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## Our Campaign Finance Nationalism

Eugene D. Mazo

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# Our Campaign Finance Nationalism

Eugene D. Mazo\*

## *Abstract*

*Campaign finance is the one area of election law that is most difficult to square with federalism. While voting has a strong federalism component—elections are run by the states and our elected officials represent concrete geographical districts—our campaign finance system, which is rooted in the First Amendment, almost entirely sidesteps the boundaries of American federalism. In so doing, our campaign finance system creates a tenuous connection between a lawmaker’s constituents, or the people who elect him, and the contributors who provide the majority of his campaign cash. The recent explosion of outside spending in American elections by wealthy individuals and Super PACs has further eroded the relationship between campaign finance and election law federalism. Indeed, today the restrictions placed on campaign finance are not federal at all, but rather national: only foreign nationals cannot make contributions or expenditures to influence federal, state, or local elections in the United States. However, these restrictions barring foreign nationals from participating in our elections suffer from several doctrinal inconsistencies, and, as the 2016 election showed, they are also hard to police in practice. This Article explores the relationship between our election law federalism and our campaign finance nationalism. It explains the difficulties that the states and the federal government have encountered when they have tried to regulate campaign finance at the border by restricting how outside money is spent to influence our elections.*

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TABLE OF CONTENTS

I. INTRODUCTION .....	761
II. ELECTION LAW FEDERALISM .....	765
A. <i>Voting, Redistricting, and Election Administration</i> .....	765
B. <i>Campaign Finance</i> .....	771
III. THE BIRTH OF CAMPAIGN FINANCE NATIONALISM .....	776
A. <i>The Prohibition of Foreigners</i> .....	776
B. <i>Bluman v. Federal Election Commission</i> .....	783
IV. THE LIFE OF CAMPAIGN FINANCE NATIONALISM .....	790
A. <i>Challenges to Nonresident Contribution Limits</i> .....	790
B. <i>The Growing Influence of Nonresident Contributions</i> .....	797
V. THE DEATH OF CAMPAIGN FINANCE NATIONALISM .....	808
A. <i>Foreign Participation in American Elections</i> .....	808
B. <i>Closing the Door to Foreign Participation</i> .....	816
VI. CONCLUSION .....	822
APPENDIX.....	825

## I. INTRODUCTION

We live in a country with a bifurcated electoral system. On one hand, our federal and state officials are chosen from distinct geographical districts, and only residents of those districts may vote for these officials. Only a resident of New Jersey, for instance, may cast a vote for the candidate running to represent New Jersey in the U.S. Senate. Likewise, only a resident of California's 45th Congressional District may cast a vote for the candidate running to represent that district in the U.S. House of Representatives. On the other hand, a resident of Iowa can contribute money to either of these candidates.<sup>1</sup> The Iowan can contribute the same amount to the candidate running for Senate in New Jersey as he can to the candidate running for Congress in California, despite the fact that he may vote for neither of them.<sup>2</sup> The bifurcated nature of this system, in which a politician's contributors are often geographically disaggregated from his bounded constituents, has become one of the hallmarks of modern politics in the United States.<sup>3</sup>

The reason our system functions this way is because the law views voting and campaigning as distinct activities.<sup>4</sup> Each activity is governed by its own body of law.<sup>5</sup> For the most part, voting is governed by state law.<sup>6</sup> State law dictates who qualifies to vote, how a person who is qualified to vote

1. Eugene D. Mazo, *The Disappearance of Corruption and the New Path Forward in Campaign Finance*, 9 DUKE J. CONST. L. & PUB. POL'Y 259, 305 n.213 (2014) (“[O]ut-of-state residents are allowed to influence elections in states that are not their own by sending campaign contributions to politicians across state borders, . . . but they are not allowed to vote in these states’ elections . . .”).

2. *See id.*

3. *See* David Fontana, *The Geography of Campaign Finance Law*, 90 S. CAL. L. REV. 1247, 1263 (2017) (“Those with the resources to contribute at meaningful rates and in meaningful amounts reside in a very small number of neighborhoods in a very small number of metropolitan areas. Campaign finance law permits and even privileges their contributions to congressional elections . . .”); *see also* Anne Baker, *The More Outside Money Politicians Take, The Less Well They Represent Their Constituents*, WASH. POST (Aug. 17, 2016), <https://www.washingtonpost.com/news/monkey-cage/wp/2016/08/17/members-of-congress-follow-the-money-not-the-voters-heres-the-evidence/> (“About a quarter of the members of the House of Representatives raise a larger share of their campaign funds from donors outside of their districts.”).

4. *See Voting and Election Laws*, USA.GOV, <https://www.usa.gov/voting-laws> (last visited Mar. 16, 2019) (describing voting laws and campaign finance laws as distinct and governed by separate bodies of law).

5. *See id.*

6. *See NCSL's Elections Resources*, NAT'L CONF. OF ST. LEGISLATURES (May 25, 2018), <http://www.ncsl.org/research/elections-and-campaigns/election-laws-and-procedures-overview.aspx> (compiling individual state regulations for a variety of voting issues, such as voter registration, provisional ballots, and voter identification laws).

goes about registering to vote, and how someone who is registered to vote may be disqualified from voting. State law also restricts voting in state and local elections to a state's citizens or residents. Because state law regulates voting differently from state to state, the laws that enable voting are emblematic of America's election law federalism.<sup>7</sup> By contrast, the law that governs campaigning and spending money on elections is national in scope.<sup>8</sup> A major portion of this law involves the doctrines of free speech and freedom of association guaranteed by the First Amendment.<sup>9</sup> Since the First Amendment applies to every person equally, our campaign finance jurisprudence largely ignores the federalism of voting.<sup>10</sup> Minors under the age of eighteen, incarcerated prisoners, corporations, unions, political parties, and political action committees cannot vote, yet they each have the ability to influence our federal, state, and local elections with their checkbooks.<sup>11</sup>

This bifurcation of our voting rights federalism and campaign finance nationalism dictates how elections are run in the United States. Candidates must appeal to the voters of distinct geographic districts, even when the money they use to do so comes from the far-flung corners of country.<sup>12</sup> The interplay between our state laws on voting and the First Amendment's protections for campaigning provide the recipe for this state of affairs.<sup>13</sup> But when a foreign citizen wishes to influence an election in the United States, such as by making a contribution or expenditure to support a candidate for office, the purity of the First Amendment crumbles and the law prevents him from doing so.<sup>14</sup> The same First Amendment protections that make our campaign finance system national in scope do not also extend to make it in-

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7. See *infra* Section II.A (describing voting as a "state's rights issue"); see also Derek Muller, *Invisible Federalism and the Electoral College*, 44 ARIZ. ST. L.J. 1237, 1239 (2012) (explaining that each state administers its own elections and determines its own voters' eligibility).

8. See *Voting and Election Laws*, *supra* note 4.

9. See Richard Briffault, *Of Constituents and Contributors*, 2015 U. CHI. LEGAL. F. 29, 53–54 (2015) (explaining how "[t]he Supreme Court has protected the right of minors too young to vote to make contributions to candidates and political parties, as well as the rights of corporations ineligible to vote to make campaign expenditures").

10. See *id.* at 54–55.

11. See *id.*

12. See Mazo, *supra* note 1, at 305 n.213.

13. See Briffault, *supra* note 9, at 54–55.

14. See 52 U.S.C. § 30121; see also "Foreign" Campaign Contributions and the First Amendment, 110 HARV. L. REV. 1886, 1888 (1997) (explaining how "current law forbids 'foreign nationals' from making contributions or expenditures in connection with federal, state, or local elections.").

ternational. The reason this is so, the courts have said, is because foreigners are not members of the same political community.<sup>15</sup>

A number of prominent commentators have criticized this doctrinal distinction, pointing out its inconsistencies in light of the robust view of the First Amendment articulated in *Citizens United v. FEC*<sup>16</sup> and other recent campaign finance cases.<sup>17</sup> To be sure, these commentators do not want foreigners to participate in American elections, but they argue the Supreme Court has created a campaign finance system that makes it very difficult to police various kinds of foreign participation.<sup>18</sup> *Citizens United* may have offered a vigorous view of the First Amendment, but that case failed to articulate the proper boundaries of our campaign finance system.<sup>19</sup> Instead, these boundaries have been dictated by a lower court decision in another case, *Bluman v. FEC*.<sup>20</sup> Several years after *Bluman* was decided, the Russian

15. See, e.g., *Bluman v. FEC*, 800 F. Supp. 2d 281 (D.D.C. 2011), *aff'd*, 565 U.S. 1104 (2012) (explaining how “[i]t is fundamental to the definition of our national political community that foreign citizens do not have a constitutional right to participate in . . . activities of democratic self-government,” and, as such, 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” by restricting their political contributions and express advocacy expenditures); see also Deborah Hellman, *Liberty, Equality, Bribery, and Self-Government: Reframing the Campaign Finance Debate*, in *DEMOCRACY BY THE PEOPLE: REFORMING CAMPAIGN FINANCE IN AMERICA* 66 (Eugene D. Mazo & Timothy K. Kuhner eds., 2018) (explaining how there is a line of cases restricting foreigners from participating in activities such as voting, serving on juries, or working as police or probation officers because they are not members of the political community).

16. 558 U.S. 310 (2010).

17. See, e.g., *McCutcheon v. FEC*, 572 U.S. 185 (2014); *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011). Professor Richard Hasen has been one of the most outspoken commentators against our current campaign finance doctrine and the way it applies to foreigners. See, e.g., Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 584 (2011) (arguing that “it is unclear how, if the Court took its own broad pronouncements in *Citizens United* seriously, it could possibly sustain spending limits against foreign nationals and governments”).

18. See, e.g., RICHARD L. HASEN, *PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT, AND THE DISTORTION OF AMERICAN POLITICS* 15–25 (2016) (criticizing *Citizens United* and questioning how its view of the First Amendment could possibly restrict foreign contributions).

19. See Hasen, *supra* note 17, at 581 (arguing that while the Supreme Court “harmonized campaign finance law on the question of the constitutionality of spending limits on corporations,” it “amplified and solidified other significant, incoherent aspects of its campaign finance jurisprudence”).

20. See *Bluman*, 800 F. Supp. 2d at 281. See also Anthony J. Gaughan, *Trump, Twitter, and the Russians: The Growing Obsolescence of Federal Campaign Finance Law*, 27 S. CAL. INTERDISC. L.J. 79, 107 (2017) (describing how the 2016 election should inspire reform of our federal campaign finance laws); Jens David Ohlin, *Did Russian Cyber Interference in the 2016 Election Violate International Law?*, 95 TEX. L. REV. 1579 (2017) (exploring whether Russia’s actions in 2016 violated

government's aggressive actions during the presidential election of 2016 revealed the limits of our campaign finance nationalism and demonstrated the difficulty of policing these boundaries in practice.<sup>21</sup> Russia's actions offered an example of how it may be only a matter of time before events beyond the control of the courts lead to a public reckoning.<sup>22</sup>

This Article explores the national aspects of our campaign finance system. Part II reviews the literature on election law federalism and explains how campaign finance, which is largely regulated under the First Amendment, does not easily fit within it.<sup>23</sup> Part III chronicles the history, structure, and contours of America's campaign finance nationalism.<sup>24</sup> It explores the origins of the prohibition on foreigners from making contributions or expenditures to influence American elections,<sup>25</sup> and it examines the important decision in *Bluman*,<sup>26</sup> which forms the linchpin of this prohibition.<sup>27</sup> Part IV looks at the consequences of our campaign finance nationalism.<sup>28</sup> It examines the efforts that a number of states have made to restrict nonresident campaign contributions and how these efforts have fared in the courts.<sup>29</sup> It also provides statistics about how two distinct constituencies—voters and donors—have arisen in American politics, and it demonstrates the increasing extent to which American politicians have become beholden to nonresident donors.<sup>30</sup> Finally, Part V explores how our campaign finance nationalism can be exploited by foreigners.<sup>31</sup> If the Russian government's aggressive attempts to influence the 2016 presidential election taught us anything, it is that our campaign finance system remains exceedingly vulnerable to foreign influence. Part V ends by examining the efforts now being advanced to pro-

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the American people's right to self-determination).

21. See ELIZABETH BODINE-BARON ET AL., COUNTERING RUSSIAN SOCIAL MEDIA INFLUENCE 2 (2018) (explaining that Russian social media disinformation campaigns "present a significant challenge to policymakers" and arguing that Russian information interference in American elections "poses an immediate and real threat to U.S. democracy").

22. See *id.*

23. See *infra* Part II.

24. See *infra* Part III.

25. See *infra* Section III.A.

26. 800 F. Supp. 2d 281 (D.D.C. 2011), *aff'd*, 565 U.S. 1104 (2012).

27. See *infra* Section III.B.

28. See *infra* Part IV.

29. See *infra* Section IV.A.

30. See *infra* Section IV.B.

31. See *infra* Section V.A.

tect our country's campaign finance nationalism.<sup>32</sup>

## II. ELECTION LAW FEDERALISM

### A. Voting, Redistricting, and Election Administration

With few exceptions, the American electoral system is defined by its federalism.<sup>33</sup> Federalism serves as the defining feature of three major areas of election law—voting rights, redistricting, and election administration. State law, whether constitutional or statutory, dictates how one qualifies to run for state or federal office.<sup>34</sup> State law also dictates how citizens elect their state and federal officials. State law determines how citizens qualify to vote, how qualified citizens register to vote, and how registered citizens cast their ballots in order to make their votes count.<sup>35</sup> When it comes to electing the federal officials who represent the states in the U.S. Senate, the U.S. House of Representatives, and the Electoral College, the federal Constitution allocates the right to choose the members of these bodies to the states.<sup>36</sup> The states, subject to some limitations, by and large oversee their own elections as they wish to choose their state and federal representatives.<sup>37</sup>

Not only is voting almost entirely regulated by the states, but the act of voting itself is largely viewed as a states' rights issue.<sup>38</sup> The Constitution provides the federal government with relatively few abilities to regulate voting.<sup>39</sup> The Constitution grants Congress the power to “make or alter” laws

32. See *infra* Section V.B.

33. See Muller, *supra* note 7, at 1251; see also Richard Hasen, *What to Expect When You're Electing: Federal Courts and the Political Thicket in 2012*, 59 *FED. LAW.* 34, 35 (2012) (describing the U.S. election system as “hyperfederalized”).

34. See *Who Can Become a Candidate for State Legislator*, NAT'L CONF. OF ST. LEGISLATURES (Apr. 22, 2015), <http://www.ncsl.org/research/elections-and-campaigns/who-can-become-a-candidate-for-state-legislator.aspx>.

35. See Hasen, *supra* note 33 (noting that state governments make “decisions about ballot machinery, voter registration rules, and other technical minutiae”).

36. U.S. CONST. art. I, §§ 2–3; U.S. CONST. art. II, § 1.

37. See U.S. CONST. art. I, § 4 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such regulations . . .”).

38. See, e.g., *Bush v. Gore*, 531 U.S. 98, 104 (2000) (stating that voting is a states' rights issue and highlighting how “[t]he individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college”).

39. See Justin Weinstein-Tull, *Election Law Federalism*, 114 *MICH. L. REV.* 747, 752 (2016)

concerning the “Times, Places, and Manner” of federal elections.<sup>40</sup> It also sets the qualifications that candidates must have to run for President, Vice President, the Senate, and the House<sup>41</sup>—and the states lack the power to add additional qualifications to these requirements.<sup>42</sup> In addition, Congress has the power to enforce certain constitutional provisions related to voting, and it has used its enforcement power to pass federal statutes that provide some uniformity for the federal elections that take place across the country.<sup>43</sup> Beyond these provisions, however, the states have largely pushed back on any kind of federal intrusions on voting.<sup>44</sup> As a result, the states regulate state and local elections in vastly different ways from one another.<sup>45</sup>

There is a complex interplay at work between the federal government and the states when it comes to regulating elections.<sup>46</sup> There is an equally complex relationship present between the states and their local governments.<sup>47</sup> In practice, the states delegate much of the power to implement key voting-related decisions to their local governments.<sup>48</sup> The states vest con-

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(stating that the Constitution places “the primary responsibility for holding elections with states”); see also Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 88, 95 (2014) (explaining how the federal U.S. Constitution “does not provide an explicit individual right to vote”).

40. See U.S. CONST. art. I, § 4, cl. 1; *Arizona v. Inter-Tribal Council of Ariz., Inc.*, 570 U.S. 1 (2013).

41. U.S. CONST. art. II, § 1, cl. 5 (presidential qualifications); U.S. CONST. art. I, § 3, cl. 3 (qualifications for the Senate); U.S. CONST. art. I, § 2, cl. 2 (qualifications for the House).

42. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 783 (1995) (“Allowing individual States to adopt their own qualification for congressional service would be inconsistent with the Framers’ vision of a uniform National Legislature representing the people of the United States.”).

43. There are four important federal statutes that govern voting across the states. The most important of these is the Voting Rights Act of 1965 (VRA), 52 U.S.C. §§ 10101–10702 (2018). The others are the National Voter Registration Act of 1993 (NVRA), 52 U.S.C. §§ 20501–20511 (2018); the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), 52 U.S.C. §§ 20301–20311 (2018); and the Help America Vote Act of 2002 (HAVA), 52 U.S.C. §§ 20901–21145 (2018).

44. See Michael T. Morley, *Dismantling the Unitary Electoral System? Uncooperative Federalism in State and Local Elections*, 111 NW. L. REV. COLLOQUY 103, 113–18 (2017) (arguing that the willingness of states to maintain unitary standards for elections as preferred by Congress is disintegrating); Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1258–59 (2009) (coining the term “uncooperative federalism” and describing how states use their position within the system of American federalism to challenge the federal government’s authority).

45. See Weinstein-Tull, *supra* note 39, at 754 (explaining how a “great variety exists in how elections are administered” across the nation, not only among states “but also within states”).

46. See *id.*

47. See *id.*

48. See Justin Weinstein-Tull, *Abdication and Federalism*, 117 COLUM. L. REV. 839, 841 (2017)

siderable authority in county and local governments to carry out basic tasks like registering voters and counting ballots.<sup>49</sup> Scholars of election law federalism study and debate the nature of the complex relationships between the federal government and the states and between the states and their local governments.<sup>50</sup> They also study the power struggles that ensue between these various levels of government.<sup>51</sup> A significant literature addresses the myriad issues implicated by these interweaving relationships.<sup>52</sup>

Voting is not the only election-related issue controlled by the states. When it comes to redistricting, the states also have almost free reign to proceed as they wish.<sup>53</sup> In drawing both their congressional and state electoral districts, the states function relatively independently from outside interference.<sup>54</sup> There are only a few federal constitutional requirements to which the states must adhere in redistricting.<sup>55</sup> One is the principle of “one person, one vote,” which necessitates that a state’s congressional districts as well as its state legislative districts must be of equal population when drawn.<sup>56</sup> These electoral districts also cannot be racially gerrymandered, and they must comply with the requirements of the Voting Rights Act.<sup>57</sup>

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(explaining how states delegate many of their responsibilities to local governments).

49. See HEATHER K. GERKEN, *THE DEMOCRACY INDEX: WHY OUR ELECTION SYSTEM IS FAILING AND HOW TO FIX IT* 20–25 (2009).

50. See, e.g., Weinstein-Tull, *supra* note 39, at 764–75.

51. See *id.* at 775–80 (“[E]lection law federalism is defined by two distinct features—expansive federal power to regulate and widespread state prerogative to delegate.”).

52. See, e.g., Franita Tolson, *Reinventing Sovereignty? Federalism as a Constraint on the Voting Rights Act*, 65 VAND. L. REV. 1195, 1201 (2012) (noting that there has been “debate over how federalism affects election law”).

53. See Nicholas O. Stephanopoulos, *Our Electoral Exceptionalism*, 80 U. CHI. L. REV. 769, 771–72 (2013) (describing the few limitations that states have when drawing district lines).

54. *Id.*

55. According to Justin Levitt and Michael McDonald, there was originally no requirement that electoral districts be drawn at all, and indeed, states could at one time elect their congressional delegations from at-large districts. See Justin Levitt and Michael P. McDonald, *Taking the “Re” out of Redistricting: State Constitutional Provisions on Redistricting Timing*, 95 GEO. L.J. 1247, 1251 (2017). In 1842, Congress began to require that each member of the House of Representatives be elected from a single-member district, though this requirement was removed in 1850. It was then reinstated in 1862, removed again in 1929, and reinstated for good in 1967. *Id.* at 1251 nn.18–19.

56. *Reynolds v. Sims*, 377 U.S. 533, 586–87 (1964); *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964).

57. Or at least with the requirements of the Voting Rights Act that are still in force. See *Shelby County v. Holder*, 570 U.S. 529, 557 (2013) (striking down the coverage formula of Section 4(b) of the Voting Rights Act, and thus leaving Section 5 of the VRA inoperable); see also Stephanopoulos, *supra* note 53, at 772 (stating that “the only universal requirements for redistricting are equal population, the ban on racial gerrymandering, and compliance with the VRA”).

All other decisions concerning redistricting, however, are left to the states. State constitutions often govern redistricting and dictate when it must happen.<sup>58</sup> For example, the timing of redistricting following a census varies greatly from state to state.<sup>59</sup> Some states draw their new district lines immediately after new census numbers are released, while other states wait a year or even two.<sup>60</sup> Furthermore, some states allow only one round of redistricting to occur per decade, whereas other states, controversially, draw and redraw their district lines mid-census, according to the wishes of their legislatures.<sup>61</sup> The method of redistricting also varies greatly from state to state. In many states, ordinary legislatures carry out redistricting.<sup>62</sup> In other states, nonpartisan bodies or commissions are charged with this work.<sup>63</sup> The point is that redistricting is entirely a state-centered and state-run process, one that is emblematic of America's election law federalism.

Election administration is a state-run process as well. The states act as the final decision-makers on their voting machines, voter ID laws, provisional and absentee ballots, and voter registration requirements.<sup>64</sup> Decisions about these aspects of administering elections are heavily regulated by state law. To be sure, recently both Congress and the federal courts have begun to play a greater role in election administration.<sup>65</sup> With the passage of the National Voter Registration Act of 1993 (NRVA),<sup>66</sup> and, in the aftermath of *Bush v. Gore*,<sup>67</sup> of the Help America Vote Act of 2002 (HAVA),<sup>68</sup> Congress has imposed new requirements on the states concerning their voting technology, voter identification provisions, provisional voting requirements, and

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58. See, e.g., N.J. CONST. art II, § 2 (outlining New Jersey's redistricting requirements).

59. See Levitt & McDonald, *supra* note 55, at 1257–58.

60. *Id.* at 1257.

61. *Id.* at 1258.

62. See JUSTIN LEVITT, A CITIZEN'S GUIDE TO REDISTRICTING 20–26 (2010).

63. See *id.*

64. See Michael M. Uhlmann, *Federalism and Election Reform*, 6 TEX. REV. L. & POL. 491, 502 (2002) (noting how “[t]he dominant feature of election administration in the United States is its remarkable, even radical decentralization”).

65. See Daniel Tokaji & Owen Wolfe, Baker, Bush, and Ballot Boards: *The Federalization of Election Administration*, 62 CASE W. RES. L. REV. 969, 979 (2012).

66. National Voter Registration Act of 1993, Pub. L. No. 103-31, 107 Stat. 77 (codified as amended at 52 U.S.C. §§ 20501–20511 (2012 & Supp. 2015)).

67. 531 U.S. 98 (2000).

68. Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (codified as amended at 52 U.S.C. §§ 20901–21145 (2012 & Supp. 2015)).

voter registration systems.<sup>69</sup> These federal statutes constitute the most expansive federal intervention into the states' administration of their elections in U.S. history.<sup>70</sup> Still, it is state law that makes these new requirements come to fruition.<sup>71</sup> State law also often does the opposite, imposing restrictions on voter registration and early voting, and establishing voter ID requirements and other restrictions that impact a voter's experience at the polls before Election Day arrives and a citizen's vote is even cast.<sup>72</sup>

The states are also the dominant regulators of our political parties.<sup>73</sup> State law dictates the requirements that a party must meet to register with the state.<sup>74</sup> State law regulates how parties must go about conducting their primary elections and the ballot access requirements that political parties must guarantee to voters—including whether state primaries will be open, closed, semi-closed, blanket, or top-two in nature.<sup>75</sup> In general, once political parties are established, the states may not regulate their internal structure, governance, or policymaking.<sup>76</sup> But only the state can determine whether a new party will be recognized in the first place. Some scholars argue that parties must be allowed to have the First Amendment right to associate with whichever voters they wish, but the states, which pay the bill for party primary elections, have not always allowed this to be the case in practice.<sup>77</sup>

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69. Tokaji & Wolfe, *supra* note 65, at 984.

70. *Id.*

71. *Id.*

72. See Justin Levitt, *Election Deform: The Pursuit of Unwarranted Electoral Regulation*, 11 ELECTION L.J. 97, 98 (2012) (chronicling these efforts by states, and their effects, in 2011).

73. See *State Regulations that Affect Political Parties*, ELECTION L. ISSUES 3-1, <http://www.electionlawissues.org/Resources/~media/Microsites/Files/election/Chapter%20Three%20-%20Proofed2.pdf> (last visited Mar. 16, 2019).

74. See, e.g., *Political Party Qualification*, CAL. SECRETARY OF ST., <https://www.sos.ca.gov/elections/political-parties/political-party-qualification/> (last visited Mar. 16, 2019) (explaining California's requirements for qualifying as a political party).

75. See *State Regulations that Affect Political Parties*, *supra* note 73.

76. All voters are eligible to vote in open primaries, regardless of party affiliation. In closed primaries, only members of the party are allowed to vote. In semi-closed primaries, party members and independent voters who are not affiliated with another party are allowed to vote. In blanket primaries, voters choose one candidate per office, regardless of the candidate's party affiliation, and the top vote getters from each party then advance to the general election. See *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997). Finally, in a top-two primary, all candidates are listed on the same primary ballot, and the top-two voter getters, regardless of their partisan affiliation, advance to the general election. For example, California uses a top-two primary system today.

77. See, e.g., Michael R. Dimino, *It's My Party and I'll Do What Want To: Political Parties, Unconstitutional Conditions, and the Freedom of Association*, 12 FIRST AMEND. L. REV. 65, 66, 80-81 (2013) (arguing that political parties, though governed by state law, are also expressive associa-

There are important debates in the scholarly community about election law federalism, what constitutes it, and what role the federal government (and the federal courts) should play in overseeing election-related reforms in the states.<sup>78</sup> The literature on election law federalism celebrates the democratic laboratories that emerge when the states advance and defend their unique republican forms of government.<sup>79</sup> The distinctions in how individual states articulate their government aspirations are important.<sup>80</sup> The variations in state law play a role not only in safeguarding each state's democratic identity, but also in safeguarding our federal system.<sup>81</sup> Much of the election law literature makes this point in various different ways. To scholars of all stripes, election law federalism is invoked as an important safeguard that preserves the integrity of the American electoral system as a whole.<sup>82</sup>

Even our presidential elections, which are national in scope (and certainly so in their consequences), are driven by the dynamics of federalism.<sup>83</sup> The selection of presidential electors occurs on a state-by-state basis.<sup>84</sup> The electors cast their presidential ballots in their respective states.<sup>85</sup> State law dictates how each state will allocate its electors to the Electoral College, just

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tions that, under some circumstances, should be able to free themselves from state regulation).

78. See, e.g., Zephyr Teachout, *Neoliberal Political Law*, 77 LAW & CONTEMP. PROBS. 215, 218 (“The Court’s election-law federalism jurisprudence suggests that it perceives the federalism principle as more about limiting federal power than granting power to the states.”).

79. Anthony Johnstone, *The Federalist Safeguards of Politics*, 39 HARV. J.L. & PUB. POL’Y 415, 419 (2016).

80. *Id.* at 420.

81. *Id.*

82. See, e.g., Franita Tolson, *Partisan Gerrymandering as a Safeguard of Federalism*, 2010 UTAH L. REV. 859, 860 (2010) (arguing that that partisan gerrymandering, though sometimes antagonistic to democratic ideals, can potentially be democracy-enhancing and federalism-reinforcing and often acts as a structural safeguard of federalism). But see David Schleicher, *Federalism and State Democracy*, 95 TEX. L. REV. 763, 768 (2017) (arguing that federalism doctrine, policy, and theory does not take the “second order” problem of state elections seriously, in that state elections are still often influenced by national considerations). Schleicher uses the term “second-order elections” to refer to “elections at one level of government that reflect voter preferences developed in relation to another level of government.” *Id.* at 772. Most voters “use their national-level preferences in state legislative elections and pay little attention to what state legislators . . . actually think or how they voted.” *Id.* at 774–75. The result is that voters in a federal system know little about state government. *Id.*

83. See Muller, *supra* note 7, at 1251.

84. U.S. CONST. art. I, §1, cl. 2; *id.* amend XII.

85. U.S. CONST. amend XII; see also *U.S. Electoral College: About the Electors*, NAT’L ARCHIVES AND RECS. ADMIN., <https://www.archives.gov/federal-register/electoral-college/electors.html> (last visited Mar. 16, 2019).

as it dictates how the selection of presidential electors will be administered.<sup>86</sup> While some states apportion electors state-wide on a winner-take-all basis, other states apportion them by congressional district or proportionally.<sup>87</sup> The Framers purposefully designed the Electoral College to be elected on a state-by-state basis to guard against the “heat and ferments” that could sway electors’ deliberations if they convened in one place and at one time.<sup>88</sup> Since the nation’s founding, individual states have elected presidential electors without regard to the selection method used by other states.<sup>89</sup> Calls to abolish the Electoral College and have the President be elected by popular vote, which surface now and again, would have to find a way to contend with the many aspects of federalism that permeate our electoral system.<sup>90</sup>

### B. Campaign Finance

Campaign finance presents a complicated wrinkle for election law federalism.<sup>91</sup> Unlike the other areas of election law, campaign finance does not respect state or local boundaries. Instead, our campaign finance system is almost entirely national in scope.<sup>92</sup> For instance, while state law imposes unique contribution limits and disclosure rules for the election of state and local officials (see the Appendix),<sup>93</sup> the states are not able to prevent outsid-

86. See *Summary: State Laws Regarding Presidential Electors*, NAT’L ASS’N OF SECRETARIES OF ST. (Nov. 2016), <https://www.nass.org/sites/default/files/surveys/2017-08/research-state-laws-pres-electors-nov16.pdf> (summarizing the laws in all fifty states which govern the electoral process).

87. See *U.S. Electoral College: Frequently Asked Questions*, NAT’L ARCHIVES AND RECS. ADMIN., <https://www.archives.gov/federal-register/electoral-college/faq.html> (last visited Mar. 16, 2019) (explaining how “[t]he District of Columbia and 48 states have a winner-takes-all rule for the Electoral College. In these States, whichever candidate receives a majority of the popular vote, or a plurality of the popular vote . . . takes all of the state’s Electoral votes. Only two states, Nebraska and Maine, do not follow the winner-takes-all rule. In those states, there could be a split of Electoral votes among candidates through the state’s system for proportional allocation of votes.”).

88. Muller, *supra* note 7, at 1243 (quoting THE FEDERALIST NO. 68, at 457–58 (Alexander Hamilton)).

89. *Id.* at 1239.

90. *Id.* at 1292.

91. See Garrick Pursley, *The Campaign Finance Safeguards of Federalism*, 63 EMORY L.J. 781, 786 (2014) (positing how, in the scholarly literature, “[u]nexaminated so far . . . are the effects . . . of modern campaign finance law . . . on federalism”).

92. See Fontana, *supra* note 3, at 1266 (“Campaign finance law does not include any meaningful geographical limitations.”); R. SAM GARRETT, CONG. RESEARCH SERV., RL 41542, THE STATE OF CAMPAIGN FINANCE POLICY: RECENT DEVELOPMENTS AND ISSUES FOR CONGRESS 3 (2018).

93. See *State Limits on Contributions to Candidates: 2017–2018 Election Cycle*, NAT’L CONF. OF ST. LEGISLATURES (Jun. 27, 2017),

ers from contributing to the campaigns of these officials.<sup>94</sup> The only boundaries that campaign finance law adheres to are based on national citizenship.<sup>95</sup> In our political system, all U.S. citizens (and lawful permanent residents) may freely spend money to influence elections, either in their home jurisdictions or in other jurisdictions, including those where they do not reside. But that is not the case concerning citizens of other countries. Under the law, “foreign nationals” are precluded from making contributions or expenditures to influence any federal, state, or local election.<sup>96</sup>

Campaign finance differs in this way because it is governed by an entirely different body of law. The complicated interplay between state statutes and state constitutional provisions that characterizes most of the law of voting does not apply to two major areas of campaign finance that are entirely national in scope and spill across state lines: contributions and expenditures.<sup>97</sup> Then again, these two areas of campaign finance are not international in scope and do not extend across international borders to foreign citizens. How this situation came to be deserves some explanation.

Congress attempted to regulate campaign finance piecemeal through various federal statutes adopted during the first half of the twentieth century.<sup>98</sup> But our modern campaign finance system traces its true origins to the early 1970s, when Congress adopted the Federal Election Campaign Act of 1971 (FECA),<sup>99</sup> a federal statute that was then amended in 1974 in the wake of the Watergate scandal.<sup>100</sup> These 1974 amendments sought to regulate various aspects of money in politics wholesale. Congress sought to regulate

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[http://www.ncsl.org/Portals/1/Documents/Elections/Contribution\\_Limits\\_to\\_Candidates\\_2017-2018\\_16465.pdf](http://www.ncsl.org/Portals/1/Documents/Elections/Contribution_Limits_to_Candidates_2017-2018_16465.pdf) (listing limits on campaign contributions by state).

94. See Mazo, *supra* note 1 and accompanying text.

95. See *Who Can and Can't Contribute*, FED. ELECTION COMM'N, <https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/who-can-and-cant-contribute/> (last visited Mar. 16, 2019).

96. See 52 U.S.C. § 30121 (2002).

97. See Erwin Chemerinsky, *Symposium: The Distinction Between Contribution Limits and Expenditure Limits*, SCOTUSBLOG (Aug. 12, 2013), <https://www.scotusblog.com/2013/08/symposium-the-distinction-between-contribution-limits-and-expenditure-limits/>.

98. The Tillman Act of 1907 barred corporations from making contributions to federal candidates, a ban that remains in effect today. In 1943, Congress barred unions from doing the same when it passed the Smith Connally Act, although this law was repealed in 1946. In 1947, Congress passed the Taft-Hartley Act, which banned both corporations and unions from making expenditures relating to any federal primary or general election. See ROBERT E. MUTCH, *CAMPAIGNS, CONGRESS, AND COURTS: THE MAKING OF FEDERAL CAMPAIGN FINANCE LAW* 152–57 (1988).

99. Pub. L. No. 92–225, 86 Stat. 3 (February 7, 1972) (codified at 52 U.S.C. § 30101 et seq.).

100. See MUTCH, *supra* note 98, at 48–50.

*contributions*, or the amount that a person could give to a candidate or campaign; to regulate *expenditures*, or the amount that a candidate or campaign could spend on its own (or that a person not affiliated with a campaign could spend independently); to mandate *disclosure*, which referred to the requirement that campaigns, committees, and donors must publicly report their contributions and expenditures; and to provide for a system of *public financing*, which refers to funding that a federal candidate could seek from the government.<sup>101</sup> In addition, FECA's 1974 amendments created a new government agency, the Federal Election Commission, to oversee, administer, and enforce the new campaign finance scheme created by Congress.<sup>102</sup>

In 1976, the constitutionality of FECA's 1974 amendments was challenged in *Buckley v. Valeo*,<sup>103</sup> which became the seminal case of American campaign finance law.<sup>104</sup> In *Buckley*, the Supreme Court scrutinized FECA through the prism of the First Amendment.<sup>105</sup> The Court allowed the government to place restrictions on campaign contributions to federal candidates, but it recognized only one justification for doing so: "the prevention of corruption or the appearance of corruption."<sup>106</sup> At the same time, the Court mandated that independent expenditures receive different treatment. It reasoned that independent expenditures made "relative to a clearly identified candidate" constituted core political speech and were entitled to greater constitutional protection than contributions.<sup>107</sup> The Court held that re-

101. See Eugene D. Mazo & Timothy K. Kuhner, *Democracy by the Wealthy: Campaign Finance Reform as the Issue of Our Time*, in DEMOCRACY BY THE PEOPLE: REFORMING CAMPAIGN FINANCE IN AMERICA 9 (Eugene D. Mazo & Timothy K. Kuhner eds., 2018).

102. *Id.*

103. 424 U.S. 1 (1976) (per curiam).

104. See L. PAIGE WHITAKER, CONG. RESEARCH SERV., RL 30669, THE CONSTITUTIONALITY OF CAMPAIGN FINANCE REGULATION: *BUCKLEY V. VALEO* AND ITS SUPREME COURT PROGENY 45 n.320 (2008); see also Mazo & Kuhner, *supra* note 101, at 9 (noting how *Buckley* "still stands as the seminal case of American campaign finance law").

105. See *Buckley*, 424 U.S. at 14 ("The Act's contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities.")

106. *Id.* at 25. While the Court in *Buckley* identified the prevention of corruption or its appearance as a sufficient government interest to justify restrictions on contributions to candidates, the Court did not precisely define what "corruption" meant. In justifying the government's ability to limit campaign contributions, the Court did explain that, "[t]o the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined," and it did go on to state how "[o]f almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." *Id.* at 26–27.

107. *Id.* at 39–45.

restrictions on independent expenditures should be subject to the “exacting scrutiny.”<sup>108</sup> In practice, this meant the government would not be able to place any meaningful limits on such expenditures.

The Court likewise held that limits on a candidate’s own expenditures, or the use of his personal funds, could not be restricted, since “[t]he candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election.”<sup>109</sup> And it rejected equality as a rationale for regulation. “[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment,” the Court said.<sup>110</sup> In an effort to avoid problems of overbreadth and vagueness under the First Amendment, the Court limited the reach of FECA’s regulatory regime to “express advocacy.”<sup>111</sup> This was the term of art used to refer to speech that directly names a candidate for office and specifically calls for his or her election or defeat,<sup>112</sup> such as by saying “Vote for Bernie” or “Defeat Hillary.” However, *Buckley* held that “issue advocacy”—or speech aimed at educating the public on issues of general concern that did not directly call for the election or defeat of a particular political candidate—did not fall within FECA’s regulatory scheme.<sup>113</sup>

By the 1990s, corporate and union spending on sham issue ads began.<sup>114</sup> These were advertisements paid for by corporations and unions that were meant to influence what voters thought of a particular candidate, but that, because they omitted words such as “vote for” or “vote against,” escaped regulation.<sup>115</sup> In passing the Bipartisan Campaign Reform Act of 2002 (BCRA),<sup>116</sup> Congress closed several loopholes in federal campaign finance law, including the problem of sham issue ads. Congress addressed the prob-

108. *Id.* at 44–45.

109. *Id.* at 52.

110. *Id.* at 48–49. See also Richard L. Hasen, *The Nine Lives of Buckley v. Valeo*, in *ELECTION LAW STORIES* 305 (Joshua A. Douglas & Eugene D. Mazo eds., 2016) (calling the above line “one of the most famous (some would say notorious) sentences in *Buckley*”).

111. *Buckley*, 424 U.S. at 48–49.

112. *Id.* at 43; see also Hasen, *supra* note 17, at 588–89.

113. *Buckley*, 424 U.S. at 45–46; see also Hasen, *supra* note 17, at 588–89.

114. Hasen, *supra* note 17, at 589.

115. *Id.*

116. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107–155, 116 Stat. 81 (March 27, 2002). BCRA amended FECA, which appears at 52 U.S.C. §30101 et seq. BCRA is also commonly known as the “McCain-Feingold Law.” See GARRETT, *supra* note 92, at 4 n.12.

lem of sham issue ads by inventing a new term of art, the “electioneering communication.”<sup>117</sup> This was as a broadcast, cable, or satellite communication that reached 50,000 people, featured a candidate seeking federal office, and aired 30 days before a primary election or 60 days before a general election.<sup>118</sup> BCRA prohibited corporations and unions from paying for such communications with their general treasury funds, a prohibition that the Court upheld in *McConnell v. FEC* in 2003.<sup>119</sup> That paved the way for *Citizens United*,<sup>120</sup> in which the Court overruled earlier precedent,<sup>121</sup> before holding, 5–4, that BCRA’s prohibition on corporate electioneering communications violated the First Amendment.<sup>122</sup> In effect, *Citizens United* recognized that corporations had First Amendment rights, too.<sup>123</sup> The case became, in Professor Michael Kang’s words, “a clear turning point not just for campaign finance law but for all regulation of the relationship between campaign money and the political process.”<sup>124</sup>

The immediate consequence of *Citizens United* was that federal and state laws prohibiting corporate speech—at least in the form of corporate and union spending on elections—became unconstitutional.<sup>125</sup> But it was the reasoning *Citizens United* employed that concerns us. The Court labeled the government’s restrictions on corporate expenditures a form of discrimination relative to the First Amendment rights of ordinary citizens.<sup>126</sup> It should not matter that the party wishing to make these independent expenditures was a

117. See 52 U.S.C. § 30104(f)(3) (previously codified at 2 U.S.C. § 434(f)(3)).

118. 52 U.S.C. § 30104(f)(3)(A).

119. 540 U.S. 93 (2003).

120. 558 U.S. 310 (2010).

121. *Id.* at 365 (overruling *Austin v. Mich. Chamber of Comm.*, 494 U.S. 652 (1990)).

122. *Id.* at 319, 372.

123. *Id.* at 365 (holding that “the Government may not suppress political speech on the basis of the speaker’s corporate identity” because “[n]o sufficient governmental interest justifies limits on the political speech of non-profit or for-profit corporations”).

124. Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1, 6 (2012). *Citizens United* also changed the structure of politics in ways that have serious implications for federalism, leading many scholars to criticize the decision in that regard, too. See, e.g., Pursley, *supra* note 91, at 820 (arguing that *Citizens United* and subsequent campaign decisions have “erode[d] the relationship between federal candidates and their geographic constituencies”); Franita Tolson, *The Federalism Implications of Campaign Finance Regulation*, 164 U. PA. L. REV. ONLINE 247, 251 (2016) (explaining how “the Court’s approach in its recent cases—let everyone in, let everyone spend—stands in tension with the truly pluralistic and inclusive systems that states are seeking to implement.”).

125. *Id.* (explaining how as a result of *Citizens United* “meaningful checks on the influence of money must come, if they come at all, from somewhere other than campaign finance law”).

126. *Citizens United*, 558 U.S. at 349; Kang, *supra* note 124, at 12–13.

corporation, the Court held, since “the First Amendment generally prohibits the suppression of political speech based on the speaker’s identity.”<sup>127</sup> This reasoning unsettled campaign finance law and soon fostered a new kind of spending in American elections.<sup>128</sup> How far the mandate not to discriminate against “the speaker’s identity” should extend, however, was a question that the Court’s majority left explicitly unanswered.<sup>129</sup> After all, if corporations had free speech rights, did that mean that foreigners had them too?

### III. THE BIRTH OF CAMPAIGN FINANCE NATIONALISM

#### A. *The Prohibition of Foreigners*

Foreign influence on American elections has long been worrisome. From the very beginning, America’s Framers demonstrated concern about the possible corrupting effects that foreign powers could have on the young republic.<sup>130</sup> “During and after the Revolutionary War,” Zephyr Teachout explains in her book on the history of corruption, “the new Americans were driven by a fear of being corrupted by foreign powers, and a related fear of adopting the Old World’s corrupt habits.”<sup>131</sup> At various times in American history, Congress tried to ban foreigners from influencing the nation’s politics. Often these efforts followed a scandal in which one political party revealed the corrupting influence of foreigners on American policy.<sup>132</sup> In

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127. *Citizens United*, 558 U.S. at 350.

128. *See id.* at 395 (Stevens, J., dissenting) (“The Court today rejects a century of history when it treats the distinction between corporate and individual campaign spending as an invidious novelty . . .”). The ban on corporate participation in American elections had a long history, as Justice Stevens pointed out in his powerful dissent in *Citizens United*. *Id.* The ban on corporate participation in campaign finance went back to the Tillman Act of 1907 and the Taft Hartley Act of 1947. *See* ROBERT E. MUTCH, *BUYING THE VOTE: A HISTORY OF CAMPAIGN FINANCE REFORM* 7–8 (2014).

129. *See Citizens United*, 558 U.S. at 362 (“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.”).

130. *See* Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 353 (2009) (explaining how, at the Constitutional Convention, the Framers were “concerned that the small size of the young country (compared to the great European powers) would open it up to foreign corruption”).

131. ZEPHYR TEACHOUT, *CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN’S SNUFF BOX TO CITIZENS UNITED* 18 (2014).

132. *See, e.g.*, RICHARD HOFSTADTER, *THE IDEA OF A PARTY SYSTEM: THE RISE OF LEGITIMATE OPPOSITION IN THE UNITED STATES, 1780–1840*, at 90 (1969) (explaining how, in 1789, the Federalists and Republicans had accused each other of being corrupted by foreign influence).

1798, for instance, Congress passed the Alien and Sedition Acts, a series of four laws that restricted the activities of foreign residents in the United States by limiting their freedoms of speech and of the press.<sup>133</sup>

By the 1930s, Congress was again concerned by the growing foreign influence over U.S. policymaking. In response, it enacted the Foreign Agent Registration Act of 1938 (FARA),<sup>134</sup> a federal statute that imposed a requirement for the “agents” of “foreign principals” to register with the federal government.<sup>135</sup> Despite these registration requirements, there was no formal statutory prohibition to prevent foreigners from making direct contributions to American political campaigns.<sup>136</sup> Rather, the significant prohibitions of contributions were aimed at corporations and unions at the time. Since 1907, the Tillman Act had prohibited corporations from making contributions to influence federal elections.<sup>137</sup> Later, in 1947, Congress passed the Taft-Hartley Act, which “banned any corporate or union contributions or expenditures relating to any federal primary . . . or general election.”<sup>138</sup>

In the 1960s, calls for more regulation of foreign activity in the United States came again, this time after it was revealed that foreign interests had been contributing funds to U.S. federal election campaigns in the hopes of gaining sympathy in Washington.<sup>139</sup> Sugar manufacturers from the Philippines, seeking to influence legislation concerning sugar import quotas, were the major sources of these contributions.<sup>140</sup> The chairman of the Senate Foreign Relations Committee, Senator J. William Fulbright of Arkansas, opened

133. See Matt A. Vega, *The First Amendment Lost in Translation: Preventing Foreign Influence in U.S. Elections after Citizens United v. FEC*, 44 LOYOLA L.A. L. REV. 951, 963 (2011) (discussing the Alien and Sedition Acts). The Alien and Sedition Acts were four separate laws. *Id.* at 965 n.78. The Naturalization Act “extended the residency requirement for aliens to become citizens to fourteen years.” *Id.* at 965. The Alien Friends Act made any alien thought to be a danger to the safety of the United States eligible for deportation. The Alien Enemies Act allowed aliens whose home countries were at war with the United States to be deported. Finally, the Sedition Act “made it a crime to publish ‘false, scandalous and malicious’ writings against the [U.S.] government.” *Id.*

134. Foreign Agents Registration Act of 1938, ch. 327, 52 Stat. 631 (1938) (codified at 22 U.S.C. §§ 611–621 (2006)).

135. 22 U.S.C. § 612 (2006) (discussing who needs to be registered as a foreign principal).

136. Lori Fislser Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence over Domestic Affairs*, 83 AM. J. INT’L L. 1, 21 (1989).

137. See Tillman Act of 1907, 34 Stat. 864 (Jan. 26, 1907).

138. See Labor Management Relations Act of 1947, 61 Stat. 136 (1947) (later codified at 29 U.S.C. §§ 151–166 (2006)); see also Vega, *supra* note 133, at 969, 969 n.111.

139. Vega, *supra* note 133, at 970–71.

140. *Id.* at 971 n.121.

hearings on this issue.<sup>141</sup> These hearings revealed how various foreign interests, through their Washington lawyers and lobbyists, had been channeling campaign funds to sympathetic legislators seeking re-election.<sup>142</sup> Although it was not illegal for lawyers and lobbyists to make campaign contributions on behalf of foreign principals,<sup>143</sup> the Fulbright hearings brought to light how foreigners were influencing the nation's policies through their agents.<sup>144</sup>

After these hearings, Senator Fulbright put forth a bill to amend FARA to prohibit this kind of activity.<sup>145</sup> This bill sought to limit foreign influence over American elections by prohibiting the agent of a foreign principal from making contributions to political candidates.<sup>146</sup> In 1966, Congress officially amended FARA to make it a felony for an “agent of a foreign principal” to knowingly make, promise, solicit, accept, or receive any contribution from a foreign principal.<sup>147</sup> The language of this prohibition did not entirely solve the problem, however, for the amended law failed to prevent foreign principals from contributing campaign funds directly to candidates.<sup>148</sup> Donations

141. See *Activities of Nondiplomatic Representatives of Foreign Principals in the United States: Hearings Before the Senate Comm. on Foreign Relations*, 88th Cong., 1st Sess. 827 (1963).

142. Vega, *supra* note 133, at 993 n.259.

143. Damrosch, *supra* note 136, at 22.

144. *Id.* at 22 n.82. Senator Fulbright wanted foreign governments and businesses to promote their interests through official diplomatic channels, but foreign entities considered it was more effective to hire U.S. lawyers and lobbyists to advance their causes. See Bruce D. Brown, *Alien Donors: The Participation of Non-Citizens in the U.S. Campaign Finance System*, 15 YALE L. & POL'Y REV. 503, 509 (1997) (reviewing the Fulbright hearings and the impetus behind them); see also Daniel M. Berman & Robert A. Heineman, *Lobbying by Foreign Governments on the Sugar Act Amendments of 1962*, 28 LAW & CONTEMP. PROBS. 416, 419 (1963) (explaining the incentives of foreign actors).

145. Damrosch, *supra* note 133, at 23 (“As a result of the hearing, Senator Fulbright introduced a bill to prohibit campaign contributions for or on behalf of a foreign principal in connection with any election to public office.”). Enacted in 1938, FARA was designed to stem the spread of Nazi propaganda as the United States entered World War II. See Vega, *supra* note 133, at 968–69 (discussing why Congress amended FARA during World War II). Rather than restrict propaganda as such, FARA required disclosure and transparency of foreign agents in the United States. *Id.* at 969–70 (explaining Congress’ fear of promoting communist ideas). Amendments to FARA enacted in 1942 elaborated FARA’s purpose to “protect the national defense, internal security, and foreign relations of the United States by requiring public disclosure . . . [of] activities for or on behalf of foreign governments . . . .” See Jihad Atieh, *Foreign Agents: Updating FARA to Protect American Democracy*, 31 U. PA. J. INT’L L. 1051, 1057 (2010). In 1942, jurisdiction over enforcing the provisions of FARA was passed to the Department of Justice, in the hopes that the statute would be enforced more robustly. *Id.* (explaining why FARA was amended). However, the Department of Justice largely failed to enforce FARA, and the public outcry over this failure led to the Fulbright hearings. *Id.* at 1057–58.

146. Damrosch, *supra* note 136, at 22–23 (explaining the purpose of Senator Fulbright’s bill).

147. Foreign Agents Registration Act of 1966, Pub. L. No. 89-486, § 8, 80 Stat. 248–49 (1966).

148. Atieh, *supra* note 145, at 1058–59 (indicating why the amended law failed).

were not considered illegal under the new prohibition unless they were distributed through an agent,<sup>149</sup> and in 1972, President Richard Nixon exploited this loophole by accepting large foreign contributions for his presidential campaign. During the Watergate hearings, Congress discovered that Nixon took in over \$10 million in overseas donations.<sup>150</sup> These contributions came directly from foreigners, rather than from their U.S.-based agents.<sup>151</sup> Until the Federal Election Campaign Act's disclosure regime came into effect in April 1972, there were no disclosure requirements for pre-nomination presidential candidates, which explains how Nixon was able to accept these foreign contributions without ever having to report them.<sup>152</sup>

When Nixon's reliance on foreign money came to light in the aftermath of Watergate, Congress began to consider ways to amend the prohibition on foreign contributions.<sup>153</sup> In 1974, when the revisions to the Federal Election Campaign Act were being debated, Senator Lloyd Bentsen of Texas offered an amendment aimed at preventing foreign nationals from influencing U.S. elections.<sup>154</sup> Bentsen did not think that foreigners had any business in American political campaigns. "They cannot vote in our elections so why should we allow them to finance our elections?" Bentsen asked.<sup>155</sup> "Their loyalties lie elsewhere; they lie with their own countries and their own governments."<sup>156</sup> Bentsen proposed a solution that came to be known as the "Bentsen Amendment."<sup>157</sup> His purpose in offering it was to "ban the contributions of foreign nationals to campaign funds in American political cam-

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149. See Jeffrey K. Powell, *Prohibitions on Campaign Contributions From Foreign Sources: Questioning Their Justification in a Global Interdependent Economy*, 17 U. PA. J. INT'L ECON. L. 957, 960–61 (1996); Daniel Scott Savrin, *Curtailing Foreign Financial Participation in Domestic Elections: A Proposal to Reform the Federal Election Campaign Act*, 28 VA. J. INT'L L. 783, 791 (1988).

150. See Vega, *supra* note 133, at 971–72 (citing the figure of \$10 million in foreign donations to Nixon's campaign).

151. *Id.*

152. See FRED EMERY, *WATERGATE: THE CORRUPTION OF AMERICAN POLITICS AND THE FALL OF RICHARD NIXON* 108–09 (1994).

153. Powell, *supra* note 149, at 961; see also Ciara Torres-Spelliscy, *How Much is an Ambassadorship? And the Tale of How Watergate Led to a Strong Corrupt Foreign Practices Act and a Weak Federal Election Campaign Act*, 16 CHAP. L. REV. 71, 80–85 (2012) (discussing the Watergate scandal and how this loophole allowed for corrupt campaign practices).

154. 120 CONG. REC. 8783 (Mar. 28, 1974) (statement of Sen. Bentsen).

155. *Id.*; see also Vega, *supra* note 133, at 973 (quoting the same language).

156. 120 CONG. REC. 8783 (Mar. 28, 1974) (statement of Sen. Bentsen).

157. Powell, *supra* note 149, at 961; Vega, *supra* note 133, at 972.

paigns.”<sup>158</sup> The privilege to contribute to campaigns, Bentsen argued, should “be limited to U.S. citizens and to those who have indicated their intention to live here, are here legally, and are permanent residents.”<sup>159</sup>

The Bentsen Amendment added a provision to FECA’s 1974 amendments<sup>160</sup>—the same ones that would be challenged in *Buckley v. Valeo*<sup>161</sup>—which sought to close one of the major loopholes in FARA.<sup>162</sup> It struck the words “an agent of a foreign principal” from FARA and inserted the words “a foreign national” in their place.<sup>163</sup> The Bentsen Amendment then went on to explain that “a foreign national” was being used in the same way as “foreign principal” was previously defined in FARA, except that the new term did not include any citizen of the United States or any individual who is lawfully admitted for permanent residence in the United States.<sup>164</sup> Importantly, FARA’s previous use of the term “foreign principal” had applied not only to individuals, but to other foreign actors as well.<sup>165</sup> A “foreign principal” included a corporation “organized under the laws of or having its principal place of business in a foreign country.”<sup>166</sup> It also included foreign governments and foreign political parties,<sup>167</sup> as well as, of course, non-citizens who did not have permanent residence in the United States.<sup>168</sup>

In 1976, Congress granted the FEC jurisdiction to implement and enforce the Bentsen Amendment.<sup>169</sup> Eventually, the Bentsen Amendment was

158. 120 CONG. REC. 8782 (Mar. 28, 1974).

159. *Id.* at 8784; *see also* Savrin, *supra* note 149, at 793 n.40 (quoting the same language); Vega, *supra* note 133, at 973 n.133 (quoting similar language).

160. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974).

161. 424 U.S. 1 (1976).

162. 120 CONG. REC. 8783 (Mar. 28, 1974).

163. 120 CONG. REC. 8786 (Mar. 28, 1974).

164. *Id.*

165. *See* 22 U.S.C. § 611(b) (2006).

166. 22 U.S.C. § 611(b)(3). As commentators have pointed out, however, the statute created a loophole that allows foreign corporations to make contributions through their U.S. subsidiaries. *See* Powell, *supra* note 149, at 964. The FEC has issued several advisory opinions that have interpreted Section 441e to allow domestic subsidiaries of foreign corporations to make contributions to candidates. As Powell explains, “[d]espite the fact that the domestic subsidiary may be foreign controlled or even wholly-owned by its foreign parent, the statute did not define it as a foreign national if it was chartered in the United States and had its principal place of business in the United States.” *Id.*

167. 22 U.S.C. § 611(b)(1).

168. 2 U.S.C. § 441e(b)(2) (1994).

169. *See* Vega, *supra* note 133, at 973; *see also* Powell, *supra* note 149, at 958 n.5.

codified at 2 U.S.C. § 441e.<sup>170</sup> Subsection (a) of the statute read as follows:

It shall be unlawful for a foreign national directly or through any other person to make any contribution of money or other thing of value, or to promise expressly or impliedly to make any such contribution, in connection with an election to any political office or in connection with any primary election, convention, or caucus held to select candidates for any political office; or for any person to solicit, accept, or receive any such contribution from a foreign national.<sup>171</sup>

When initially crafted, the law only applied to contributions. It prohibited foreign nationals from donating money or any other thing of value in connection “with an election to any political office.”<sup>172</sup> The law also imposed liability on a person who tried to “solicit, accept, or receive” a contribution from a foreign national.<sup>173</sup> This was so regardless of whether the person “knew that the source of the donation is foreign.”<sup>174</sup> Congress wanted to ensure broad liability and framed the law to extend beyond only those actors who were contributing foreign money.<sup>175</sup> Importantly, Congress also made the provisions of Section 441e apply to contributions given to campaigns in all elections, including “any primary election, convention, or caucus held to select candidates for any political office.”<sup>176</sup> This meant the provisions applied to federal elections as well as to state and local ones.<sup>177</sup>

Section 441e was the beginning of America’s campaign finance nationalism. For the first time, this provision explicitly made it illegal for foreigners to make direct contributions to American political campaigns. Nonetheless, gaps in the statutory scheme remained. The 1974 restrictions, for

170. Pub. L. No. 93-443, §101, 80 Stat. 1267 (1974); Pub. L. No. 94-283, § 112(2), 90 Stat. 493 (1976) (codified at 2 U.S.C. § 441e (1994)).

171. Pub. L. 92-225, title III, §319, as added Pub. L. 94-283, title I, §112(2), May 11, 1976, 90 Stat. 493; Pub. L. No. 96-187, title I, §105(5), Jan. 8, 1980, 93 Stat. 1354; amended Pub. L. No. 107-155, title III, §§ 303, 317, Mar 27, 2002, 116 Stat. 96, 109 (originally codified at 2 U.S.C. § 441e(a) (1976)).

172. 2 U.S.C. § 441e(a).

173. § 441e(a); see also Donna M. Ballman, *Political Campaign Contributions by Foreign Nationals in Florida Elections*, 65 FLA. B.J. 31, 32 (1991) (listing examples of what does and does not count as any “other thing of value”).

174. See Powell, *supra* note 149, at 963 (explaining that Congress did not intend one’s lack of knowledge of the donation’s source to act as a shield against liability).

175. *Id.*

176. 2 U.S.C. § 441e(a).

177. *Id.*

example, did not eliminate the possibility that foreign citizens might still influence American elections by making contributions to political parties, which could then give the money to the candidates. In this way, foreigners could impact American elections through what came to be known as the “soft money loophole,” without the need to contribute directly to candidates themselves. In 1996, attempts by foreigners to influence that year’s presidential election led to a public outcry, and eventually to an investigation by the Senate Committee on Governmental Affairs.<sup>178</sup> The Committee found that foreigners had exploited the soft money loophole and bought access to American public officials by making contributions to political parties.<sup>179</sup> The Committee also discovered efforts made by Chinese officials to influence U.S. policy through the indirect financing of campaigns.<sup>180</sup>

In response to this controversy, when Congress passed the Bipartisan Campaign Reform Act in 2002 (BCRA),<sup>181</sup> it amended Section 441e to expand the scope of election-related activities that would be banned for foreign nationals. Subsection (a) of Section 441e soon read as follows:

It shall be unlawful for—

(1) a foreign national, directly or indirectly, to make

A contribution or donation of money or other thing of value, or to make an express or limited promise to make a contribution or donation, in connection with a Federal, State, or local election;

A contribution or donation to a committee of a political party;

An expenditure, independent expenditure, or disbursement for an electioneering communication . . . ; or

(2) A person to solicit, accept, or receive a contribution or donation described in subparagraph (A) or (B) of paragraph (1) from a for-

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178. See *Bluman v. FEC*, 800 F. Supp. 2d 281, 283 (D.D.C. 2011), *aff’d*, 565 U.S. 1104 (2012) (noting how “[a]ctivities by foreign citizens in the 1996 election cycle sparked public controversy and an extensive investigation by the Senate Committee on Governmental Affairs”).

179. *Id.*; see also S. Rep. No. 105-167, at 781–2010, 4619–5925 (1998).

180. S. Rep. No. 105-167, at 2501–12; see also *Vega*, *supra* note 133, at 974.

181. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, §303, 116 Stat. 81, 96.

eign national.<sup>182</sup>

This new language differed from the old in important ways. First, the statute now mentioned that it would be unlawful for a foreign national to contribute money or other thing of value not just in connection with “an election to any political office” (as the old language held), but specifically “in connection with a Federal, State, or local election.” This ensured that the ban on foreign nationals would be enforced nationally at all levels of the American political system. Second, the new language made it clear that contributions “to a committee of a political party” would be banned, too, thus closing the soft money loophole. Finally, the statute was updated to include a ban on expenditures. Foreign nationals were now not only prohibited from making contributions, but also, in light of BCRA’s new regulatory scheme, from making “[a]n expenditure, independent expenditure, or disbursement for an electioneering communication.”<sup>183</sup> This last provision would eventually be challenged on First Amendment grounds.

#### B. Bluman v. Federal Election Commission

The ban preventing foreign nationals from participating in American elections remained unchallenged for thirty-six years. Then *Citizens United* was decided, and that ban was brought into question.<sup>184</sup> *Citizens United* was not a case about foreigners. Rather, it was a case that overturned the prohibition in American law that had prevented corporations from using their treasury funds to make independent expenditures to influence elections.<sup>185</sup> Nonetheless, Justice Kennedy’s 5–4 majority opinion, and in particular the robust view of the First Amendment it espoused, made many observers wonder how long the ban barring foreign nationals from participating in campaign finance could stand. Justice Kennedy reasoned that corporations could not be prevented from spending their money on elections because the First Amendment prohibits the suppression of political speech based on the speaker’s identity.<sup>186</sup> Whether that dictate applied to the speech of foreigners, however, was a question the Supreme Court left deliberately unan-

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182. 2 U.S.C. § 441e(a).

183. 2 U.S.C. § 441(e)(a)(1)(B).

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

185. *Id.* at 365 (Kennedy, J.) (overturning prior prohibitions on American corporations’ use of independent expenditures to influence federal elections).

186. *Id.* at 350.

swered.<sup>187</sup> In the eyes of some commentators, the only way the Court could strike down a ban on speech for corporations but uphold that same ban for foreigners was by engaging in “doctrinal incoherence.”<sup>188</sup>

The Court’s opportunity to demonstrate how it would handle foreign campaign spending after *Citizens United* came in *Bluman v. FEC*.<sup>189</sup> In *Bluman*, the Court upheld the ban on foreign spending found in Section 441e.<sup>190</sup> It did so, however, without hearing oral arguments or issuing a written opinion. Rather, the written opinion in *Bluman* was handed down by a three-judge panel of the U.S. District Court for the District of Columbia, and that decision was then simply summarily affirmed by the Supreme Court.<sup>191</sup> This meant that the Supreme Court agreed with the district court’s result, though not necessarily with its reasoning.<sup>192</sup>

The plaintiffs in *Bluman* were two foreign citizens living and working in the United States on temporary visas. While in the United States, they hoped to spend money on election-related activities.<sup>193</sup> Benjamin Bluman was a Canadian citizen who had come to the United States to attend Harvard Law School.<sup>194</sup> From September 2006 to June 2009, he resided in the United States on a student visa.<sup>195</sup> In November 2009, Bluman began working as an associate at a New York law firm, at which point he obtained a temporary

187. *Id.* at 362 (“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.”).

188. See Hasen, *Citizens United and the Illusion of Coherence*, *supra* note 17, at 610 (arguing that the Supreme Court can only “sustain a law imposing foreign spending limits without overturning *Citizens United* . . . through doctrinal incoherence”). Professor Hasen has offered that one way the Court could try to bring coherence to the doctrine is to “state that the threat from foreign spending influencing U.S. elections is one different in kind than that posed by domestic corporate spending, and that when it comes to protecting the country from foreign influence, the First Amendment must give way.” *Id.* However, such an argument would not be convincing, according to Professor Hasen, because it would not be premised on combating corruption or the appearance of corruption. *Id.*

189. 800 F. Supp. 2d 281 (D.D.C. 2011), *aff’d*, 565 U.S. 1104 (2012).

190. *Id.* at 288 (upholding the ban and explaining how “the United States has a compelling interest . . . in limiting the participation of foreign citizens in activities of American democratic self-government, and thereby preventing foreign influence over the U.S. political process.”).

191. See *Bluman v. FEC*, 565 U.S. 1104 (2012) (summarily affirming the lower court’s decision without comment).

192. *Id.* at 1104.

193. *Bluman*, 800 F. Supp. 2d at 282.

194. *Id.* at 285 (stating that Bluman came to the United States to attend law school); RICHARD L. HASEN, *PLUTOCRATS UNITED*, *supra* note 18, at 16 (identifying Bluman’s law school as Harvard).

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

work visa.<sup>196</sup> Bluman wanted to make contributions to three political candidates: Jay Inslee, then a Democratic member of the U.S. House of Representatives from Washington; Diane Savino, a state senator from New York; and Barack Obama, who was then President.<sup>197</sup> In addition, Bluman wanted to spend money to print flyers supporting President Obama's re-election, which he hoped to distribute in New York City's Central Park.<sup>198</sup>

Asenath Steiman, Bluman's co-plaintiff, was a dual citizen of Canada and Israel who was also in the United States on a temporary work visa.<sup>199</sup> She was working as a medical resident at a hospital in New York City.<sup>200</sup> Steiman wanted to contribute money to Tom Coburn, a Republican U.S. Senator from Oklahoma; a yet-to-be-named candidate for the Republican nomination for President in 2012; the National Republican Senatorial Committee; and the Club for Growth, a conservative organization that advocates for smaller government.<sup>201</sup> All of these activities were barred by Section 441e, under the amendments enacted to that statute in 2002.

The unanimous opinion for the three-judge panel in *Bluman* was authored by Judge Brett Kavanaugh (long before he was nominated by President Trump, and narrowly confirmed by the U.S. Senate, to the Supreme Court). After setting out the circumstances facing Bluman and Steinman, the district court had to decide what level of scrutiny to apply to Section 441e.<sup>202</sup> The plaintiffs argued their desired activity constituted protected speech and that strict scrutiny should apply.<sup>203</sup> By contrast, the FEC argued that Section 441e amounted to a congressional pronouncement on foreign affairs and that rational basis scrutiny should apply.<sup>204</sup> The issue was more complicated than either party acknowledged because Section 441e applied limits to both contributions and expenditures, which were traditionally subject to different levels of scrutiny under the First Amendment.<sup>205</sup>

Ultimately, the court reasoned that Section 441e should be upheld even under strict scrutiny. But in coming to that conclusion, the court made an

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196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.* at 285–86.

interesting move. Rather than engage in the First Amendment campaign finance arguments advanced by the plaintiffs, the court ruled that this case “does not implicate those debates.”<sup>206</sup> Instead, this case raised “a preliminary and foundational question about the definition of the American political community, and, in particular, about the role of foreign citizens in the U.S. electoral process.”<sup>207</sup> Framing the issue this way, the court proceeded to summarize the many cases in which foreigners were provided the same constitutional rights as U.S. citizens,<sup>208</sup> as well as the many cases in which foreigners had been denied the rights that U.S. citizens enjoy.<sup>209</sup> These denied rights included the right to vote, serve on a jury, become a police or probation officer, and work as a public school teacher.<sup>210</sup> The line between these cases was that the activities from which foreigners were barred “intimately relate to the process of democratic self-government.”<sup>211</sup>

After reviewing the case law, the court in *Bluman* stated what it called a “straightforward principle”: “It is fundamental to the definition of our 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.”<sup>212</sup> This bar included “preventing foreign influence over the U.S. political process.”<sup>213</sup> With the issue presented this way, the question the court tried to answer was whether political contributions and express advocacy expenditures were part of democratic self-government. And its answer was that they were.<sup>214</sup> “Political contributions and express-advocacy expenditures are an integral aspect of the process by which Americans elect officials to federal, state, and local government offices,” the court reasoned, given that such contributions and expenditures “finance advertisements, get-out-the-vote drives, rallies, candidate speeches, and the myriad other activities by which candidates appeal to potential voters.”<sup>215</sup>

There were several curious aspects of *Bluman*. One was that the opinion

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206. *Id.* at 286.

207. *Id.*

208. *Id.* at 286–87.

209. *Id.* at 287.

210. *Id.*

211. *Id.* (citations omitted).

212. *Id.* at 288.

213. *Id.*

214. *Id.* (stating that “[w]e think it evident that these campaign activities are part of the overall process of democratic self-government”).

215. *Id.*

approvingly quoted the four dissenters in *Citizens United* to support the view that the government may impose restrictions on the right of foreigners to make contributions or expenditures in American elections.<sup>216</sup> Even though the majority in *Citizens United* expressly stated that it was not addressing this issue, Judge Kavanaugh’s opinion explained how it found Justice Stevens’s dissent “to be a telling and accurate indicator of where the Supreme Court’s jurisprudence stands on the question of foreign contributions and expenditures.”<sup>217</sup> Second, the court in *Bluman* expressly limited its ruling to express advocacy expenditures made by foreigners and refused to forbid foreigner nationals from engaging in issue advocacy. The court made it clear that Section 441e “does not restrain foreign nationals from speaking out about issues or spending money to advocate their points of view about issues.”<sup>218</sup> This would become a cause for concern later on.

Third, the court defined the relevant political community from which foreign nationals were banned as “the American political community.”<sup>219</sup> Rather than view the case through the prism of the First Amendment, the court explained how this case “raises a preliminary and foundational question about the definition of the American political community.”<sup>220</sup> And in explaining why lawful permanent residents were not foreign nationals, the court highlighted how “Congress may reasonably conclude that lawful permanent residents of the United States stand in a different relationship to the American political community than other foreign citizens do.”<sup>221</sup> In emphasizing the American political community as the relevant unit of analysis, *Bluman*’s main achievement was to solidify the idea that campaign finance nationalism should govern throughout the United States.

When the plaintiffs argued that the right to speak about elections was different from the right to vote in them—and that Section 441e’s long-standing ban on contributions and expenditures should not be justified under the First Amendment given that the statute’s restrictions were tied to speech and not the activity of voting—the court did not buy the argument: “The

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216. *Id.* at 289 (quoting *Citizen United v. FEC*, 558 U.S. 310, 420–23, 424 n.1 (2010) (Stevens, J., concurring in part and dissenting in part) (explaining that measures keeping foreigners out of the electoral process “have been a part of U.S. campaign finance law for many years”)).

217. *Id.*

218. *Id.* at 290.

219. *Id.* at 286, 290.

220. *Id.* at 286.

221. *Id.* at 291–92.

statute does not serve a compelling interest in limiting the participation of *non-voters* in the activities of democratic self-government; it serves the compelling interest of limiting the participation of *non-Americans* in the activities of democratic self-government.”<sup>222</sup> The court further clarified that the compelling interest that justifies restraining foreigners from participating in American elections “does not apply equally to minors, corporations, and citizens of other states and municipalities”<sup>223</sup> because these “are all members of the American political community.”<sup>224</sup> In other words, foreigners could be prevented from participating in American campaign finance, but citizens of other states could not. Again, this reasoning would soon form the intellectual linchpin of American campaign finance nationalism.

Academic commentators have largely been supportive of *Bluman*’s result, even if they have been critical of its reasoning. Many were unsurprised that the Supreme Court decided to summarily affirm *Bluman* rather than offer a full-blown opinion to justify the result.<sup>225</sup> *Bluman*’s fiercest critic has been Professor Richard Hasen, who argues that endorsing the constitutionality of Section 441e in the same breath as the Supreme Court’s opinion in *Citizen United* leads to incoherence in campaign finance doctrine.<sup>226</sup> Hasen has attacked several conservative lawyers who advance robust views of the First Amendment for what he believes is their inconsistent endorsement of *Citizens United* and *Bluman*.<sup>227</sup> He includes James Bopp, Floyd Abrams, and Bradley Smith in this camp.<sup>228</sup> For his part, Professor Smith believes that *Bluman* and *Citizens United* are not inconsistent,<sup>229</sup> and he personally comes out as “more or less agnostic on the result in *Bluman*.”<sup>230</sup>

Other commentators wrestle with the case’s nuances in light of their impact on the American campaign finance system. In an important article, Pro-

222. *Id.* at 290.

223. *Id.*

224. *Id.*

225. See, e.g., Todd E. Pettys, *Campaign Finance, Federalism, and the Case of the Long-Armed Donor*, 81 U. CHI. L. REV. DIALOGUE 77, 83 n.36 (2014) (calling the Supreme Court’s decision to issue only a summary affirmance of the lower court’s decision “unsurprising”).

226. Hasen, *Citizens United and the Illusion of Coherence*, *supra* note 17, at 605–10.

227. HASEN, *PLUTOCRATS UNITED*, *supra* note 18, at 10–11, 113–17.

228. *Id.* at 113–17.

229. Bradley A. Smith, *The Academy, Campaign Finance, and Free Speech Under Fire*, 25 J. L. & POL’Y 227, 246–47 n.96 (2016).

230. *Id.* Professor Smith elaborates to say that, “because I do not consider it, as a practical matter, a very important case, I have not worried too much about sorting out my concerns . . . . [A]s an empirical matter I am not terribly worried about foreign money damaging our democracy today.” *Id.*

fessor Anthony Johnstone explains one possible take-away from the case: “While *no* foreign actors have the right to participate in *any* national political process, according to the logic of current doctrine *all* national actors would appear to have the right to participate in *all* state political processes beyond voting.”<sup>231</sup> That analysis is perceptive and fairly accurate.

Where such a state of affairs is the norm, however, federalism suffers. Federalism calls for borders to exist not only between the different states, but also between the states as a whole and the national government.<sup>232</sup> No form of federalism can work without some limits being put in place to restrict the influence that outside actors have over the internal affairs of any given state.<sup>233</sup> While the plaintiffs in *Bluman* framed their claims in terms of the First Amendment, and the court instead reframed the case as being about the confines of the American political community, neither side saw that the case could also concern a third issue: namely, American federalism. In short, while upholding the restriction on foreigners from participating in our campaign finance system, *Bluman* failed to offer a view on what activities the states, as their own political communities, might reserve for their own residents, apart from voting and holding office. The logic here should be apparent. After all, some would-be campaign contributors come from outside a state’s political community, even if, under *Bluman*, they happen to come from the American political community. Several states have understood nonresident contributors to come from separate political communities and have tried to ban out-of-state residents from funding their elections. Our campaign finance nationalism has not made their efforts easy.

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231. Anthony Johnstone, *Outside Influence*, 13 ELECTION L.J. 117, 119 (2014).

232. *Id.* at 122; see also Patrick M. Garry et. al, *Raising the Question of Whether Out-Of-State Political Contributions May Affect a Small State’s Political Autonomy: A Case Study of the South Dakota Voter Referendum on Abortion*, 55 S.D. L. REV. 35, 36 (2010) (explaining how “the federalism structure in the American political system presumes not only that states occupy a separate level of authority from that of the federal government, but also that each state retains its own independence and autonomy from every other state”).

233. Johnstone, *supra* note 231, at 122–23 (explaining how “[n]o form of federalism, and therefore no form of government under the Constitution, works without limits on outside influence in the states”).

## IV. THE LIFE OF CAMPAIGN FINANCE NATIONALISM

## A. Challenges to Nonresident Contribution Limits

Our campaign finance nationalism has several consequences. One is that it prevents the states from prohibiting nonresidents from making campaign contributions to local political candidates. Four states have tried to impose a semblance of federalism in their state campaign finance systems by passing statutes that impose limits on nonresident contributions. These statutes have sought to bar out-of-state residents from influencing a state's elections and local politics.<sup>234</sup> In three states that have imposed such limits—Oregon, Alaska, and Vermont—these statutes have been struck down.<sup>235</sup> In the fourth state, Hawaii, the prohibition on nonresident contributions is still good law, though it may not be for long.<sup>236</sup>

A small movement to ban nonresident contributions emerged in the mid-1990s, when several small states tried to limit the ability of their elected officials to receive campaign contributions from beyond their borders.<sup>237</sup> All of the states that imposed such bans did so using a similar strategy,<sup>238</sup> in each case proceeding through indirect means.<sup>239</sup> Rather than place limits on what nonresident contributors could give, they adopted laws to regulate what in-state candidates could accept.<sup>240</sup> On their face, these laws targeted in-state candidates, not out-of-state contributors. The laws also did not bar all

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234. See OR. CONST. art. II, § 22 (1994) (limiting contributions from outside of the district in which the candidate is running to 10% of one's total campaign funding); ALASKA STAT. § 15.13.072(a)(3), (e) (1997) (limiting the amount candidates can accept from outside of the state to \$3000 to \$20,000, depending on the office sought, and banning contributions from groups organized outside of the state); VT. STAT. ANN. tit. 17 § 2805(c) (2012) (limiting contributions from outside of the state to 25% of a candidate's total contributions).

235. See *VanNatta v. Kiesling*, 899 F. Supp. 488 (D. Or. 1995), *aff'd sub nom.* *VanNatta v. Kiesling*, 151 F.3d 1215 (9th Cir. 1998) (striking down Oregon's nonresident contribution ban); *Thompson v. Hebdon*, 909 F.3d 1027 (9th Cir. 2018) (striking down Alaska's ban); *Landell v. Sorrell*, 382 F.3d 92 (2nd Cir. 2004), *rev'd and remanded sub nom.* *Randall v. Sorrell*, 548 U.S. 230 (2006) (striking down Vermont's ban).

236. See HAW. REV. STAT. § 11-362 (2010) (limiting contributions from outside of Hawaii to 30% of a candidate's total contributions during an election period).

237. See Ben Wallace, *A Vote Against State Nonresident Contribution Limits*, 78 LA L. REV. 597, 605–06 (2018).

238. *Id.* (reviewing the strategies used by these states).

239. See *id.* at 606.

240. See *id.*

outside contributions, but only those exceeding a set limit or ceiling.<sup>241</sup> Typically, they prohibited in-state candidates from receiving nonresident contributions over a specific dollar amount,<sup>242</sup> or else a certain percentage above what the candidate's total in-state contributions might have been.<sup>243</sup>

In some cases, local governments have also tried to impose restrictions on nonresident contributions. For instance, Akron, Ohio, tried to amend its charter to limit the percentage of a candidate's funds that could be raised from contributors outside the city's limits.<sup>244</sup> A federal district court struck down the city's plans.<sup>245</sup> Austin, Texas, tried another tactic when it imposed an aggregate limit on contributions that came from outside Austin. Austin's city code prohibited candidates from accepting an aggregate total of more than \$30,000 per election (and \$20,000 in the case of a runoff) from sources "other than natural persons eligible to vote in a postal zip code completely or partially within the Austin city limits."<sup>246</sup> When a former city councilman challenged these limits, claiming they forced him to change campaign tactics when he could no longer solicit contributions from outside the Austin area,<sup>247</sup> a federal court dismissed his complaint for lack of standing, a decision that the U.S. Court of Appeals for the Fifth Circuit affirmed.<sup>248</sup>

The most significant laws restricting nonresident contributions are those that have been proposed at the state level.<sup>249</sup> Four states have passed laws restricting nonresident contributions, but these laws have not fared well in the courts.<sup>250</sup> In 1994, Oregon became the first state to impose such limits.<sup>251</sup> Oregon's voters passed a ballot initiative that amended the state's constitu-

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241. *See id.*

242. *See id.*

243. *See id.* at 606 n.53 (making these points).

244. *See Frank v. City of Akron*, 95 F. Supp. 2d 706 (N.D. Ohio 1999), *rev'd in part*, 290 F.3d 813 (6th Cir. 2002).

245. *Id.* at 723 n.3 (explaining that such a provision is unconstitutional and would have the effect of prohibiting certain people, such as those who happened to work in the City of Akron but reside elsewhere, from contributing to their preferred candidate).

246. *See AUSTIN, TEX. CODE*, Art. III, § 8(A)(3) (1997). The limits of \$30,000 and \$20,000 were also adjusted for inflation, and they had risen to be \$36,000 and \$24,000, respectively, when this nonresident provision was challenged in court in 2015. *See Zimmerman v. City of Austin*, 881 F.3d 378, 382 (5th Cir. 2018).

247. *Id.* at 389.

248. *Id.* at 388–90.

249. *See Wallace, supra* note 237, at 607.

250. *Id.*

251. *Id.*

tion to prohibit political candidates from receiving significant out-of-district (not out-of-state) contributions.<sup>252</sup> The purpose was to “prevent out-of-district individuals and organizations from buying influence in [Oregon’s] elections, thus allowing ‘ordinary people [to] secure their rightful control of their own government.’”<sup>253</sup> The initiative consisted of four directives. The first allowed political candidates to take only contributions which originated from individuals who were residents of the electoral district of the public office being sought when the contribution was made.<sup>254</sup> The second punished a candidate who accepted more than 10% of his contributions from outside of the district by preventing that candidate from holding public office for a period of time twice as long as the tenure of the office sought.<sup>255</sup> The third prevented in-district residents from contributing funds on behalf of out-of-district residents.<sup>256</sup> The fourth made violating this scheme a felony.<sup>257</sup>

In *VanNatta v. Keisling*, a federal district court struck down Oregon’s scheme on First Amendment grounds.<sup>258</sup> The district court found that the initiative burdened political speech and the freedom of association, and that it could not survive strict scrutiny because it was not narrowly tailored to prevent “corruption or the appearance of corruption.”<sup>259</sup> The court gave several reasons why this was so. First, the initiative prevented non-corrupt, out-of-district contributors from associating with candidates running for state office.<sup>260</sup> Arguing that elected officials in state offices impact all state residents, not just the residents within a candidate’s district,<sup>261</sup> the court was troubled by how Oregon’s scheme “impairs out-of-district residents from associating with a candidate for state office who, if elected, will have a real and direct impact on those persons.”<sup>262</sup> Second, the initiative did not thwart

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252. OR. CONST. art II, § 22 (1994), *invalidated by* *VanNatta v. Keisling*, 899 F. Supp. 488 (D. Or. 1995). Oregon’s new law specifically targeted contributions from “out-of-district” residents, as opposed to out-of-state residents. *Id.*

253. *VanNatta*, 899 F. Supp. at 491.

254. *Id.* at 491.

255. *Id.*

256. *Id.*

257. *Id.*; *see also id.* at 493 (“Sections 1 and 2 of Measure 6 [Oregon’s initiative] prohibit candidates from accepting out-of-district contributions, whereas Sections 3 and 4 criminalize donations made by in-district residents on behalf of out-of-district contributors.”).

258. *Id.* at 491.

259. *Id.* at 496–97 (citation omitted).

260. *Id.* at 497.

261. *Id.*

262. *Id.*

so-called “in-district corruption,” because it did not prevent a candidate from receiving money from corrupt constituents of his district.<sup>263</sup> Finally, the initiative did nothing to prevent large contributions from outside an electoral district, so long as they amounted to less than 10% of a legislator’s total contributions.<sup>264</sup> In other words, candidates who were strong fundraisers could still be swayed by “outside special interests” and corruption because there was no dollar limit in terms of how much outsiders could give.<sup>265</sup>

In 1996, shortly after Oregon enacted its constitutional amendment, Alaska passed a bill to limit nonresident contributions as well.<sup>266</sup> Alaskans were about to vote on an initiative to reform their state’s campaign finance system, and the bill was a response not only to the impending initiative before the state’s voters but also to the greater concerns about corruption being voiced by the public.<sup>267</sup> The legislative history of Alaska’s law is telling.<sup>268</sup> The state’s legislature was worried that organized special interests were responsible for raising a significant portion of all election campaign funds in the state, which meant these interests had the ability to exert influence over elected officials.<sup>269</sup> The new law’s purpose was “to substantially revise Alaska’s election campaign finance laws in order to restore the public’s trust in the electoral process and to foster good government.”<sup>270</sup> This was important because candidates in Alaska could previously convert campaign funds to personal income, which fostered bribery and corruption.<sup>271</sup>

Alaska’s new law prohibited candidates, groups, or political parties from receiving contributions from out-of-state residents if they exceeded specific dollar limits.<sup>272</sup> A candidate seeking the office of governor or lieutenant governor could accept only \$20,000 in out-of-state contributions in a calendar year.<sup>273</sup> A candidate for the state senate could accept only \$5,000,<sup>274</sup> and a candidate for state representative or municipal offices could only seek

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263. *Id.*

264. *Id.*

265. *Id.*

266. *See* ALASKA STAT. § 15.13.072 (1997).

267. *See* State v. Alaska Civil Liberties Union, 978 P.2d 597, 601 (Alaska 1999).

268. *See id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. ALASKA STAT. § 15.13.072.

273. ALASKA STAT. § 15.13.072(e)(1).

274. ALASKA STAT. § 15.13.072(e)(2).

\$3,000.<sup>275</sup> In addition, political parties could accept no more than 10% of their individual contributions from out-of-state donors per year.<sup>276</sup>

In 1999, these out-of-state contribution limits were upheld by the Alaska Supreme Court in *State v. Alaska Civil Liberties Union*.<sup>277</sup> The plaintiff in the case, the Alaska Civil Liberties Union, relied on *VanNatta v. Keisling* in challenging these limits, but the Alaska Supreme Court found *VanNatta* distinguishable, in that Oregon's out-of-district contribution restrictions burdened both residents and nonresidents of the state,<sup>278</sup> while Alaska's restrictions did not burden any Alaska residents.<sup>279</sup> The court also found that Alaska's restrictions were less burdensome on nonresident contributors because, unlike Oregon, Alaska did not share a contiguous border with any other state.<sup>280</sup> The court explained how Alaskans had the power to preserve their own unique political community by excluding nonresidents from voting.<sup>281</sup> This power was "self-evident,"<sup>282</sup> and although the court had "not previously affirmed the authority of the state to limit the influence of nonresidents over state elections through regulation of their campaign contributions," it found that "such an extension would not be illogical."<sup>283</sup>

Alaska's law stood for over twenty years, altered only by a 2006 initiative that further revised the limits set by the legislature and the voters in 1996.<sup>284</sup> In 2018, however, Alaska's out-of-state contribution limits were challenged again, this time in federal court.<sup>285</sup> This time, a federal district court upheld the nonresident contribution limits,<sup>286</sup> but, in *Thompson v. Heb-*

275. ALASKA STAT. § 15.13.072(e)(3).

276. ALASKA STAT. § 15.13.072(f).

277. 978 P.2d 597 (Alaska 1999).

278. *Id.* at 616–17.

279. *Id.* at 616 (describing how Alaska's law only applies to nonresidents and does not limit the speech of any Alaskans, including those most likely to be affected by the outcome of a campaign).

280. *Id.*

281. *See id.* (noting that each state has an obligation to preserve its own political community).

282. *Id.* at 616 n.123 (stating that "[t]he state's power to preserve the political community by excluding nonresidents from voting is self-evident").

283. *Id.* Despite the fact that the Alaska Supreme Court's decision in *State v. Alaska Civil Liberties Union* stood in conflict with the Ninth Circuit's decision in *VanNatta v. Keisling*, both cases were denied certiorari by the Supreme Court. *See* Andrew Hyman, *Alaska Gives Ninth Circuit the Cold Shoulder: Conflicts in Campaign Finance Jurisprudence*, 152 U. PA. L. REV. 1453, 1456 (2004).

284. *See* 2006 Alaska Laws Initiative Meas. 1, § 1.

285. *Thompson v. Dauphinais*, 217 F. Supp. 3d 1023 (D. Alaska 2016).

286. *Id.* at 1040.

*don*, the U.S. Court of Appeals for the Ninth Circuit reversed and struck them down.<sup>287</sup> The Ninth Circuit reasoned that Alaska's law did not further the state's important interest in preventing corruption or its appearance, as required to survive a First Amendment challenge; at most, the law "aime[d] to curb perceived 'undue influence' of out-of-state contributors," which was not a sufficient interest for restricting campaign contributions.<sup>288</sup>

Vermont became the third state to impose nonresident contribution limits when it passed a statute with a provision that prevented state candidates from receiving more than 25% of their total campaign contributions from nonresidents.<sup>289</sup> When the statute was challenged in federal district court on First Amendment grounds, this provision was struck down.<sup>290</sup> In *Landell v. Sorrell*, the district court explained that most candidates would be "unaffected or only slightly affected by the limit on out-of-state contributions,"<sup>291</sup> because the percentages of out-of-state contributions received had traditionally been very low in Vermont. The percentage of out-of-state contributions that the average candidate for Vermont's lower house received was 2.2% in 1998, 2.6% in 1996, and 1.7% in 1994.<sup>292</sup> In races for Vermont's upper house, the percentage of out-of-state contributions received by the average candidate was 9% in 1998, 9% in 1996, and 7.5% in 1994.<sup>293</sup>

The state argued that limits on out-of-state contributions combat the perception that the Vermont legislature might be unduly influenced by out-of-staters, but the district court found this argument "not well focused."<sup>294</sup> The state's justification did not account for the fact that people outside of Vermont might have a legitimate interest in Vermont politics, and thus a right to participate in Vermont's elections.<sup>295</sup> Many individuals from outside of Vermont, such as second homeowners, were influenced by Vermont's

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287. *Thompson v. Hebdon*, 909 F.3d 1027, 1044 (9th Cir. 2018) (striking down Alaska's nonresident contribution limits).

288. *Id.* at 1041.

289. See 1997 Vermont Campaign Finance Reform Act ("Act 64") (codified at VT. STAT. ANN. tit. 17, § 2805(c) (2012)) ("A candidate, political party or political committee shall not accept, in any two-year general election cycle, more than 25 percent of total contributions from contributors who are not residents of the state of Vermont or from political committees or parties not organized in the state of Vermont.").

290. *Landell v. Sorrell*, 118 F. Supp. 2d 459 (D. Vt. 2000).

291. *Id.* at 472.

292. *Id.*

293. *Id.* at 472–73.

294. *Id.* at 484.

295. *Id.*

laws, and they may well “have legitimate interests in Vermont politics and policy,” the court explained.<sup>296</sup> Because the court had no evidence before it to suggest that out-of-state contributions were any more corrupting than those that came from inside the state, it struck down Vermont’s law.<sup>297</sup> The court cited *VanNatta* and explained how the provision of Vermont’s law restricting nonresident contributions was not narrowly tailored.<sup>298</sup>

The Second Circuit affirmed the ruling in *Landell*,<sup>299</sup> explaining that it could “find no sufficiently important governmental interest” to support the provision of Vermont’s law that limited out-of-state contributions to 25% of all candidate contributions.<sup>300</sup> As the Second Circuit went on to explain, “the out-of-state contribution limit isolates one group of people (non-residents) and denies them the equivalent First Amendment rights enjoyed by others (Vermont residents).”<sup>301</sup> The First Amendment did not permit state governments to preserve their politics from the influence of outsiders.<sup>302</sup> The Second Circuit also reviewed the Oregon statute struck down in *VanNatta* and the Alaska statute upheld *Alaska Civil Liberties Union*, and it looked disapprovingly at how the “analysis in the Alaska case is a sharp departure from the corruption analysis adopted by the Supreme Court in *Buckley*.”<sup>303</sup> The Supreme Court granted certiorari, but at this stage the parties were no longer disputing the lower courts’ holdings on the constitutionality of Vermont’s out-of-state contribution limits, and thus the Supreme Court was not provided with an opportunity to address this issue.<sup>304</sup>

Hawaii was the last state to adopt a statute limiting contributions from nonresident donors.<sup>305</sup> The 2010 version of that statute limited out-of-state contributions to 30% of a candidate’s total contributions during an election period,<sup>306</sup> with exemptions made for contributions from family members.<sup>307</sup>

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296. *Id.* at 470.

297. *Id.* at 484.

298. *Id.*

299. *Landell v. Sorrell*, 382 F.3d 91 (2nd Cir. 2002).

300. *Id.* at 146.

301. *Id.*

302. *Id.* at 148.

303. *Id.*

304. See *Randell v. Sorrell*, 548 U.S. 230, 239 (2006) (explaining how “the lower courts held . . . out-of-state contribution limits unconstitutional, and the parties do not challenge that holding”).

305. See HAW. REV. STAT. § 11-362 (2010).

306. HAW. REV. STAT. § 11-362(a) (“Contributions from all persons who are not residents of the State at the time the contributions are made shall not exceed thirty per cent of the total contributions received by a candidate or candidate committee for each election period.”).

As of this writing, Hawaii's statute is still good law, although how long that status quo will stand is anybody's guess. The statute has not yet been challenged in the courts. Indeed, in 2019, Hawaii's state senate introduced a bill to amend the state's statute so that it now requires contributions from non-residents that exceed the applicable 30% limit to escheat back to the Hawaii election campaign fund if they are not returned to the contributor within 30 days. The fact that Hawaii's legislature recently sought to amend this statute provides some evidence that the state's lawmakers believe it is constitutional. Yet given the precedent established with similar legislation in Oregon, Alaska, and Vermont, Hawaii's statute seems ripe for challenge.

*B. The Growing Influence of Nonresident Contributions*

The inability of the states to limit nonresident contributions is not the only consequence of our campaign finance nationalism. The system has also created a regime in which political candidates running for both federal and state office continuously feel the need to seek money from contributors across the country. Over time, candidates develop two distinct groups to whom they owe allegiance: voters and donors. Professor Richard Briffault refers to these as "constituents" and "contributors," and he explains why it is troubling that they may not constitute the same people.<sup>308</sup> Contributors, especially when they do not reside in the lawmaker's electoral district, may possess very different goals from constituents—indeed, a lawmaker's responsiveness to them may not be in his constituents' interests.<sup>309</sup>

Research shows that the funding provided to our lawmakers increasingly comes from contributors who are not their constituents.<sup>310</sup> Janet Grenzke conducted a study of the campaign contributions made to federal congressmen in the late 1970s and early 1980s and found that more than half of the reportable individual contributions to long-term members of Congress came from outside of their districts, even though, at the time, most non-district contributions still came from within the state.<sup>311</sup> Grenzke's study found that

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307. HAW. REV. STAT. § 11-362(b) ("This section shall not be applicable to contributions from the candidate's immediate family.")

308. Briffault, *supra* note 9, at 31.

309. *Id.*

310. *Id.* at 32 (finding that "non-constituents provide the bulk of itemized individual contributions—that is, donations of \$200 or more—to candidates for Congress").

311. See Janet Grenzke, *Comparing Contributions to U.S. House Members from Outside Their Districts*, 13 LEG. STUD. Q. 82, 85–86 (1988). Grenzke's study looked only at individual contribu-

the percentage of within-district and within-state contributions had steadily declined with successive election cycles.<sup>312</sup> In 1977–1978, 48% of contributions made to long-term members of Congress in the amount of \$500 or more came from outside of their congressional districts.<sup>313</sup> By 1979–1980, 53% of contributions of \$500 or more came from outside of the district, and by 1981–1982 that figure had jumped to 61%.<sup>314</sup>

Twenty years after Grenzke's study, another study of outside campaign contributions was conducted by James Gimpel, Francis Lee, and Shana Pearson-Merkowitz. These authors found that between 1996 and 2000, the average congressional campaign received 63% of its individual contributions from outside of the candidate's district.<sup>315</sup> By 2002, that figure was 68%, although in 2004 it dipped slightly to 67%.<sup>316</sup> Not only did the percentage of outside contributions rise for the average congressman, but so did the number of outside districts from which they were received. In 1996, this study found, the average number of outside districts from which campaign contributions came stood at 55.<sup>317</sup> By 2004, these contributions came from 70 other districts on average.<sup>318</sup> In most cases, these outside districts were located far away. Only 22% of the individual itemized contributions in the average congressional race came from adjacent districts, while 45% came from far-away districts not adjacent to the recipient's district.<sup>319</sup>

The latest statistics concerning outside contributions to federal candidates come from the 2018 election cycle. According to the Center for Responsive Politics, in 2018 candidates for the U.S. House of Representatives received an average of 73.8% of their contributions from outside of their dis-

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tions of more than \$100, as contributions of less than that amount did not trigger disclosure at the time. For her data, Grenzke examined contributions made to the 154 members of the House of Representatives who had served continuously from 1973 to 1982, as well as contributions made to 18 additional members of the House who had served continuously from 1973 to 1980. *Id.* at 84.

312. *Id.* at 85.

313. *Id.*

314. *Id.* Grenzke found that two factors determined which congressional incumbents benefitted most from out-of-district contributions: the lawmaker's liberalism, and the lawmaker's power over the legislative agenda. *See id.* at 89 ("The proportion of out-of-district contributions is higher for liberal legislators and for legislators with power over legislation that is national in scope.").

315. *See* James G. Gimpel et al., *The Check Is in the Mail: Interdistrict Funding Flows in Congressional Elections*, 52 AM. J. POL. SCI. 373, 378 (2008).

316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.* at 378–79.

tricts.<sup>320</sup> In 2016, the equivalent figure for outside contributions stood at 64.9%,<sup>321</sup> and in 2014 it was 61.2%.<sup>322</sup> When only current House members are included in the data for 2018, it turns out 71.9% of their contributions came from outside of their districts.<sup>323</sup> In 2016, the equivalent figure for current House members was 67.1%,<sup>324</sup> and in 2014 it was 66.3%.<sup>325</sup> The evidence clearly shows that the percentage of contributions made to federal candidates by nonresidents has greatly increased over the years, and it continues to increase with each successive election cycle.

Some House members receive almost all of their contributions from outside of their districts. In 2018, as Table 1 shows, the number of House members who received 80% or more of their itemized contributions from outside of their congressional districts stood at 143 (32.87% of the House's total membership).<sup>326</sup> That number, an all-time high, rose from 119 members in 2016 (27.36%), 98 members in 2014 (22.52%), and 88 members in 2012 (20.23%).<sup>327</sup> In 2018, 65 members of House (14.94% of the total) received an astounding 90% or more of their contributions from outside of their districts.<sup>328</sup> The equivalent figure stood at 38 members in 2016

320. See *In-District v. Out-of-District: All House Candidates, Election Cycle 2018*, CTR. FOR RESPONSIVE POL., <https://www.opensecrets.org/overview/district.php?cycle=2018&display=A> (last visited on May 22, 2019). The data compiled by the Center for Responsive Politics examined only itemized individual contributions of \$200 or more given to a federal candidate, and only candidates who received a minimum of \$50,000 in itemized individual contributions were included. The figures were based on Federal Election Commission data covering the 2017-2018 election cycle. *Id.*

321. *In-District v. Out-of-District: All House Candidates, Election Cycle 2016*, CTR. FOR RESPONSIVE POL., <https://www.opensecrets.org/overview/district.php?cycle=2016&display=A> (last visited on May 22, 2019).

322. *In-District v. Out-of-District: All House Candidates, Election Cycle 2014*, CTR. FOR RESPONSIVE POL., <https://www.opensecrets.org/overview/district.php?cycle=2014&display=A> (last visited on May 22, 2019).

323. *In-District v. Out-of-District: All Current Representatives, Election Cycle 2018*, *supra* note 320.

324. *In-District v. Out-of-District: All Current Representatives, Election Cycle 2016*, *supra* note 321.

325. *In-District v. Out-of-District: All Current Representatives, Election Cycle 2014*, *supra* note 322.

326. See *In-District v. Out-of-District: All Current Representatives*, CTR. FOR RESPONSIVE POL. (last visited May 22, 2019), <https://www.opensecrets.org/overview/district.php?cycle=2012&display=M>. The numbers and percentages provided in this paragraph are based on the author's calculations from data provided by the Center for Responsive Politics for the 2012-2018 elections cycles.

327. *Id.*

328. *Id.*

(8.74%), 40 members in 2014 (9.19%), and 33 members in 2012 (7.58%).<sup>329</sup> It is evident that these numbers have increased with each election cycle.

TABLE 1: OUTSIDE CONTRIBUTIONS TO U.S. HOUSE MEMBERS, 2012—2018				
Year →	2012	2014	2016	2018
# receiving at least 80% from outside of district	88	98	119	143
% of House membership	20.23%	22.52%	27.36%	32.87%
# receiving at least 90% from outside of district	33	40	38	65
% of House membership	7.58%	9.19%	8.74%	14.94%

The data on outside contributions comes from the Center for Responsive Politics. This data also classifies a few congressional candidates as receiving 100% of their contributions from outside of their districts. In 2018, there were 239 of these candidates in total. Of course, the vast majority of these candidates managed to raise very little money and probably had little to no chance of ever winning election. However, that was not true in every case; at least one candidate in 2018 who raised 100% of his contributions from outside of his district beat an incumbent.<sup>330</sup> In 2016, another candidate who raised 100% from outside of his district also won election.<sup>331</sup> In general,

329. *Id.*

330. Current Representative T.J. Cox, a Democrat who ran for Congress in 2018 in California's 21st Congressional District against incumbent Republican David Valadao, raised \$2,927,765, reporting \$2,005,667 of it in itemized contributions—100% of which came from outside of the district. See *In-District v. Out-of-District: All Current Representatives, Election Cycle 2018*, *supra* note 320. Cox wound up winning his race against Valadao, who raised \$3,279,453 and reported \$1,670,482 in itemized contributions—73% of which came from outside of the district. See *California District 21 2018 Race: Summary Data*, CTR. FOR RESPONSIVE POL., <https://www.opensecrets.org/races/summary?id=CA21&cycle=2018> (last visited May 26, 2019).

331. In 2016, Republican incumbent Ted Budd ran against Democratic challenger Bruce Davis in North Carolina's 13th Congressional District. Budd raised \$594,297, including \$333,598 in itemized contributions—100% of which came from outside the congressional district. See *In-District v. Out-of-District: All Current Representatives, Election Cycle 2016*, *supra* note 321; see also *North Carolina District 13 2016 Race: Summary Data*, CTR. FOR RESPONSIVE POL., <https://www.opensecrets.org/races/summary?id=NC13&cycle=2016> (last visited May 26, 2019).

raising all of one's campaign funds from outside of one's district may not be a recipe for success, but the data clearly shows that raising a significant portion of funds from outside is common, and perhaps necessary, in today's politics.

The Center for Responsive Politics also reports on a category of candidates who raised most of their contributions from *within* their districts. Back in 2012, a total of seven candidates raised 80% or more of their itemized contributions from within their districts.<sup>332</sup> One of these candidates was Beto O'Rourke, who raised a total of \$477,292 in itemized contributions in 2012, the first year he was elected to Congress—88% of which came from within his district.<sup>333</sup> In 2014, nine candidates raised 80% or more in contributions within their districts and in 2016 six candidates did so.<sup>334</sup> In each of these years, most of these candidates were incumbents in very safe districts. But by 2018, times had changed. In 2018, the number of candidates who raised at least 80% of their money within their districts had gone up to 18, but none of them were incumbents and hardly any were victorious.<sup>335</sup>

These statistics suggest that very few successful candidates in this day and age raise significant funds within the districts they represent, and that our campaign finance system has now become almost entirely national. This

332. See *In-District v. Out-of-District: Most In-District (Current Candidates Only): 2012 Election Cycle*, CTR. FOR RESPONSIVE POL., <https://www.opensecrets.org/overview/district.php?cycle=2012&display=T> (last visited May 26, 2019).

333. *Id.* Of the seven candidates who raised 80% or more of their contributions from within their districts in 2012, four were already incumbents, including Mac Thornberry (R-TX, District 13—94% of his itemized contributions came from within his district), Mo Brooks (R-AL, District 5—89%), John A. Yarmuth (D-KY, District 3—84%), and Louis Gohmert, Jr. (R-TX, District 1—83%). Six of these seven “80% or more” candidates won their races that year, including non-incumbents Beto O'Rourke (D-TX, District 16—88%) and Tom Rice (R-SC, District 7—87%). *Id.*

334. See *In-District v. Out-of-District: All Current Representatives, Election Cycle 2014*, *supra* note 322; *In-District v. Out-of-District: Most In-District (Current Candidates Only): Election Cycle, 2016*, *supra* note 321; *In-District v. Out-of-District: All Current Representatives, Election Cycle 2016*, *supra* note 321.

335. The one exception was Republican Tim Burchette, who was elected to Congress from Tennessee's 2nd Congressional District in 2018. Burchette raised a total of \$1,080,763, of which \$967,242 came in itemized contributions (85% of it from within the district). He was one of two congressional candidates who raised at least \$500,000 in contributions from constituents of his own district. The other was Democrat Courtney Tritch, who ran in Indiana's 3rd Congressional District but lost her race. See *In-District v. Out-of-District: All Current Representatives, Election Cycle 2018*, *supra* note 320; *Tennessee District 02 2018 Race: Summary Data*, CTR. FOR RESPONSIVE POL., <https://www.opensecrets.org/races/summary?id=TN02&cycle=2018> (last visited May 26, 2019); *Indiana District 03 2018 Race: Summary Data*, CTR. FOR RESPONSIVE POL., <https://www.opensecrets.org/races/summary?id=IN03&cycle=2018> (last visited May 26, 2019).

situation is even more pronounced with respect to U.S. Senate elections. This is perhaps to be expected given the higher national profile and name recognition that many U.S. Senators enjoy. In contrast to most House races, which take place in gerrymandered districts, the electoral “district” for each Senator consists of the state he represents. Thus the relevant data comes from comparing in-state versus out-of-state contributions to Senate candidates. In most cases, given the high cost of winning a Senate seat, these totals are much larger than the amounts raised by House candidates.<sup>336</sup>

One might expect Senators to receive even more of their contributions from out of state, but the picture that emerges in the Senate is mixed. The Center for Responsive Politics reports that for incumbent Senators running for re-election in 2018, 41.9% of their contributions on average came from within state and 58.1% came from out of state.<sup>337</sup> Thus the percent of out-of-state contributions for Senators is lower than the average percent of out-of-district contributions for House members, which stood at 71.9% in 2018. Nonetheless, in 2018, Heidi Heitkamp (D-ND) received 96.2% of her itemized contributions from outside of North Dakota, and Doug Jones (D-AL) received 84.4% of his from outside of Alabama.<sup>338</sup> The equivalent figures were 77.1% for Jon Tester (D-MT), 73.6% for Elizabeth Warren (D-MA), and 70.1% for Claire McCaskill (D-MO).<sup>339</sup> On the other hand, Diane Feinstein (D-CA) received the majority of her itemized contributions—73.9%—from California.<sup>340</sup> All of these Senators managed to raise between \$10 and \$25 million, which is much more than members of the House raise.<sup>341</sup>

The Senators and House members who are able to cast a wide geographical net when it comes to campaign contributions tend to have wider national profiles. Studies show that the longer a lawmaker is in office and the more power he has over the legislative agenda, the more likely he is to raise a substantial percentage of campaign funds from outside of his district.<sup>342</sup> The

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336. In 2016, the average cost of winning House seat was \$1,518,021, and the average cost of winning a Senate was \$10,464,068. See *Vital Statistics on Congress: Data on the U.S. Congress, Updated March 2019*, BROOKINGS INSTITUTION, tbl. 3-1 (March 4, 2019), [https://www.brookings.edu/wp-content/uploads/2017/01/vitalstats\\_ch3\\_full.pdf](https://www.brookings.edu/wp-content/uploads/2017/01/vitalstats_ch3_full.pdf).

337. See *Top In-State vs. Out-of-State: 2018 Election Cycle*, CTR. FOR RESPONSIVE POL., <https://www.opensecrets.org/overview/instvsout.php> (last visited May 26, 2019).

338. *Id.*

339. *Id.*

340. *Id.*

341. *Id.*

342. See, e.g., Grenzke, *supra* note 311, at 89, 94–95. Grenzke posits that one characteristic of

last time former House Speaker Paul Ryan (R-WI) ran for election, in 2016, he raised more than \$19 million in contributions, 99% of which came from outside of his Wisconsin district.<sup>343</sup> Nancy Pelosi consistently raises a very high percentage of her contributions from outside of her district, despite the fact that she represents one of the wealthiest districts in the United States.<sup>344</sup> Pelosi raised 87% of her contributions in 2018 and 85% in 2016 from outside of her district, which includes most of the city of San Francisco.<sup>345</sup>

Individual itemized contributions made to federal candidates represent only a portion of total money that candidates receive. Other candidate committees, political party committees, and political action committees set up by corporations and unions (so-called PACs) are also able to make contributions to federal candidates.<sup>346</sup> Very rarely will these committees be located in a particular candidate's home district. In addition, contributions can be made by citizens across the country to entities that make independent expenditures to influence elections without coordinating with the candidate. Such independent expenditure groups include 504(c)(4) organizations and Super PACs. The former entities are named after the section of the IRS Code that regulates their functioning. 504(c)(4) organizations are not required to disclose their contributors, meaning that the geographic location of their donors cannot easily be discerned.<sup>347</sup> On the other hand, Super PACs must report and disclose their contributors.<sup>348</sup>

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legislators who receive a high proportion of out-of-district contributions is that they "have power over legislation that is national in scope." *Id.* at 89. This is particularly the case when a member of the House of Representatives is able to translate his seniority into direct power over legislation. *Id.* at 93.

343. See *In-District v. Out-of-District: All Current Representatives, Election Cycle 2016*, *supra* note 321.

344. *Id.*

345. San Francisco's 94104 zip code was the number one zip code from which political contributions were sent nationwide in 2014 (when it produced \$73.7 million) and 2016 (\$93.2 million). In 2018, it fell to number two (\$75.2 million) behind New York City's 10022 zip code (\$102.7 million). See *Top Zip Codes*, CTR. FOR RESPONSIVE POL., <https://www.opensecrets.org/overview/topzips.php?cycle=2018> (last visited on May 26, 2019).

346. See Briffault, *supra* note 9, at 37–38.

347. See Katherine Shaw, *Reorientating Disclosure Debates in the Post-Citizens United World*, in *DEMOCRACY BY THE PEOPLE: REFORMING CAMPAIGN FINANCE IN AMERICA* 159–60 (Eugene D. Mazo & Timothy K. Kuhner eds., 2018) (explaining that social welfare organizations established under Section 501(c)(4) or the Internal Revenue Code are allowed to participate in political activities and must report their expenditures made for political purposes, but not the contributions they receive).

348. *Id.* at 160–61; Richard Briffault, *Super PACs*, 96 MINN. L. REV. 1644, 1646 (2012) (explaining that a "Super PAC is a political committee, registered with the FEC, and subject to the federal

In recent years, expenditures by Super PACs have skyrocketed, in part because the law places no limits on how much donors can contribute to these entities.<sup>349</sup> The maximum contribution that an individual can give to a federal candidate is \$2,800 for the 2020 election cycle, but there are no restrictions on the amount that an individual can give to a Super PAC. This makes Super PACs attractive to donors who wish to spend more to influence campaigns than the federal candidate contribution limits allow.<sup>350</sup>

Contributions made to Super PACs are even more geographically disconnected than the contributions made directly to candidates. The Center for Responsive Politics groups contributions to outside spending groups like Super PACs based on various different categories, including the donor's location. In 2018, of the individuals contributing to these groups, \$122.3 million was given by Sheldon Adelson of Las Vegas; \$92.9 million by Michael Bloomberg of New York City; and \$72.4 million by Tom Steyer of San Francisco. Rounding out the top ten, Richard Uihlein contributed \$37 million from Lake Forest, Illinois; James Simons \$20.7 million from New York City; Kenneth Griffin \$18.4 million from Chicago; Donald Sussman \$13.9 million from Rye Brook, New York; Stephen Schwarzmann \$11.8 million from New York City; George Soros \$10.9 million from New York City; and Jeff Bezos \$10.1 million from Seattle, Washington.<sup>351</sup> Although this money did not go to the candidates themselves, it directly impacted their campaigns. And, of course, it originated from concentrated wealth that was geographically disaggregated from the elections it was meant to influence.<sup>352</sup>

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organizational, registration, reporting, and disclosure requirements of other political committees"). In addition to Super PACs and 501(c) organizations, there is another kind of organization—called the 527 organization—that sometimes participates in independent spending in elections. 527 organizations, like Super PACs, must publicly disclose their donors, although they disclose them to the IRS, not to the FEC. Given that they are not required to register with the FEC, 527 organizations must avoid engaging in "express advocacy," which refers to specifically calling for the election or defeat of a particular federal candidate. *Id.* at 1648; see Richard Briffault, *The 527 Problem . . . and the Buckley Problem*, 73 GEO. WASH. L. REV. 949 (2005) (explaining how 527's work).

349. Briffault, *Super PACs*, *supra* note 348, at 1647.

350. See Tyler S. Roberts, *Enhanced Disclosure as a Response to Increased Out-of-State Spending in State and Local Elections*, 50 COLUM. J.L. & SOC. PROBS. 137, 141 (2016).

351. See *2018 Top Donors to Outside Spending Groups*, CTR. FOR RESPONSIVE POL., <https://www.opensecrets.org/outsidespending/summ.php?cycle=2018&disp=D&type=V&superonly=N> (last visited May 26, 2019).

352. According to the Center for Responsive Politics, Super PACs raised \$850,199,116 during the 2018 election cycle. Their top 100 donors nationally accounted for 77.7% of this money. See *Super PACs: How Many Donors Give*, CTR. FOR RESPONSIVE POL., <https://www.opensecrets.org/outside->

The national aspects of our campaign finance system arguably make sense when it comes to federal candidates. Federal candidates make laws that affect people across the country. Whoever represents Texas in the U.S. Senate will have an opportunity to vote on laws that will impact every American, no matter where he lives. But the system makes a lot less sense when it comes to state and local officials, who vote on laws affecting the people of their state.<sup>353</sup> A state senator from Montana will pass laws that concern Montanans, and it is unclear why a donor who resides in North Carolina, Maine, or Louisiana should be able to contribute to his campaign. Despite this logic, the same campaign finance nationalism that applies at the federal level also applies at the state and local level. Out-of-state contributions and out-of-state spending affect every level of government throughout the United States today.<sup>354</sup> Out-of-state contributions accounted for an average of 23% of all donations made directly to gubernatorial candidates between 2007 and 2014.<sup>355</sup> In 2013, when New Jersey and Virginia held gubernatorial elections, 49% of contributions came from out of state.<sup>356</sup> In 2013, Terry McAuliffe received 68% of his contributions from out of state in his bid to become governor of Virginia.<sup>357</sup> In 2012, Scott Walker received 60% from out of state for the governor's race in Wisconsin.<sup>358</sup>

Attorney general races and state supreme court races likewise have received their share of out-of-state spending recently.<sup>359</sup> So have local mayoral races and city council race. And then there is another type of contest that

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spending/donor-stats?cycle=2018&type=I (last visited on May 26, 2019); see also *See 2018 Top Donors to Outside Spending Groups*, *supra* note 351.

353. See Briffault, *supra* note 9, at 38–39 (explaining how “[a]ll members of Congress in some sense represent all Americans so that non-constituents as well as constituents have a stake in the outcome of a Senate race or a House district election” but finding that “[t]he growing role of out-of-state and out-of-district contributions in state and local elections presents a different issue”).

354. See Roberts, *supra* note 350, at 140.

355. *Id.* at 145.

356. *Id.*; see also J.T. Stepleton, *Crossing the Line: Boosting Gubernatorial Candidates With Out-of-State Contributions*, NAT'L INST. ON MONEY IN STATE POL., tbl. 2 (Jan. 28, 2016), <https://www.followthemoney.org/research/institute-reports/crossing-the-line-boosting-out-of-state-contributions-to-gubernatorial-campaigns>.

357. J.T. Stepleton, *supra* note 356, at tbl. 4.

358. *Id.*

359. Scott Greytak et al., *Bankrolling the Bench: The New Politics of Judicial Elections 2013-2014*, BRENNAN CTR. FOR JUSTICE 32 (2015), [https://www.brennancenter.org/sites/default/files/publications/The\\_New\\_Politics\\_of\\_Judicial\\_Elections\\_2013\\_2014.pdf](https://www.brennancenter.org/sites/default/files/publications/The_New_Politics_of_Judicial_Elections_2013_2014.pdf) (explaining that national groups are playing an increasing role in state judicial elections).

does not involve supporting a political candidate but that draws a larger proportion of out-of-state money than any other election: ballot measures.<sup>360</sup> One-third of all the funds raised either to support or oppose statewide ballot measures conducted between 2010 and 2015 came from out of state.<sup>361</sup>

The literature has only recently started paying attention to the usual geography of our campaign finance nationalism.<sup>362</sup> Professor Briffault, in demonstrating how contributions from nonresidents have become increasingly significant in American politics, argues that the growth of outside contributors “reflects and reinforces the growing nationalization and partisan and ideological polarization of our elections at the federal, state, and local levels.”<sup>363</sup> He and other commentators have criticized our campaign finance nationalism, lamenting a state of affairs that allows campaign contributions to flow across district and state lines. But not all scholars find themselves in this camp. Others have supported this system and even defended it, or at least aspects of it.<sup>364</sup> Many scholars have undertaken efforts to understand the effects of nonresident spending and the justifications for it. For instance, Professor Johnstone defends the political community principle in *Bluman* as an important exception to the universal speaker-neutrality rationale advanced by *Citizens United*. Johnstone accepts that contributions may come from outside electoral districts but not from foreigners.<sup>365</sup>

Most scholars acknowledge that our campaign finance system creates a new constituency for politicians, one separate from the voters they represent.<sup>366</sup> The problem with this new constituency is the effect it has on poli-

360. Roberts, *supra* note 350, at 150.

361. *Id.*

362. See Fontana, *supra* note 3, at 104 (explaining how, “[f]or those few scholars paying attention to the geography of campaign finance law, the details of where campaign finance contributions come from and where they go are largely ignored”). Fontana further elaborates: “By and large, the intellectual oxygen related to campaign finance law has been occupied by those focusing on the constitutional dimensions of the power that the wealthy enjoy to shape federal elections. The geography of campaign finance law is a conceptually different and prior problem.” *Id.* at 104–05.

363. Briffault, *supra* note 9, at 42.

364. See Pettys, *supra* note 225, at 87–88 (arguing that geographically mobile voters “have an incentive to try to ensure that they will be comfortable with the prevailing regulatory regime no matter where they ultimately reside”); Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1082 (2014) (arguing that allowing one state’s citizen to engage in another’s politics strengthens federalism by allowing states to serve as a counterweight to the federal government); Wallace, *supra* note 237, at 625–27 (maintaining that allowing non-resident contributions preserves federalism and strengthens the First Amendment).

365. Johnstone, *supra* note 231, at 120.

366. Briffault, *supra* note 9, at 43 (explaining how, “[f]or better or worse, outside donors have

cymaking. When a lawmaker receives a large portion of his war chest from outside of his district, it serves to shift that lawmaker's policies so that they align closer to the wishes of his donors. Over time, our campaign finance nationalism moves the policy positions of our legislators away from their median constituents to align more with their median contributors.<sup>367</sup> The wealthy political donors and spenders who influence our elections are not at all representative of the American voting population.<sup>368</sup> These donors tend to be significantly more conservative on economic issues, in their views on social welfare spending, and on issues like affirmative action.<sup>369</sup>

Given the dissimilarities in the demographics of constituents and contributors, the resulting misalignment in policy is not surprising. This alignment problem has been documented by many scholars, and it is a significant consequence of the current system.<sup>370</sup> Our campaign finance system leads to a situation where a politician has two masters, the voter and the donor; and one master possesses different policy preferences from the other. Yet donors tend to have more influence on legislative decision-making because most politicians cannot keep their jobs without them. Candidates rely on wealthy donors to back their electoral campaigns. Once elected, these candidates have no choice but to please the donors who supported them. The alternative is that they will not have enough money to run for re-election.<sup>371</sup>

To battle the effects of outside money, a very weak form of campaign finance federalism has developed in the states. It consists of the different state contribution limits that the states impose on various kinds of donors who participate in their state elections—individuals, parties, PACs, corporations, and unions. The states apply these contribution limits regardless of

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become a new constituency, albeit one quite different from the usual meaning of the term”).

367. Another consequence of our campaign finance nationalism is that this system undermines the federalism of the states and their traditional role as laboratories of democratic experimentation. See Roberts, *supra* note 350, at 159–60. This happens when wealthy donors increasingly contribute and spend across state lines to pursue a national approach for solving local issues. *Id.* at 164.

368. See Mazo & Kuhner, *supra* note 101, at 6–7.

369. *Id.*

370. See Nicholas Stephanopoulos, *Aligning Campaign Finance Law*, in DEMOCRACY BY THE PEOPLE: REFORMING CAMPAIGN FINANCE IN AMERICA 78–80 (Eugene D. Mazo & Timothy K. Kuhner eds., 2018); see also LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPT CONGRESS—AND A PLAN TO STOP IT 15–20 (2011) (introducing the concept of “dependence corruption” and explaining how Congress becomes drawn to the interests of donors rather than focusing “on the people alone”); see generally Nicholas O. Stephanopoulos, *Aligning Campaign Finance Law*, 101 VA. L. REV. 1425 (2015).

371. See Mazo & Kuhner, *supra* note 101, at 7.

whether the donor is located within the state or outside of it. The tables in the Appendix summarize these contribution limits for all 50 states. For instance, only 11 states allow unlimited contributions to be made to candidates who run in their gubernatorial races. In addition, 22 states ban corporations from making direct contributions to any state candidate, and another 18 states ban unions from doing so as well (see Appendix, Table 3).

Though these contribution limits differ from state to state, this form of campaign finance federalism is “weak” because it cannot prevent out-of-state individuals or entities from contributing to state candidates. Nor can it prevent these candidates from soliciting campaign contributions from outside of their districts. In short, because the state contribution limits apply equally to all donors across the country, they prevent the states from developing truly unique political communities that are supported only by their citizens. A state’s unique contribution limit will also be ripe for challenge when it is made too low, although some low limits have been upheld.<sup>372</sup> And all state expenditure limits will be held unconstitutional.

## V. THE DEATH OF CAMPAIGN FINANCE NATIONALISM

### A. *Foreign Participation in American Elections*

This Article has argued thus far that our political system is characterized by its “campaign finance nationalism.” We have used this term to draw a picture of a political system in which the funding of campaigns at the federal, state, and local level is national in scope, despite the fact that voting is not. Everyone is free to donate to a candidate across state lines, although only a resident of the candidate’s district can cast a vote for him. One consequence of our campaign finance nationalism is that state governments are unable to prevent out-of-state contributors from influencing their local politics. Another is that our politicians, regardless of the level of government at which they serve, are forced to fundraise all over the country. The more ex-

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372. See, e.g., *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377 (2000) (upholding a \$1,075 Missouri state limit on contributions to state candidates made by political action committees). *But see* *Randall v. Sorrell*, 548 U.S. 230 (2006) (striking down a \$400 Vermont state limit that restricts what politics parties could give to all statewide candidates as too low); see also Anthony J. Gaughan, *The Futility of Contributions Limits in the Age of Super PACs*, 60 *DRAKE L. REV.* 755, 764–65 (2012) (noting the relatively low limits many states set for both in-state and out-of-state contributions).

pensive the campaign, the wider one's fundraising net must be cast.

At the same time, given the mandate of Section 441e and the decision in *Bluman*, our political funding system was designed to prevent "campaign finance internationalism" from taking root. The American campaign finance system, in other words, was not designed to be global. American citizens, permanent residents, and domestic corporations and unions can all participate in the system; foreign nationals cannot. But to what extent does our campaign finance system preserve its nationalism successfully?

Throughout the history of the United States, foreign actors have consistently tried to influence American elections. One way they have done this by assisting American political candidates. Foreigners wish to give money to candidates in the hope of swaying their decision-making once they become officeholders, in the same way domestic contributors do. Though our current campaign finance system is designed to prevent foreign interference, it often works poorly at doing so. Russia's electoral interference during the presidential election of 2016 is one example, but it is not the only one. Richard Nixon's \$10 million in foreign contributions during the 1972 presidential race—which served in part as the impetus for the ban on foreign contributions and expenditures found in Section 441e—is another example.

In the 1990s, foreign governments tried to influence U.S. policy by giving money to political parties instead of candidates. In 1996, large contributions by foreign nationals with ties to Asia flowed to the Democratic National Committee (DNC), causing a scandal and prompting the Senate Committee on Governmental Affairs to conduct an investigation. As a result of this, Congress banned soft money contributions in federal elections when it amended Section 441e at the same time as it passed the Bipartisan Campaign Reform Act in 2002. The law at that point forbade foreign nationals from making contributions to political parties. FEC regulations then barred foreign nationals from influencing how unions, corporations, party committees, or political committees participate in American campaigns.<sup>373</sup>

At that point, the only way foreign money could make its way into domestic campaigns was through the U.S.-based subsidiaries of foreign corporations. This exception existed because the FEC had controversially interpreted Section 441e to allow U.S.-based subsidiaries to make contributions to candidates through political action committees.<sup>374</sup> Despite the fact that

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373. See 11 C.F.R. § 110.20 (2004).

374. See Powell, *supra* note 149, at 964.

the subsidiary was foreign-controlled, it was not considered a “foreign national” as long as it was incorporated and had its principle place of business in the United States.<sup>375</sup> There were important restrictions imposed by the FEC on PAC contributions made by these subsidiaries. Foreign nationals could not participate in the activities of the subsidiary’s PAC.<sup>376</sup> Any foreign national who sat on the subsidiary’s board had to abstain from voting on any issues related to its PAC.<sup>377</sup> The subsidiary also had to produce real income in the United States to fund its PAC.<sup>378</sup> And foreign nationals could not contribute any of their own money to the subsidiary’s PAC.<sup>379</sup>

Despite these restrictions, the amount of contributions made to candidates by PACs belonging to the U.S. subsidiaries of foreign corporations began increasing. This increase in contributions continues today. In 2018, a record 238 PACs belonging to the U.S. subsidiaries of foreign corporations supported political candidates across the United States,<sup>380</sup> contributing more than \$23.5 million to American electoral campaigns in total.<sup>381</sup> That is more than such PACs had ever contributed in prior years. These PAC contributions are not the only threat, however, to our campaign finance nationalism. After *Citizens United* was decided, another threat became the ability of these U.S.-based subsidiaries to make unlimited independent expenditures. This was the issue that Justice Stevens repeatedly raised in his dissent.<sup>382</sup>

Soon after *Citizens United* struck down the ban prohibiting corporations from making independent expenditures to influence elections, a case decided by the U.S. Court of Appeals for the D.C. Circuit, *Speechnow.org v. FEC*,<sup>383</sup>

375. See FEC Advisory Op. 1992-16 (June 26, 1992), <https://www.fec.gov/files/legal/aos/1992-16/1992-16.pdf>. See also 22 U.S.C. §611(b).

376. See Powell, *supra* note 149, at 965.

377. *Id.* at 965–66; see also FEC Advisory Op. 1995-15 (June 30, 1995), <https://www.fec.gov/files/legal/aos/1995-15/1995-15.pdf>.

378. See FEC Advisory Op. 1995-15 (June 30, 1995), <https://www.fec.gov/files/legal/aos/1995-15/1995-15.pdf>.

379. Powell, *supra* note 149, at 965; see also FEC Advisory Op. 1989-20 (October 27, 1989), <https://www.fec.gov/files/legal/aos/1989-20/1989-20.p>

380. *Foreign-Connected PACs: Election Cycle 2018*, CTR. FOR RESPONSIVE POL., <https://www.opensecrets.org/pacs/foreign.php> (last visited May 27, 2019).

381. *Id.*

382. See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 465 (2010) (Stevens J., dissenting) (warning that “[u]nlike voters in U.S. elections, corporations may be foreign controlled”); *id.* at 405 n.12 (disputing the majority’s view that corporations have the same rights to the First Amendment as individuals and that “domestic corporations have a claim better than foreign corporations”).

383. 599 F.3d 686, 694–95 (D.C. Cir. 2010).

held that it was unconstitutional to apply contribution limits to PACs that made only independent expenditures.<sup>384</sup> Overnight, the phenomenon of the Super PAC was born.<sup>385</sup> Super PACs are committees that spend money on elections but not do contribute to candidates. Since they do not, technically, make contributions, there is no one for them to “corrupt.” As such, Super PACs are able to raise unlimited sums, regardless of whether it is given to them by individuals or corporations, and to spend unlimited sums.

*Citizens United* and *Speechnow.org* together provided an avenue for the U.S. subsidiaries of foreign corporations to contribute millions of dollars to Super PACs and 501(c)(4) organizations. 501(c)(4) organizations are social welfare organizations that are regulated by the IRS, not the FEC. As mentioned earlier, a 501(c)(4) does not have to disclose its donors. After *Citizens United*, the political activities of a U.S. subsidiary of a foreign corporation, like the political activities of any other U.S.-based corporation, were no longer restricted to making contributions to candidates through PACs. Now the same subsidiary was also free to spend its money on advertisements purchased through its own independent expenditures, as well as to contribute to outside spending groups like Super PACs and 501(c)(4) organizations. In recent years, many subsidiaries have started playing this game.<sup>386</sup>

Technically, foreign nationals are not allowed to direct these payments. But it is also the case that foreign companies have a great deal of influence over their U.S. subsidiaries, even if that influence is indirect. Those who run the U.S. subsidiary are naturally very sensitive to the wishes and desires of their foreign overseers. For years, the FEC has been at odds over how to regulate the political activities of these subsidiaries. Meanwhile, dozens of these subsidiaries have recently been giving to outside spending groups to influence U.S. elections. For instance, in 2017, British American Tobacco, based in the United Kingdom, acquired Reynolds American, Inc. Shortly thereafter, Reynolds American ramped up its political giving, contributing

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384. *Id.*

385. See Corey R. Sparks, *Foreigners United: Foreign Influence in American Elections After Citizens United v. Federal Elections Commission*, 62 CLEV. ST. L. REV. 245, 250 (2014).

386. See *CLC Complaint Leads to Record Fines for Foreign Interference in Presidential Election*, CAMPAIGN LEGAL CTR. (Mar. 11, 2019), <https://campaignlegal.org/update/clc-complaint-leads-record-fines-foreign-interference-presidential-election>; Karl Evers-Hillstrom & Raymond Arke, *Following Citizens United, foreign-owned corporations funnel millions into US elections*, CTR. FOR RESPONSIVE POL. (Mar. 22, 2019), <https://www.opensecrets.org/news/2019/03/citizens-united-foreign-owned-corporations-put-millions-in-us-elections/>.

\$1.2 million to Super PACs in 2018.<sup>387</sup> In 2018, the FEC hit Right to Rise, another Super PAC, which had supported Jed Bush in 2016, with a large fine for soliciting \$1.3 million in contributions during the presidential primaries from a U.S.-based subsidiary, American Pacific International Capital (APIC), that was owned by Chinese nationals.<sup>388</sup> APIC had also earlier contributed to a liberal Super PAC that supported Hillary Clinton.<sup>389</sup>

Complaints have been filed to get courts and the FEC to police this kind of activity, but it is not clear that the FEC's fines are effective. As Professor Michael Gilbert explains, "In exchange for a \$1.3 million contribution, the super PAC paid a \$390,000 fine. The difference—\$910,000 in illegal money—is the super PAC's to keep."<sup>390</sup> Even the time lag of FEC's enforcement action is revealing. The illegal foreign contributions to Right to Rise were given in 2015, whereas the FEC announced its fines in 2019, or four years later.<sup>391</sup> By that time, the election these illegal contributions were meant to influence was over. Because the benefit of violating the law exceeds the penalty, it encourages such violations. "The regulation of political expenditures by foreign corporations," as another scholar explains, "is the 800-pound gorilla that the Supreme Court has never confronted."<sup>392</sup>

The independent expenditures of the American subsidiaries of foreign corporations are not totally free from regulation. For instance, the subsidiary is only supposed to use money earned in the United States for its political activities,<sup>393</sup> and the foreign parent cannot replenish any of its funds.<sup>394</sup> The problem with enforcing such regulations is that often the subsidiary's donations remain undisclosed. As mentioned, making contributions to 501(c)(4) organizations, which do not have to disclose their donors, offers foreign nationals a way to hide their activities from American voters and law enforcement officials. It is impossible to know whether foreign citizens, foreign

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387. Hillstrom & Arke, *supra* note 386.

388. See Anna Massoglia & Karl Evers-Hillstrom, *Chinese-owned company that gave illegal \$1.3 million to Jeb Bush super PAC also gave to pro-Clinton groups*, CTR. FOR RESPONSIVE POL. (March 12, 2019), <https://www.opensecrets.org/news/2019/03/chinese-owned-company-gave-illegal-1-3-million-to-jeb-bush-super-pac/>.

389. *Id.*

390. See Michael D. Gilbert & Samir Sheth, *For Campaign Finance Violators, Crime Pays*, TAKE CARE BLOG (April 24, 2019), <https://takecareblog.com/blog/for-campaign-finance-violators-crime-pays> (explaining how the Right to Rise Super PAC, despite its fine, still came out ahead).

391. *Id.*

392. Vega, *supra* note 133, at 992.

393. *Id.* at 977.

394. *Id.* at 978.

corporations, or foreign governments use such dark money for secret spending in American elections. A foreign national can give money to a 501(c)(4) organization without the 501(c)(4) organization ever disclosing the contribution. In turn, the 501(c)(4) organization can give that money to a Super PAC. Finally, the Super PAC can spend the money on TV advertisements to influence what voters think of a particular candidate. If the original contribution comes from a foreign source, there is no way for the public to know. Investigations have revealed these groups accepting at least some money linked to foreign governments.<sup>395</sup> The lack of transparency makes it difficult to find out if these funds are being used to influence elections.<sup>396</sup>

Even if we manage to find a way to close the loopholes available to foreign corporations, there is still the issue of how foreign governments can be prevented from influencing American elections. The leading narrative concerning the 2016 presidential contest involved just such a scenario.<sup>397</sup> Russia's interference in the 2016 presidential election exposed cracks in the security of America's democratic infrastructure, exposing some of its most vulnerable weaknesses. Hackers working on behalf of the Russian government targeted multiple state voter registration databases and managed to gain access to the election machinery of a number of states.<sup>398</sup> In addition to

395. See, e.g., Eric Lipton, *Watchdog Group Files Complaint Over Donation to Trump Super PAC by Canadian Billionaire's Company*, N.Y. TIMES (May 21, 2019), <https://www.nytimes.com/2019/05/21/us/politics/donation-trump-super-pac-canadian.html> (documenting allegations that Barry Zekelman, the chief executive of Zekelman Industries, a Canadian company that is North America's largest steel tube manufacturer, made \$1.75 million in donations to a Super PAC supporting Donald Trump through a Chicago-based subsidiary); Jay Weaver et al., *Feds Open Foreign-Money Investigation into Trump Donor Cindy Yang*, MIAMI HERALD (May 12, 2019), <https://www.miamiherald.com/news/politics-government/article230217729.html> (describing an FBI investigation into Republican donor and South Florida massage-parlor entrepreneur Li "Cindy" Yang, who allegedly funneled money from China into Donald Trump's re-election effort).

396. See Ian Vandewalker & Lawrence Norden, *Getting Foreign Funds Out of American Elections*, BRENNAN CTR. FOR JUSTICE 15 (2018), [https://www.brennancenter.org/sites/default/files/publications/Getting%20Foreign%20Funds%20Out%20of%20America%27s%20Elections.%20Final\\_April9\\_0.pdf](https://www.brennancenter.org/sites/default/files/publications/Getting%20Foreign%20Funds%20Out%20of%20America%27s%20Elections.%20Final_April9_0.pdf).

397. See Anthony J. Gaughan, *Putin's Revenge: The Foreign Threat to American Campaign Finance Law*, 62 HOWARD L.J. (forthcoming 2019) (manuscript on file with author) (explaining the stages of Russia's influence campaign during the 2016 American presidential election).

398. Ellen Nakashima & Karoun Demirjian, *Russian Government Hackers Targeted Small County in Florida Panhandle in 2016*, WASH. POST (May 16, 2019), [https://www.washingtonpost.com/world/national-security/floridas-house-members-demand-changes-to-disclosure-rules-on-election-hacking/2019/05/16/8e039672-77f8-11e9-bd25-c989555e7766\\_story.html](https://www.washingtonpost.com/world/national-security/floridas-house-members-demand-changes-to-disclosure-rules-on-election-hacking/2019/05/16/8e039672-77f8-11e9-bd25-c989555e7766_story.html) (explaining how the voter registration database of a small county in the Florida panhandle was breached by Russian government hackers in 2016).

potentially manipulating America's democratic infrastructure, Russia's actions also revealed a new type of threat: foreign interference orchestrated by another government through targeted and misleading advertisements placed on social media platforms. The use of Facebook and other social media by Russian bots exposed cracks in our campaign finance nationalism.<sup>399</sup>

One of those cracks is that the regulatory scheme underpinning our campaign finance system does not apply to issue advocacy, meaning that foreigners are free to spend money to influence elections as long as they refrain from expressly advocating for the election or defeat of a candidate by name and do so outside the electioneering communications window. We have *Bluman* to thank for this. The court in *Bluman* specifically held that Section 441e does not bar foreign nationals from "issue advocacy—that is, speech that does not expressly advocate the election or defeat of a specific candidate."<sup>400</sup> The court emphasized how Section 441e "does not restrain foreign nationals from speaking about issues or spending money to advocate views about issues."<sup>401</sup> Instead, Section 441e "restrains them only from a certain form of expressive activity closely tied to the voting process—providing money for a candidate or political party or spending money in order to expressly advocate for or against the election of a candidate."<sup>402</sup>

This means that foreigners are free to speak about political issues in the United States—and to spend money to advocate for such issues—as long as they do not expressly urge the election or defeat of a candidate and speak outside the statutory window regulating electioneering communications. In other words, if the Russian government buys a broadcast advertisement that does not call for the election of any particular candidate, it appears that the Kremlin, using its vast wealth, would be on firm legal ground in attacking Hillary Clinton, as long as its ad runs more than 60 days before a general election or 30 days before a primary.<sup>403</sup> Benjamin Bluman, a Canadian citi-

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399. See Gaughan, *supra* note 397.

400. *Bluman v. FEC*, 800 F. Supp. 2d 281, 284 (2011). Following *Wisconsin Right to Life v. FEC*, 551 U.S. 449, 456 (2007), the *Bluman* court defined "express advocacy" as expenditures made to fund "express campaign speech" or its "functional equivalent." *Bluman*, 800 F. Supp. 2d at 284. An ad is the "functional equivalent" of express advocacy if it "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* at 285.

401. *Bluman*, 800 F. Supp. 2d at 290.

402. *Id.*

403. Fred Wertheimer, *Loopholes Allow Foreign Adversaries to Legally Interfere in U.S. Elections*, JUST SECURITY (May 28, 2019), <https://www.justsecurity.org/64324/loopholes-allow-foreign-adversaries-to-legally-interfere-in-u-s-elections/>.

zen, would also be free to print and distribute flyers in Central Park, if all these flyers did was mention the benefits of free trade, the harms of smoking, or the emotional pain of getting an abortion, all without urging that any candidate be elected. The section of *Bluman* holding that Section 441e's ban on foreign spending only applies to express advocacy has gone largely unnoticed by commentators who have written about the opinion,<sup>404</sup> even though the court clearly explained it had to read Section 441e this way because of an earlier Roberts Court decision, *Wisconsin Right to Life v. FEC*,<sup>405</sup> which had defined issue advocacy narrowly.<sup>406</sup> Unfortunately, the issue advocacy loophole promises to become the exception that swallows the rule.

Foreign money spent on issue advocacy is not even the last loophole in our campaign finance nationalism. Another is that the ban on foreign spending only applies to willful violations of the law. The *Bluman* court stated how seeking criminal penalties for violations of Section 441e, "which requires that the defendant acted 'willfully' . . . will require proof of the defendant's knowledge of the law."<sup>407</sup> As the court surmised further, there may be "many aliens in this country who no doubt are unaware of the statutory ban on foreign *expenditures*, in particular."<sup>408</sup> Most foreigners do not know the law applies to them, which may absolve them of liability.

Finally, it remains unclear whether the ban of foreign spending in American elections applies to ballot measures. This is again an issue of concern. In 2015, the FEC deadlocked in an enforcement action concerning whether the ban on foreign nationals related to ballot initiatives. In that case, a Luxembourg-based company and a domestic subsidiary contributed money to oppose a Los Angeles ballot initiative.<sup>409</sup> The FEC could not resolve the issue, and thus created another loophole that provides a legal means for foreign nationals to be able to influence American elections.

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404. See Richard Hasen, *Why Banning Russian Facebook Ads Might Be Impossible*, POLITICO (Sept. 26, 2017), <https://www.politico.com/magazine/story/2017/09/26/russian-facebook-ads-regulation-215647> (explaining how "in a part of *Bluman* that has not been much noticed, the three-judge court construed the statute barring foreign election spending to apply only to express advocacy ('Vote for Obama'), not to issue advocacy ('Tell Hillary to show us her emails')").

405. 551 U.S. 449 (2007).

406. *Bluman v. FEC*, 800 F. Supp. 2d 281, 290 (2011) (explaining how the "district court held it had to read the statute this way thanks to another Roberts Court opinion, which held that reading the issue advocacy test broadly would violate the First Amendment").

407. *Id.* at 292.

408. *Id.*

409. See R. Sam Garrett, *Foreign Money and U.S. Campaign Finance Policy*, CONG. RES. SERV. 2 (March 25, 2019), <https://fas.org/sgp/crs/misc/IF10697.pdf>.

B. *Closing the Door to Foreign Participation*

To the extent that our system of campaign finance nationalism should continue to function as it had before, what can be done to preserve it? Scholars, citizens, and legislators have suggested three remedies that would work to prevent foreign nationals from influencing American elections. They involve overruling *Citizens United* judicially, ratifying a constitutional amendment to overrule that decision constitutionally, or having Congress pass new laws to prevent foreign spending in American elections legislatively. So far, none of these options have been implemented successfully.

Prior to the election of Donald Trump in 2016, many activists had called for *Citizens United* to be overruled. The Supreme Court has overruled cases in the past—*Citizens United* itself, in fact, overturned two prior Supreme Court decisions in the area of campaign finance law.<sup>410</sup> Certainly, the Court’s liberal justices were in favor. A number of them stated as much in their public appearances and judicial pronouncements.<sup>411</sup> Before the 2016 presidential election, several scholars also advanced the idea of overruling *Citizens United* as the best path to achieving campaign finance reform.<sup>412</sup> This movement rested on the assumption that Hillary Clinton would win the presidency; the thought was that if she could nominate a liberal Justice to replace Justice Scalia or Justice Kennedy when they retired, that Justice would provide a narrow 5–4 path for *Citizens United* to be scrapped.<sup>413</sup>

410. See *Citizens United v. FEC*, 558 U.S. 310, 365 (2010) (overruling *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), a case that allowed the government to prohibit the independent expenditures of corporations, and parts of *McConnell v. FEC*, 540 U.S. 93 (2003), a case that had upheld Section 203 of the Bipartisan Campaign Reform Act, which prevented corporations from using their general treasury funds to finance express advocacy expenditures).

411. See *Am. Tradition P’ship, Inc. v. Bullock*, 567 U.S. 516, 518 (2012) (Breyer, J., dissenting) (“Were the matter up to me, I would vote to grant the petition for certiorari in order to reconsider *Citizens United* . . . .”); Tara Golshan, *Ruth Bader Ginsburg says her “impossible dream” is for Citizens United to be overturned*, VOX (July 11, 2016), <https://www.vox.com/2016/7/11/12148066/ruth-bader-ginsburg-citizens-united>; Adam Liptak, *Ruth Bader Ginsburg, No Fan of Donald Trump, Critiques Latest Term*, N.Y. TIMES (July 10, 2016), <https://www.nytimes.com/2016/07/11/us/politics/ruth-bader-ginsburg-no-fan-of-donald-trump-critiques-latest-term.html> (quoting Ruth Bader Ginsburg as saying, “It won’t happen. It would be an impossible dream. But I’d love to see *Citizens United* overruled.”).

412. See Richard L. Hasen, *Three Wrong Progressive Approaches (and One Right One) to Campaign Finance Reform*, 8 HARV. L. & POL’Y REV. 21, 35 (2014) (explaining how the key to campaign finance reform “is to lay the groundwork for the Supreme Court to reserve *Citizens United*”).

413. See *id.* (explaining how “[t]here will come a time in the not too distance future when Justice Scalia and Justice Kennedy will leave the Court, and if a democratic president appoints their successors, the Court’s campaign finance jurisprudence could turn back 180 degrees . . . .”).

But Hillary Clinton lost the presidency—in part, ironically enough, because of foreign interference.<sup>414</sup> After her defeat, Donald Trump nominated Judge Neil Gorsuch of the U.S. Court of Appeals for the Tenth Circuit to fill Justice Scalia’s old seat after Scalia’s death; he then nominated Judge Brett Kavanaugh of the U.S. Court of Appeal for the D.C. Circuit to replace the retiring Justice Kennedy. Judge Kavanaugh’s confirmation returned the Supreme Court to its former conservative majority and ensured that the path to overturning *Citizens United* would be closed for the foreseeable future.<sup>415</sup> Since Judge Kavanaugh was the author of the opinion in *Bluman*, his confirmation to the Supreme Court also solidified *Bluman*’s reasoning for barring foreign nationals from participating in American elections.

Activists had no choice but to pivot to another strategy, and some sought to amend the Constitution. There is precedent for using the amendment process to overturn unpopular Supreme Court rulings. In total, the Constitution has been amended 27 times. The first ten of these amendments comprise the Bill of Rights. Of the seventeen amendments that were ratified after the Bill of Rights, seven were passed to overturn specific Supreme Court decisions.<sup>416</sup> A dozen distinct amendment bills circulated through Congress as the movement overturn *Citizens United* began gathering steam.<sup>417</sup> After extensive collaboration between the House and Senate sponsors of these bills and input from grassroots advocacy organizations such as Public Citizen, People for the American Way, Free Speech For People, and Common Cause, the backers of an amendment in Congress coalesced around a consensus text known as the Democracy For All Amendment (DFAA). It has been introduced in Congress several times, most recently in 2019.<sup>418</sup>

The text of the DFAA consists of three sections. Section 1 is designed to ensure democratic self-government by allowing Congress and the States to “regulate and set reasonable limits on the raising and spending of money

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414. See HILLARY RODHAM CLINTON, WHAT HAPPENED 221–24 (2017).

415. See Mazo & Kuhner, *supra* note 101, at 12.

416. See Ronald A. Fein, *Fixing the Supreme Court’s Mistake: The Case for the Twenty-Eighth Amendment*, in DEMOCRACY BY THE PEOPLE: REFORMING CAMPAIGN FINANCE IN AMERICA 385 (Eugene D. Mazo & Timothy K. Kuhner eds., 2018).

417. *Id.* at 386.

418. See H.R.J. RES. 2, 116th Cong. (2019), <https://www.congress.gov/bill/116th-congress/house-joint-resolution/2/text>. In the 116th Congress, the text of the DCAA was jointly sponsored by lawmakers across the political aisle, including Representatives Ted Deutsch (D-FL), Jim McGovern (D-MA), Jamie Raskin (D-MD), and John Katko (R-NY), as well as Senators Tom Udall (D-NM) and Michael Bennett (D-CO).

by candidates and others to influence elections.”<sup>419</sup> This provision is specifically aimed at dislodging the regulation of campaign finance from the First Amendment protections that it currently enjoys. Section 2 of the DFAA gives Congress and the states the power to enforce the amendment “by appropriate legislation,” and also the power “to distinguish between natural persons and corporations or other artificial entities created by law, including by prohibiting such entities from spending money to influence elections.”<sup>420</sup> The language of Section 2 is particularly important for closing the loopholes that allow foreign spending by the U.S. subsidiaries of foreign corporations. Finally, Section 3 consists of a savings clause that provides that nothing in the amendment “shall be construed to abridge the freedom of the press.”<sup>421</sup> As Ron Fein and other advocates of the DFAA have explained, the amendment’s provisions aim to overturn key tenets not only of *Citizens United*, but also of *Buckley*.<sup>422</sup>

The DFAA is one among many vehicles for accomplishing this goal that has been proposed in Congress. For example, the We the People Amendment, put forth by the group Move to Amend (MTA), proposes slightly different amendment language.<sup>423</sup> Other language has also been introduced to circumvent *Citizens United*. Indeed, thirteen different campaign finance-related amendment bills were introduced in the 114th Congress (2014-2016), eleven in the 115th Congress (2016-2018), and, as of this writing, six in the 116th Congress (2018-2020).<sup>424</sup> Most of these bills are not targeted at foreign nationals and do not seek to preserve our campaign finance nationalism specifically. Rather, they aim to allow the government to set limits on contributions and expenditures, and especially to restrict corporate expenditures. Banning corporate expenditures would close the loophole that currently allows foreign corporations to influence American elections.

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419. Section 1 of the DFAA says: “To advance democratic self-government and political equality, and to protect the integrity of government and the electoral process, Congress and the States may regulate and set reasonable limits on the raising and spending of money by candidates and others to influence elections.” See H.R.J. RES. 2 § 1.

420. H.R.J. RES. 2 § 2. Section 2 of the DFAA says: “Congress and the States shall have power to implement and enforce this article by appropriate legislation, and may distinguish between natural persons and corporations or other artificial entities created by law, including by prohibiting such entities from spending money to influence elections.” *Id.*

421. H.R.J. RES. 2 § 3.

422. See Fein, *supra* note 416, at 384–88.

423. See H.R.J. Res. 48, 115th Congress (2017), <https://www.congress.gov/bill/115th-congress/house-joint-resolution/48?r=6>.

424. See *Constitutional Amendments, UNITED FOR THE PEOPLE*, <http://united4thepeople.org/amendments/> (last visited June 1, 2019).

Ratifying a constitutional amendment is a difficult endeavor. The Constitution provides two avenues for amendment. The first requires the affirmation of two-thirds of each house of Congress (290 votes of the 435-member House and 67 votes of the 100-member Senate), followed by ratification of three-fourths of the states (38 states).<sup>425</sup> The second method, which has never been used, requires a constitutional convention to be convened after two-thirds of the state legislatures (34 in total) call for it. This convention can propose an amendment, which then must be ratified by three-fourths of the states, as with the first method.<sup>426</sup> Most reformers today are not looking to begin with Congress, but, as Ronald Fein explains, to take a “bottom-up, state-by-state, grassroots-orientated approach,” one that starts at the state level.<sup>427</sup> Amendment activists believe in putting pressure on state legislatures to act first, in order to put pressure on Congress later.

Regardless of which amendment strategy is pursued, it would at best amount to an indirect method of regulating foreign nationals. Indeed, a constitutional amendment, even if it were to ban corporations from spending money to influence American elections, would not close other loopholes in the system. The issue advocacy loophole, for example, would remain. For this reason, as well as because an amendment is difficult to ratify, members of Congress have tried to address the problems posed by foreigner nationals in our campaign finance system in other ways as well. One of these is by introducing ordinary legislation directly aimed at foreign activity.

Back in 2010, the House of Representatives introduced the DISCLOSE Act.<sup>428</sup> It sought to prohibit foreign interference in American elections by extending the ban on contributions and expenditures currently in place for foreign nationals to the U.S. subsidiaries of foreign corporations.<sup>429</sup> The DISCLOSE Act would have required the highest ranking official of a U.S. subsidiary, before making a contribution, independent expenditure, or disbursement for an electioneering communication, to file a certificate with the FEC affirming that the subsidiary was not carrying out prohibited activity.<sup>430</sup>

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425. U.S. CONST. art. V.

426. *Id.*

427. See Fein, *supra* note 416, at 395–96; see also Sparks, *supra* note 385, at 264.

428. Democracy is Strengthened by Casting Light on Spending in Elections (DISCLOSE) Act, H.R. Res. 5175, 111th Cong. (2010), <https://www.congress.gov/bill/111th-congress/house-bill/5175t>.

429. H.R. Res. 5175 § 102.

430. H.R. Res. 5175 § 102(b).

The act would also have made these U.S. subsidiaries ineligible to contribute to campaigns through PACs or to make independent expenditures if more than 5% of their voting shares were controlled by a foreign government, a foreign government official, a corporation owned by a foreign government or foreign officials, or by multiple foreign citizens.<sup>431</sup>

The DISCLOSE Act passed through the House in June 2010, but it failed in the Senate.<sup>432</sup> Two years later, in 2012, it was briefly revived, this time by several Senators, as the DISCLOSE Act of 2012, or what some commentators affectionately called the “DISCLOSE Act 2.0.”<sup>433</sup> This time the bill did not seek to regulate the activities of foreign nationals directly, but instead aimed to deter corporate spending on electioneering. However, Republicans opposed the new measure, arguing that the proposals violated the First Amendment. Subsequent efforts in Congress have been made to introduce similar legislation. In 2018, Democrats introduced the DISCLOSE Act of 2018, a bill co-sponsored by 173 members of the House. It sought to apply the ban on contributions and expenditures to domestic corporations that are foreign-controlled, foreign-influenced, or foreign-owned.<sup>434</sup> Even more recently, after winning a majority of the House in the mid-term election of 2018, Democrats introduced a sweeping reform bill called For the People Act of 2019, more commonly known as H.R. 1.<sup>435</sup> This bill targeted foreign activity in American elections by prohibiting foreign nationals from directing, controlling, or participating in the decision-making process of any corporation, labor union, political committee, or political organization with regard to election activity.<sup>436</sup> The bill would also require the FEC to conduct an audit after each election to determine the influence of illicit foreign activity that took place,<sup>437</sup> prohibit foreign nationals

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431. H.R. Res. 5175 § 102(a)(3).

432. The vote in the House of Representatives in favor of the bill was 219–206. However, the Senate failed to achieve cloture and the bill failed there. See S. 3628, 111th Cong. (2010); see also Vega, *supra* note 133, at 908 n.179; Sparks, *supra* note 385, at 260.

433. See S. 3369, 112th Cong. (2012), <https://www.congress.gov/bill/112th-congress/senate-bill/3369>; see also Sparks, *supra* note 385, at 260 (describing how this legislation “was revived in 2012 as the so-called “DISCLOSE Act 2.0”).

434. See H.R. 6239, 115th Cong. §101 (2018), <https://www.congress.gov/bill/115th-congress/house-bill/6239/text>.

435. H.R. 1, 116th Cong. (2019), <https://www.congress.gov/bill/116th-congress/house-bill/1/text#toc-H5BBCCF14A5164742BC545908842F26B7>

436. H.R. 1 § 4101(a)(3).

437. H.R. 1 § 4103.

from making contributions to influence the outcome of ballot initiatives and referenda,<sup>438</sup> and prohibit foreign nationals from making contributions, expenditures, independent expenditures, or disbursements for electioneering communications for online advertising.<sup>439</sup>

Other ideas have been proposed as well. For instance, the so-called Honest Ad Act, introduced in the Senate, would regulate online political advertisements that Americans encounter on platforms like Facebook and Google.<sup>440</sup> The Honest Ads Act is designed to improve the disclosure requirements for such online advertisements by amending the Bipartisan Campaign Reform Act's definition of an electioneering communication to cover paid Internet and digital advertisements. The Honest Ads Act would require digital platforms with at least 50 million monthly viewers to maintain a public file of all electioneering communications purchased by a person or group that spends more than \$500 on ads published on such platforms, and it would require these persons and groups to disclose who paid for these ads.<sup>441</sup> The act would also require online platforms to make a concerted effort to ensure that foreign nationals are not using their technology to purchase political advertisements meant to influence the American electorate.<sup>442</sup>

In a similar vein, the PAID Ads Act, introduced in April 2019, would add political advertising to the list of prohibited activities for foreign nationals,<sup>443</sup> regulating paid internet or digital communications that refer to a clearly identified candidate for office and are disseminated within 60 days of a general federal election or within 30 days of a primary in the same way as electioneering communications.<sup>444</sup> The PAID Ads Act would also prohibit foreign nationals from buying broadcast or internet ads that promote, attack, support or oppose a candidate, regardless of whether the ads engage in express advocacy.<sup>445</sup> Finally, PAID Ads Act would prohibit spending by foreign governments for broadcast and internet ads that discuss national legislative issues of public importance during a federal election year, even if those

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438. H.R. 1 § 4104.

439. H.R. 1 § 4105.

440. See S. 1989, 115th Cong. (2017), <https://www.congress.gov/bill/115th-congress/senate-bill/1989/actions>.

441. S. 1989 8(a).

442. *Id.*

443. See Preventing Adversaries Internationally from Disbursing Advertising Dollars (PAID Ads) Act, H.R. 2135, 116th Cong., §2 (2019), <https://www.govtrack.us/congress/bills/116/hr2135/text>.

444. H.R. 2135 § 4(a)(2)(F).

445. H.R. 2135 § 4(a)(2)(H).

ads do not mention the specific name of a candidate. The legislation is designed to prohibit the types of ads run by Russia in the 2016 election.

Other proposed legislation seeks to amend FECA to require additional verification for online credit card contributions, to prohibit U.S. companies with a certain percentage of foreign ownership from making independent expenditures or campaign contributions to candidates through PACs, to require tax-exempt organizations to certify that they do not accept or use foreign funds in regard to U.S. elections, and to prohibit foreign nationals from making contributions or expenditures in state and local ballot initiatives and referenda.<sup>446</sup> The problem with all of this proposed legislation, much like that which has already been introduced in Congress, is that our political parties do not agree on it. The Democratic majority in the House of Representatives favors most of these initiatives, while the Republican-led Senate does not. Thus, our campaign finance nationalism continues, albeit with the porous holes that grant foreign actors some entry into the system. The Supreme Court, meanwhile, has avoided wading into these waters.

## VI. CONCLUSION

Does our campaign finance nationalism make sense? This remains an open question, and scholars have been divided in answering it. Justice John Paul Stevens, before his death, had opposed the idea that people and entities should be able to influence a particular candidate's election even though they could not vote for him. In a 2014 book, Stevens explained how "it is unwise to allow persons who are not qualified to vote—whether they be corporations or nonresident individuals—to have a potentially greater power to affect the outcome of elections than eligible voters have."<sup>447</sup> In a system of campaign finance nationalism, corporations and nonresidents are given that power, and the evidence suggests that they wield it with increasing frequency and effectiveness. Whether they deserve that power, however, depends on one's theory of representation in a federal system.<sup>448</sup>

Scholars like Todd Pettys and Jessica Bulman-Pozen celebrate the fact that our campaign finance system allows political engagement across state

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446. See Garrett, *supra* note 409, at 2.

447. JOHN PAUL STEVENS, *SIX AMENDMENTS: HOW AND WHY WE SHOULD CHANGE THE CONSTITUTION* 59 (2014).

448. See Pettys, *supra* note 225, at 81.

lines.<sup>449</sup> These scholars view cross-border political activity as complimentary to American federalism.<sup>450</sup> They argue that our campaign finance system brings a national agenda to local contests and suits a mobile electorate.<sup>451</sup> For them, there is no tension between voting rights federalism and campaign finance nationalism. The speaker-neutrality mandate of *Citizens United* easily co-exists with the decision in *Bluman* because foreigners fall into a different category, as people who do not warrant the protections of the First Amendment. Most Americans probably subscribe to this view too, without really thinking about it. Most Americans do not question why our politicians are allowed to seek their campaign contributions from nonresident donors, just as they do not question that most serious candidates for national office are supported by a Super PAC. Most Americans view our campaign finance nationalism as an integral part of our federal system.

Other scholars subscribe to a different theory of representation and disapprove of this state of affairs. Those who fall into this camp do not believe that our campaign finance nationalism works to advance the ideals of democratic self-government.<sup>452</sup> The First Amendment's guarantees of free speech and freedom of association, this latter group of scholars believe, are not the only ideals that should be advanced by our campaign finance system. When courts consider whether campaign finance laws are constitutional, they should consider the ideal of self-government, as fought for by the Framers, as an equally important value in need of protection.<sup>453</sup> And just as the principle of democratic self-government can be used to restrict campaign contributions from foreigners, for many of these scholars it should also be used to restrict the contributions of nonresident Americans.<sup>454</sup>

*Bluman*, of course, found resident and nonresident Americans to be members of the same political community. But whether they are part of the same political community or not depends on one's theory of representation in a federal system. For some, voting and influencing the vote that another individual may cast somewhere else are not separate enough activities that

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449. See Bulman-Pozen, *supra* note 364, at 1135.

450. See Pettys, *supra* note 225, at 86.

451. See Todd E. Pettys, *The Mobility Paradox*, 92 GEO. L.J. 481 502–03 (2004) (arguing that mobile Americans have an incentive to seek similar legislative policies regardless of where they live).

452. Briffault, *supra* note 9, at 68.

453. See Hellman, *supra* note 15, at 59–60, 66–77.

454. *Id.* at 67.

they should be governed differently. They are not separate enough that the first activity should be restricted to a state's residents, while the second activity should not be. Before his death, Justice Stevens argued that our campaign finance nationalism leads to "picking other people's congressmen, not your own."<sup>455</sup> Evidently, the system does not make sense to everyone. And to the chagrin of many, the Court has been reluctant to enter these waters. But the day may come when another foreign government decides to exploit our system, and the Court will then have no choice but to intervene.

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455. *Id.* at 78; Jeffrey Toobin, *I Told You So*, NEW YORKER (Apr. 24, 2014), <https://www.newyorker.com/magazine/2014/04/28/i-told-you-so-4>.

APPENDIX

The following tables present data on the contribution limits imposed by the states for individuals, political parties, political actions committees, corporations, and unions that wish to donate to state candidates. This data can be found in *State Data on Contributions to Candidates: 2017–2018 Election Cycle*, NAT'L CONFERENCE OF STATE LEGISLATURES (June 27, 2017), [http://www.ncsl.org/Portals/1/Documents/Elections/Contribution\\_Limits\\_to\\_Candidates\\_2017-2018\\_16465.pdf](http://www.ncsl.org/Portals/1/Documents/Elections/Contribution_Limits_to_Candidates_2017-2018_16465.pdf). The contribution limits provided are those imposed for a state's general election, not primary election. The highest contribution limit is provided for each category. In some states, for instance, various kinds of PACs have different contribution limits, but these differences do not appear in this data. In addition, this data does not consider triggers that may affect the baseline limits or take into account limits imposed by voluntary restrictions, such as when a state candidate agrees to abide by contribution limits before he can accept public funding.



KS	\$2,000	\$1,000	\$500	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited	\$2,000	\$1,000	\$500
KY	\$3,000	\$3,000	\$3,000	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited	\$3,000	\$3,000	\$3,000
LA	\$5,000	\$2,500	\$2,500	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited	\$10,000	\$5,000	\$5,000
ME	\$1,600	\$400	\$400	\$1,600	\$400	\$400	\$400	\$400	\$1,600	\$400	\$400
MD	\$6,000	\$6,000	\$6,000	\$6,000	\$6,000	\$6,000	\$6,000	\$6,000	\$6,000	\$6,000	\$6,000
MA	\$1,000	\$1,000	\$1,000	\$3,000	\$3,000	\$3,000	\$3,000	\$3,000	\$500	\$500	\$500
MI	\$6,800	\$2,000	\$1,000	\$136,000	\$20,000	\$10,000	\$10,000	\$10,000	\$68,000	\$20,000	\$10,000
MN	\$4,000	\$1,000	\$1,000	\$40,000	\$10,000	\$10,000	\$10,000	\$10,000	\$4,000	\$1,000	\$1,000
MS	Unlimited										
MO	\$2,600	\$2,600	\$2,600	\$2,600	\$2,600	\$2,600	\$2,600	\$2,600	\$2,600	\$2,600	\$2,600
MT	\$1,990	\$530	\$330	\$23,850	\$1,400	\$850	\$850	\$850	\$10,610	\$800	\$400
NE	Unlimited										
NV	\$5,000	\$5,000	\$5,000	\$5,000	\$5,000	\$5,000	\$5,000	\$5,000	\$5,000	\$5,000	\$5,000
NH	\$1,000	\$1,000	\$1,000	\$1,000	\$1,000	\$1,000	\$1,000	\$1,000	\$1,000	\$1,000	\$1,000
NJ	\$3,800	\$3,000	\$3,000	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited	\$9,300	\$9,300	\$9,300
NM	\$5,500	\$2,500	\$2,500	\$5,500	\$5,500	\$5,500	\$5,500	\$5,500	\$5,500	\$5,500	\$5,500
NY	\$44,000	\$11,000	\$4,400	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited	\$44,000	\$11,000	\$4,400
NC	\$5,200	\$5,200	\$5,200	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited	\$5,200	\$5,200	\$5,200



TABLE 3: STATE CONTRIBUTION LIMITS FOR CORPORATIONS & UNIONS						
State	Corporation			Union		
	Governor	Senate	House	Governor	Senate	House
AL	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited
AK	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited
AZ	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited
AR	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited
CA	\$29,000	\$4,400	\$4,400	\$29,000	\$4,400	\$4,400
CO	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited
CT	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited
DE	\$1,200	\$600	\$600	\$1,200	\$600	\$600
FL	\$3,000	\$1,000	\$1,000	\$3,000	\$1,000	\$1,000
GA	\$6,600	\$2,600	\$2,600	\$6,600	\$2,600	\$2,600
HI	\$6,600	\$4,000	\$2,000	\$6,600	\$4,000	\$2,000
ID	\$5,000	\$1,000	\$1,000	\$5,000	\$1,000	\$1,000
IL	\$11,100	\$11,100	\$11,100	\$11,100	\$11,100	\$11,100
IN	\$5,000	\$2,000	\$2,000	\$5,000	\$2,000	\$2,000
IA	Prohibited	Prohibited	Prohibited	Unlimited	Unlimited	Unlimited

KS	\$2,000	\$1,000	\$500	\$2,000	\$1,000	\$500
KY	Prohibited	Prohibited	Prohibited	\$3,000	\$3,000	\$3,000
LA	\$5,000	\$2,500	\$2,500	\$5,000	\$2,500	\$2,500
ME	\$1,600	\$400	\$400	\$1,600	\$400	\$400
MD	\$6,000	\$6,000	\$6,000	\$6,000	\$6,000	\$6,000
MA	Prohibited	Prohibited	Prohibited	\$500	\$500	\$500
MI	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited
MN	Prohibited	Prohibited	Prohibited	\$4,000	\$1,000	\$1,000
MS	\$1,000	\$1,000	\$1,000	Unlimited	Unlimited	Unlimited
MO	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited
MT	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited
NE	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited
NV	\$5,000	\$5,000	\$5,000	\$5,000	\$5,000	\$5,000
NH	\$1,000	\$1,000	\$1,000	Prohibited	Prohibited	Prohibited
NJ	\$3,800	\$3,000	\$3,000	\$3,800	\$3,000	\$3,000
NM	\$5,500	\$2,500	\$2,500	\$5,500	\$2,500	\$2,500
NY	\$5,000	\$5,000	\$5,000	\$44,000	\$11,000	\$4,400
NC	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited



TABLE 4: NUMBER OF STATES BY CATEGORY OF CONTRIBUTION LIMIT															
	Individual			State Party			PAC			Corporation			Union		
	Gov.	Sen.	Hou.	Gov.	Sen.	Hou.	Gov.	Sen.	Hou.	Gov.	Sen.	Hou.	Gov.	Sen.	Hou.
\$1-\$5,000	27	33	34	7	13	14	20	27	28	16	20	20	17	21	22
\$5,001-\$10,000	8	4	4	5	5	6	8	5	7	4	1	2	4	1	2
\$10,001-\$50,000	4	2	1	6	6	5	6	5	2	3	2	1	4	3	1
\$50,000+	0	0	0	9	3	2	3	1	1	0	0	0	0	0	0
Unlimited	11	11	11	23	23	23	13	12	12	5	5	5	7	7	7
Prohibited	0	0	0	0	0	0	0	0	0	22	22	22	18	18	18