the investor to invest in hundreds or

29. *Citizens United*, 130 S. Ct. at 911 (quoting First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 794 (1978)).

30. *Id.* (citing *First Nat. Bank of Boston*, 435 U.S. at 794).

31. John C. Bogle, *Individual Stockholder, R.I.P.*, WALL ST. J., Oct. 3, 2005, at A16.

32. SEC. INDUS. & FIN. MKTS. ASS'N, 2007 FACT BOOK 65 (Charles M. Bartlett, Jr. ed., 2007) (stating that institutions held 73.4% of the market value of outstanding equity securities in 2006); Bogle, *supra* note 31, at A16 (stating that institutions held 68% of all stocks in 2005); Daniel C. Langevoort, *The SEC, Retail Investors, and the Institutionalization of the Securities Markets*, 95 VA. L. REV. 1025, 1026 n.4 (2009) (stating that retail investors directly own less than 30% of the stock in U.S. corporations).

33. Bogle, *supra* note 31, at A16.

34. *See generally* HARRY M. MARKOWITZ, PORTFOLIO SELECTION: EFFICIENT DIVERSIFICATION OF INVESTMENTS (1959) [hereinafter MARKOWITZ, PORTFOLIO SELECTION]; Harry M. Markowitz, *Portfolio Selection*, J. FINANCE 77 (1952) [hereinafter MARKOWITZ, *Portfolio Selection*].

thousands of different securities across the entire range of the economy.[35] Doing this at an individual level is out of reach for most investors because of the prohibitive cost of diversifying at the individual level, the prohibitive time commitment required, and the lack of expertise of the average investor.

To achieve diversification by purchasing hundreds or thousands of individual securities across multiple asset classes and industries would require the individual investor to engage in potentially thousands of individual transactions. The investor would need to pay a broker to complete each transaction. Even using a discount broker, implementing this strategy on an individual level would be cost-prohibitive.[36] Investing in the type of institutional investment vehicles most commonly employed today[37] takes advantage of economies of scale and reduces the transaction costs for individual investors to an affordable level.

Executing thousands of individual transactions also would require an extensive amount of time that the average investor does not have. Not only would it require the investor to research and then execute the initial transactions, but it would also necessitate constant monitoring of each individual investment and continual follow-up transactions to maintain the desired diversification balance. Such an undertaking would be a tall order even if the investor had unlimited time to dedicate to investing. It is simply not feasible for the average investor to make such a commitment while also juggling the demands of a career and family. Institutional investment vehicles provide this service on an aggregate level so that individual investors can have the benefit of diversification.

In addition to the cost and time required to individually create a diversified investment portfolio, there is a large cost and time commitment involved in gaining the expertise necessary to formulate, research, and implement a diversified investment strategy. Professionals employed by companies offering institutional investment vehicles have often spent years obtaining college educations in finance or economics. Additionally, they spend a large portion of their professional lives keeping abreast of advancements in investment theory and changes in asset classes, securities markets, industries, and individual companies. The average investor is unable to spend the time or resources necessary to obtain a similar level of expertise, and thus institutional investment vehicles offer him the only feasible way to take advantage of such expertise.

In today's world of increased life spans and rising health costs, it is vital that individuals have the ability to maximize their retirement savings. This requires that the individual investor take advantage of a diversified portfolio of investments. As the preceding paragraphs illustrate, however, it is not practical for the average investor to do

35. *See generally* MARKOWITZ, PORTFOLIO SELECTION *supra* note 34; MARKOWITZ, *Portfolio Selection supra* note 34.

36. *See, e.g.*, TD AMERITRADE, http://www.tdameritrade.com/welcome1.html. (last visited Apr. 16, 2010). TD Ameritrade, a discount broker, charges $9.99 per online trade. Executing 1,000 individual trades with Ameritrade would therefore cost the investor $9,990. The cost of executing these trades alone would eliminate a large portion of expected future gains for most small investors. Additional costs would be incurred each time the investor was required to make additional transactions to rebalance his or her portfolio.

37. *See supra* text accompanying notes 31-33. These investments include: pension plans, deferred compensation plans, 401(k)'s, 403(b)'s, Roth IRA's, individual IRA's, managed mutual funds, and index funds.

so without placing his money into an institutional investment fund.[38]

Turning back to Justice Kennedy's rebuttal, to bring a lawsuit, vote against the slate of directors, or divest himself of a particular stock, an individual shareholder would have to look to each of his investment funds, each one potentially holding shares of hundreds or thousands of different companies, determine which companies that he owned stock in, and then monitor the campaign contributions of each of these companies. The time commitment required is not feasible for the average investor. Nor is it likely that the individual investor will be able to fund a lawsuit against a company that he owns but a few shares in. If the dissenter is indeed in the minority, it is unlikely that his vote will affect director elections. More importantly, should he desire to sell his shares, the institutional fund that holds them will likely not be willing to bear the administrative burden of allowing individual shareholders to divest themselves of particular stocks held in the fund. Thus, today's investor is unable to effectively protect his own speech using the tools of corporate governance.

In summary, the suggestion to "Just sell the damn shares," or utilize the tools of corporate governance leaves the average investor in an untenable dilemma: either the investor must forgo the opportunity to take advantage of the most prudent investment strategy available to him, or submit to having his finances compelled to fund offensive political speech.

V. COMPELLED SPEECH UNDER SUPREME COURT JURISPRUDENCE

To the extent that funding political expression is viewed as speech, it follows that having one's money used to fund political expression is also speech. If one disagrees with the use of his money to fund political expression that he opposes, and it is used anyway, it is compelled speech.[39] Two distinct dangers arise from coercing individual shareholders to fund political advocacy. First, there is a risk that the audience of the political advocacy will be confused as to the strength of the position that the corporation is advocating.[40] Despite the fact that there may be a large number of dissenting shareholders that oppose the political advocacy of the corporation, the use of their money

38. It is worth noting a recent trend in investing, styled "green investments." *See* Investopedia.com, *Investment Question: What are Green Investments?*, http://www.investopedia.com/ask/answers/07/green-investments.asp (last visited Apr. 17, 2010). Green investments are an attempt to offer investors a way to exercise their political preferences by creating investment vehicles containing the shares of "socially responsible," or "environmentally friendly" firms. While these vehicles can be viewed as a positive step towards furthering the self-realization goals of individual investors, they do not solve the problem of compelling dissenting shareholder advocacy of political *candidates* that is the subject of this essay.

39. It is of little matter that in the case of shareholder money being used to fund corporate political speech that the individual shareholder may be compelled to have only a small amount of his money used or that he may not be aware of every instance in which it is being used. To illustrate this, it is instructive to look at an example from the perspective of the listener. If a small amount of information in the marketplace of ideas were censored, it would be no answer that the amount censored was small or that the listener was unaware that it was being censored. The act of censorship would interfere with the rights of the listener regardless of the amount of censorship or whether the listener was aware of the censorship. The rights of the speaker are violated in the same way by compelled speech, regardless of the amount of speech that is compelled or whether the speaker is aware that his speech is being compelled.

40. *See* Martin H. Redish & Kirk J. Kaludis, *The Right of Expressive Access in First Amendment Theory: Redistributive Values and the Democratic Dilemma*, 93 NW. U. L. REV. 1083, 1114 (1999) ("[C]ompelled speech harms the interests of free expression by [] confusing the populace as to the actual strength and popularity of substantive positions advocated by [the party compelling the speech].").

to fund the advocacy risks deceiving the audience into believing that the viewpoint is widely held. Listeners may view the marketplace of ideas as wholeheartedly endorsing Candidate 2[41] when in fact there is substantial reasoned disagreement. Second, compelled use of a dissenting shareholder's money to fund political advocacy that is abhorrent to him dilutes the effectiveness of the dissenting shareholder's own message.[42] A shareholder who is a passionate advocate for Candidate 1 will have his expression diluted by a corporation that uses his money to fund attack ads against Candidate 1 or support ads for Candidate 2.

It is clear that if a unit of the *government* used citizens' money to fund this type of political advocacy, it would be compelled speech under current Supreme Court jurisprudence. It is a violation of an individual's First Amendment rights for a government actor to require an individual to fund political advocacy that he disagrees with, unless the advocacy in question is part of a larger program that is viewpoint neutral. In *Wooley v. Maynard*, the Court held that the First Amendment protected not only an individual's right to speak, but also the individual's right to refrain from speaking at all.[43] Thus, the state could not require an individual to display the political motto "Live Free or Die" on his license plate.[44] In *Abood v. Detroit Board of Education*, a case in which a public teachers union used union dues to fund advocacy of political candidates, the Court held that the First Amendment protects an individual from being compelled to fund political advocacy that he finds objectionable.[45] In *University of Wisconsin v. Southworth*, the Court held that a public university could not use student activity fees to fund political advocacy that was objectionable to individual students, unless such advocacy was part of a larger program that was viewpoint neutral.[46]

In none of these cases did the Court suggest that an acceptable solution would be for the individual to forgo the opportunity to be a teacher, to attend a public university, or to drive a car. Implicitly the Court recognized that these are important opportunities, and explicitly held that the government could not require an individual to fund distasteful political advocacy in order to take advantage of them.[47] Under the Court's compelled speech jurisprudence, therefore, if corporations were run by the government, the use of dissenting shareholder money to fund election advocacy of a particular candidate would be a violation of the shareholder's First Amendment rights. It is clear that the Court would not require an individual to choose between forgoing the opportunity to invest in the stock market or being compelled to fund political advocacy.

Most corporations, however, are not run by the government. The question, therefore, is not whether the First Amendment protects individuals from being compelled to speak by a corporation — it does not — but rather, whether consistent with the First

41. *See supra* Section III.

42. *See* Redish & Kaludis, *supra* note 40, at 1114 ("[C]ompelled speech harms the interests of free expression by . . . diluting the force of the speaker's persuasiveness in the eyes of his listeners.").

43. Wooley v. Maynard, 430 U.S. 705, 714 (1977) ("We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.").

44. *Id.* at 707, 717.

45. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234-36 (1977).

46. Bd. of Regents of the Univ. of Wis. v. Southworth, 529 U.S. 217, 221 (2000).

47. *See supra* notes 43-46.

Amendment the government can regulate corporations in order to protect individuals from being compelled to speak.

VI. PROMOTING SPEECH AND PROTECTING DISSENT

It is usual to think of the government as a threat to free speech when it makes laws that pertain to speech. Private entities, however, can also be a threat to free speech when the government has bestowed them with legal entitlements delegating control over the speech of individuals.[48] Corporations are such a case. The government has sanctioned the corporate form, endowed it with limited liability and perpetual life, and enabled corporations to legally collect investment money from individual shareholders through the sale of shares. The fact that corporations are entitled to use a shareholder's money to fund political candidate ads that the shareholder opposes is a threat to the shareholder's ability to refrain from speaking. It is therefore a threat to the individual's self-realization from the perspective of the speaker. Because the government was responsible for granting the corporation with the entitlements that enable this action, the government should also have a role in protecting the self-realization values of the individual shareholder.

The Court has taken this problem seriously in the past, stating "[C]ontributions by corporations to any political committee or for any political purpose should be forbidden by law; directors should not be permitted to use stockholders' money for such purposes . . . ."[49] The BCRA provided a potential solution to this problem through the use of Political Action Committees (PACs). Under the BCRA, a corporation could form a PAC, and solicit money from individual shareholder's to fund direct advocacy of political candidates.[50] If a shareholder affirmatively agrees for his money to be used for such advocacy, the funds that he designates are held in the PAC and segregated from the corporation's general treasury. The corporation can then use the money collected by the PAC to fund advertisements that directly advocate for or against political candidates. In this way, PACs allow willing corporate shareholders to continue to express political views that provide information to listeners.[51] Because these funds have been expressly contributed by willing shareholders, it simultaneously eliminates coercion of unwilling shareholders. In this way, PACs promote the self-realization values of willing corporate speakers and the self-realization values of the audience of corporate speech, while protecting the self-realization values of dissenting shareholders that choose to refrain from such speech.

While the BCRA prevents a corporation from using shareholder money from the

48. *See, e.g.*, CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 43-51 (1993) (describing that, for example, government grants of exclusive broadcast licenses and the enforcement of their exclusivity enable private broadcasters to prevent the broadcasting of views that they disagree with).

49. United States v. UAW, 352 U.S. 567, 572 (1957) (quoting Theodore Roosevelt). Justice Stevens also notes that "a respect for the interest of shareholders and members in preventing the use of their money to support candidates they opposed" was one of the justifications of the BCRA. Citizens United v. Fed. Election Comm'n., 130 S. Ct. 876, 953 (2010) (Stevens, J., dissenting).

50. *See* 2 U.S.C. § 441b(b)(4)(B) (reprinted at note 24, *supra*).

51. As Justice Stevens noted in his dissent, nothing in the BCRA prevents owners of "mom & pop" corporations from contributing their own money outside of the corporation, or from contributing it through the corporation via a PAC. *See* 130 S. Ct. at 943 (Stevens, J., dissenting).

general treasury to fund advertisements that expressly advocate for or against a political candidate, it does not prevent the corporation from using money from the general treasury to fund political issue ads.[52] Thus, corporate management remains free to fund advocacy concerning issues that are more narrowly tailored to meet the corporation's profit goals. For instance, a domestic tire manufacturer could spend money on election advertisements that illustrate the benefits of increased tariffs and encourage the electorate to back candidates and legislation that support increased tire tariffs. Thus, while the BCRA prohibits corporations from using the money of dissenting shareholders to fund advocacy of political candidates, it allows the corporation to directly fund advocacy of political *issues*, and to fund advocacy of political candidates through PACs.

One potential rebuttal against the use of PACs is that they are a less efficient mechanism for funding political speech than direct funding by the corporation. That argument would stress that shareholders have contributed their money to management, and have entrusted management with using their money in a way that best promotes corporate profits. If management determines that funding campaign advertisements for Candidate 2 is the best way to promote corporate profits, then any limitation on management's ability to do so comes at the expense of corporate efficiency and ultimately profit.

This argument is not without merit. If management determines that advertisements for Candidate 2 are the best way to increase corporate profits, then a mechanism that allows shareholders to decline to fund such advertisements will likely lead to less funding, and ultimately less promotion of corporate profits. While PACs may be somewhat less effective than direct funding by the corporation, however, they still allow the corporation to perform a valuable service in the promotion of self-realization by its shareholders. PACs allow the corporation to enable individual citizens to aggregate their money in an association for the purpose of promoting their political goals. Not only does the PAC significantly reduce the transaction costs involved with individual advocacy, but it also allows its members to enjoy the economies of scale involved with buying large amounts of advertising time. Thus, PACs promote the self-realization goals of conforming shareholders while protecting the self-realization goals of dissenting shareholders.

In this light, the BCRA can be viewed as an attempt by Congress to preserve the self-realization goals of both corporate speakers and audiences, while at the same time protecting the self-realization goals of dissenting shareholders. Under the First Amendment, no voluntary speech has been abridged. To the contrary, compelled speech is reduced because a mechanism has been put in place to ensure that speakers who wish to speak can, while those that would rather refrain may. It could be argued that these regulations may come at the expense of some corporate profits, but regulating corporate profit making activity is well within Congress' Commerce Clause power. Thus, Congress may constitutionally regulate corporate activity for the purpose of promoting First Amendment values. Under self-realization theory, therefore, the government's argument that the BCRA is necessary to protect dissenting shareholders is a valid one.

52. Prohibited "*electioneering communications*" are only those that "refer[] to a clearly identified candidate for Federal office." 2 U.S.C. § 434 (f)(3)(A)(i)(I).

VII. CONCLUSION

Free speech under the First Amendment should be evaluated using a theory that promotes individual self-realization by assessing the speech's value to both the listener and the speaker. Self-realization theory would uphold regulation that protects dissenting shareholders from being compelled to speak by a corporation, while preserving the ability (through PACs) of other individuals to associate in a corporation and fund political speech. Under the self-realization theory of free speech the BCRA would be a constitutional exercise of congressional power.[53]

-Russell Mangas

53. Subject to the exceptions discussed *supra* Part II in the text accompanying notes 23-25.