Our Campaign Finance Nationalism

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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 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 police campaign finance at the border by restricting how outside money is spent to influence our elections.

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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 congressional district in the U.S. House of Representatives. On the other hand, a resident of Iowa can contribute money to either of these candidates.[1] 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.[2] The bifurcated nature of this system, in which a politician's contributors are often geographically disaggregated and distinct from his bounded constituents, has become one of the hallmarks of modern politics in the United States.[3]

The reason our system functions this way is because the law views voting and campaigning as distinct activities.[4] Indeed, each activity is governed by its own body of law.[5] For the most part, voting is governed by state law.[6] 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 CONFERENCE OF STATE 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 a person 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.[7] By contrast, the law that governs campaigning and spending money on elections is national in scope.[8] A major portion of this law involves the doctrines of free speech and freedom of association guaranteed by the First Amendment.[9] Since the First Amendment applies to every person equally, our campaign finance jurisprudence largely ignores the federalism of voting.[10] Minors under the age of eighteen, incarcerated prisoners, corporations, unions, political parties, and political action committees all cannot vote, yet they each have the ability to influence our federal, state, and local elections with their checkbooks.[11]

This bifurcation of our voting rights federalism and campaign finance nationalism dictates how elections are run in the United States. Candidates know they 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.[12] The interplay between our state laws on voting and the First Amendment's protections for campaigning provide the recipe for this state of affairs.[13] However, when a foreigner wishes to influence an election in the United States, for instance 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.[14] In other words, the same First Amendment protections that make our campaign finance system national in scope do not also extend to make it international. The reason this is so, the courts have

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.").

said, is because foreigners are not members of the same political community.[15]

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

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

2016 revealed the limits of our campaign finance nationalism and demonstrated the difficulty of policing these boundaries in practice.[21] 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.[22]

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.[23] Part III chronicles the history, structure, and contours of America's campaign finance nationalism.[24] It explores the origins of the prohibition on foreign nationals from making contributions or expenditures to influence American elections,[25] and it examines the important decision in *Bluman*,[26] which forms the linchpin of this prohibition.[27] Part IV looks at the consequences of our campaign finance nationalism.[28] It examines the efforts that a number of states have made to restrict nonresident campaign contributions and how these efforts fared in the courts.[29] It also provides statistics about how two distinct constituencies—voters and donors—have arisen to whom our politicians must answer, and it demonstrates the increasing extent to which American politicians have become beholden to nonresident donors.[30] Finally, Part V explores how our campaign finance nationalism is being exploited by foreigners.[31] The Article ends by examining the efforts now being advanced to protect our nation's campaign finance system.[32] If the Russian government's aggressive attempts to influence the 2016 presidential election taught us anything at all, it is that our campaign finance system remains exceedingly vulnerable to foreign influence.

21. *See* ELIZABETH BODINE-BARON ET AL., COUNTERING RUSSIAN SOCIAL MEDIA INFLUENCE 2 (Rand Corporation, 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.

32. *See infra* Section IV.C.

II. ELECTION LAW FEDERALISM

A. Voting, Redistricting, and Election Administration

With few exceptions, the American electoral system is defined by its federalism.[33] Federalism serves as the defining feature of three major areas of election law—voting rights, redistricting, and election administration. State law dictates how individual states will elect their state officials. State law, whether constitutional or statutory, dictates how one qualifies to run for state office.[34] State law also determines how a state's citizens qualify to vote, how qualified citizens must register to vote, and how those who are registered to vote must cast their ballots in order to make their votes count.[35] 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.[36] The states, subject to important limitations, by and large oversee their elections as they wish to choose their state and federal representatives.[37]

Not only is voting almost entirely regulated by the states, but the act of voting itself is largely viewed as a states' rights issue.[38] The Constitution provides the federal government with relatively few abilities to regulate elections.[39] For example, it grants Congress the power to "make or alter" laws

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. 1, § 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) (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").

concerning the "Times, Places, and Manner" of federal elections.[40] It also sets the qualifications that candidates must have to run for President, Vice President, the Senate, and the House[41]—and the Supreme Court has said that the states lack the power to add additional qualifications to these requirements.[42] The Constitution also provides some minimal qualifications that voters must have to cast ballots for these offices.[43] In addition, Congress has the power under the Constitution 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.[44] Despite these provisions, the states have largely pushed back on any kind of federal intrusions on voting.[45] As a result, the states regulate state and local elections in vastly different ways from one another.[46]

To be sure, there is a complex interplay at work between the federal government and the states when it comes to regulating elections.[47] There is also an equally complex relationship present between the states and their local governments.[48] In practice, the states delegate much of the power to implement key election-related decisions to the organs of local government.[49] For

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. U.S. CONST. art. I, § 2, cl. 4 (qualifications to vote for the House); U.S. CONST. amend. XVII, § 1 (qualifications to vote for the Senate).

44. There are four important federal statutes that govern voting across the states. These 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).

45. *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" to describe states which use their position within the system of American federalism to challenge the federal government's authority).

46. *See* Weinstein-Tull, *supra* note39, at 754 (explaining how a "great variety exists in how elections are administered" across the nation, not only among states "but also within states").

47. *See id.*

48. *See id.*

49. *See* Justin Weinstein-Tull, *Abdication and Federalism*, 117 COLUM. L. REV. 839, 841 (2017) (explaining how states delegate many of their responsibilities to local governments).

example, the states vest considerable authority in their counties and local governments to carry out basic tasks like registering voters and counting ballots.[50] 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.[51] They also study the power struggles that ensue between these various levels of government.[52] A vast body of literature addresses the myriad issues implicated by these interweaving relationships.[53]

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.[54] When they draw both congressional and state electoral districts, the states function relatively independently from outside interference.[55] There are few federal constitutional requirements to which the states must adhere in redistricting.[56] One of these 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.[57] These electoral districts also cannot be racially gerrymandered, and they must comply with the requirements of the Voting Rights Act, or the parts of it that remain in force.[58]

All other decisions concerning redistricting, however, are left to the

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

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

52. *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.").

53. *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").

54. *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).

55. *Id*.

56. According to Justin Levitt and Michael P. 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.

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

58. *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); s*ee also* Stephanopoulos, *supra* note54, at 772 (stating that "the only universal requirements for redistricting are equal population, the ban on racial gerrymandering, and compliance with the VRA").

states. State constitutions often govern redistricting and dictate when it must happen.[59] For example, the timing of redistricting following a census varies greatly from state to state.[60] Some states draw their new district lines immediately after new census numbers are released, while other states wait a year or even two.[61] Furthermore, some states allow only one round of redistricting to occur per decade, whereas other states, controversially, draw and re-draw their lines mid-census, according to the wishes of their legislatures.62 The method of redistricting also varies from state or state. In many states, ordinary legislatures carry out redistricting.[63] In other states, nonpartisan bodies or commissions are charged with this work.[64] The point is that redistricting is entirely a state-centered and state-run process, one that is emblematic of 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.[65] Decisions about these aspects of administering elections are heavily regulated by state law. To be sure, most recently, both Congress and the federal courts have begun playing a greater role in election administration.[66] With the passage of the National Voter Registration Act of 1993 (NRVA),[67] and, in the aftermath of *Bush v. Gore*,[68] of the Help America Vote Act of 2002 (HAVA),[69] Congress has imposed new requirements on the states concerning their voting technology, voter identification provisions, provisional voting requirements, and voter

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

60. *See* Levitt & McDonald, *supra* note56, at 1257–58.

61. *Id.* at 1257.

62. *Id.* at 1258.

63. *See* JUSTIN LEVITT, A CITIZEN'S GUIDE TO REDISTRICTING 20–26 (Brennan Ctr. for Just. at N.Y. Univ. Sch. of Law ed., 2010).

64. *See id.*

65. *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").

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

67. 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)).

68. 531 U.S. 98 (2000).

69. 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)).

registration systems.[70] These federal statutes serve as the most expansive federal intervention into the states' administration of their elections in U.S. history.[71] Still, it is state law that makes these new requirements come to fruition.[72] It is also state law that 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 even arrives and a citizen's vote is ever cast.[73]

The states are also the dominant regulators of our political parties.[74] State law dictates the requirements that a party must meet to register with the state.[75] State law also regulates how parties must go about conducting their primary elections and the ballot access requirements that political parties must guarantee—including whether state primaries will be open, closed, semi-open or semi-closed, or blanket in nature.[76] In general, once political parties are established, the states may not regulate their internal structure, governance, or policymaking.[77] But only the state can determine whether a new party will be recognized in the first place. Some scholars have argued that parties should enjoy robust First Amendment rights to associate with whichever voters they wish, but the states have not always allowed that to be the case in practice.[78]

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.[79] The literature on election law federalism celebrates the democratic

70. Tokaji & Wolfe, *supra* note 66, at 984.

71. *Id.*

72. *Id.*

73. *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).

74. *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).

75. *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).

76. *See State Regulations that Affect Political Parties*, *supra* note 74.

77. *See* Timmons v. Twin Cities Area New Party, 520 U.S. 351, 363 (1997).

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

79. *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

laboratories that emerge when the states advance and successfully implement their unique republican forms of government.[80] The distinctions in how individual states articulate their government aspirations are important.[81] The variations in state law play a role in not only in safeguarding each state's unique identity, but also in safeguarding our federal system.[82] 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.[83]

Even our presidential elections, which are national in scope (and are certainly so in their consequences), are driven by the dynamics of federalism.[84] Under the Constitution, the selection of presidential electors occurs on a state-by-state basis.[85] The electors cast their presidential ballots in their respective states.[86] State law also dictates how each state will allocate its electors to the Electoral College, just as it dictates how the selection of presidential electors will be administered.[87] While some states apportion electors state-wide on a winner-take-all basis, other states apportion them proportionally by congressional district.[88] The Framers purposefully designed the Electoral College to

as more about limiting federal power than granting power to the states.").

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

81. *Id.* at 420.

82. *Id.*

83. *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.*

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

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

86. 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).

87. *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).

88. *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,

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.[89] Since the nation's founding, individual states have elected presidential electors without regard to the selection processes of other states.[90] Calls to abolish the Electoral College and to have the President be elected by popular vote, which surface now and again, would have to find a way to contend with the aspects of federalism that permeate the system.[91]

B. Campaign Finance

Campaign finance presents a complicated wrinkle for election law federalism.[92] Unlike the other areas of election law, campaign finance law does not respect state or local boundaries. Instead, our campaign finance system is almost entirely national in its scope.[93] For instance, while state law imposes unique contribution limits and disclosure rules for the election of state and local officials in various cases (for these limits, see the Appendix),[94] the states are not able to prevent outsiders from contributing to the campaigns of their state and local officials.[95] Indeed, the only boundaries that campaign finance law adheres to are based not on state residency but on national citizenship.[96] In our political system, all U.S. citizens (and lawful permanent residents) may

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.").

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

90. *Id.* at 1239.

91. *Id.* at 1292.

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

93. *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).

94. *See State Limits on Contributions to Candidates: 2017–2018 Election Cycle*, NAT'L CONF. OF ST. LEGISLATURES (Jun. 27, 2017), http://www.ncsl.org/Portals/1/Documents/Elections/Contribution_Limits_to_Candidates_2017-2018_16465.pdf (listing limits on campaign contributions by state).

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

96. *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).

freely spend money to influence elections, either in their home jurisdictions or other jurisdictions, including those where they do not reside. However, "foreign nationals" are precluded from making contributions or expenditures to influence any federal, state, or local election in the United States.[97]

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.[98] How this came to be deserves some explanation.

Congress had made a few attempts to regulate campaign finance piecemeal through various federal statutes adopted during the twentieth century.[99] 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),[100] a federal statute that it then amended in 1974 in the wake of the Watergate scandal.[101] Through these 1974 amendments, Congress sought to regulate four different aspects of money in politics. It sought to regulate *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 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 and obtain from the government.[102] In addition, FECA's 1974 amendments also created a new government

97. *See* 52 U.S.C. § 30121 (2002).

98. *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/.

99. 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 (Praeger ed., 1988).

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

101. *See* MUTCH, *supra* note 99, at 48–50.

102. *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., Cambridge Univ. Press 2018).

agency, the Federal Election Commission, to oversee, administer, and enforce Congress's new campaign finance scheme.[103]

In 1976, the constitutionality of FECA's 1974 amendments was challenged in *Buckley v. Valeo*,[104] which became the seminal case of American campaign finance law.[105] In *Buckley*, the Supreme Court scrutinized FECA through the prism of the First Amendment.[106] In its decision, 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 spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office."[107] At the same time, the Court mandated that independent expenditures receive different treatment. The Court reasoned that independent expenditures made "relative to a clearly identified candidate" were core political speech, and thus were entitled to greater constitutional protections than contributions.[108] The Court held that restrictions on independent expenditures should be subject to a greater level of "exacting scrutiny applicable to limitations on core First Amendment rights of political expression."[109] 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

103. *Id.*

104. 424 U.S. 1 (1976) (per curiam).

105. *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 102, at 9 (noting how *Buckley* "still stands as the seminal case of American campaign finance law").

106. *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.").

107. *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 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.

108. *Id*. at 39–45.

109. *Id.* at 44–45.

discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates."[110] The Court also 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 Supreme Court said.[111]

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 what it called "express advocacy."[112] This was the term of art that the Court used to refer to speech that directly names a candidate for office and specifically calls for that candidate's election or defeat,[113] 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.[114] By the 1990s, corporate and union spending on sham issue ads began.[115] These were advertisements paid for by corporations and unions that were meant to influence what voters thought of a particular candidate, but which, because they omitted words such as "vote for" or "vote against" in referring to that candidate, escaped regulation.[116]

In passing the Bipartisan Campaign Reform Act of 2002 (BCRA),[117] Congress closed several loopholes in federal campaign finance law, including the problem of sham issue ads. Congress addressed the problem of sham issue ads by inventing a new term of art, the "electioneering communication."[118] This was as a broadcast, cable, or satellite communication that could reach

110. *Id.* at 52.

111. *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., Foundation Press 2016) (calling the above line "one of the most famous (some would say notorious) sentences in *Buckley*").

112. *Buckley*, 424 U.S. at 48–49.

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

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

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

116. *Id.*

117. 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* CONG. RES. SERV., REPORT NO. R41542, THE STATE OF CAMPAIGN FINANCE POLICY: RECENT DEVELOPMENTS AND ISSUES FOR CONGRESS 4 n.12 (Dec. 13, 2018).

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

50,000 people, featured a candidate seeking federal office, and was aired 30 days before a primary election or 60 days before a general election.[119] BCRA explicitly prohibited corporations and unions from paying for such communications with their general treasury funds, a prohibition that the Supreme Court upheld in 2003 in *McConnell v. FEC*.[120] That decision paved the way for *Citizens United v. FEC*,[121] in which the Court held, 5–4, that BCRA's prohibition on corporate electioneering communications violated the First Amendment.[122] *Citizens United* overruled *Austin v. Michigan Chamber of Commerce*,[123] a case that had earlier banned corporations from using their treasury funds for independent expenditures, as well as parts of *McConnell*, in recognizing that corporations had First Amendment speech rights.[124] 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."[125]

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.[126] 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 rights that ordinary citizens enjoyed.[127] It did not matter that the party wishing to make these independent expenditures was a corporation, the Court explained, since "the First Amendment generally prohibits the suppression of

119. § 30104.

120. 540 U.S. 93 (2003).

121. 558 U.S. 310 (2010).

122. *Id.* at 319.

123. 494 U.S. 652 (1990).

124. *Citizens United*, 558 U.S. 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").

125. 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 92, 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.").

126. *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").

127. *Citizens United*, 558 U.S. at 349; Kang, *supra* note 125, at 12–13.

political speech based on the speaker's identity."[128] This reasoning unsettled campaign finance law, by soon fostering a new kind of spending in American elections.[129] How far the mandate not to discriminate against "the speaker's identity" should extend, however, was a question left explicitly unanswered.[130]

III. THE BIRTH OF CAMPAIGN FINANCE NATIONALISM

A. The Prohibition of Foreigners

From the very beginning, the Framers demonstrated concern about the possible corrupting effects that foreign powers could have on the young American republic.[131] "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."[132] At various times in American history, Congress has attempted to ban foreigners from influencing the nation's politics. Often these attempts have followed a scandal in which one political party reveals the corrupting influence of foreigners on American soil.[133] In 1798, for instance, Congress passed the Alien and Sedition Acts, a series of four laws through which it tried to restrict the activities of foreign residents in the United States by limiting their freedoms of speech and of the

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

129. *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).

130. *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.").

131. *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").

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

133. *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).

press.[134]

In the late-1930s, Congress again became gravely concerned by the growing foreign influence over U.S. policymaking. In response, it enacted the Foreign Agent Registration Act of 1938 (FARA),[135] a federal statute through which Congress instituted a new requirement for the "agents" of "foreign principals" to register with the federal government.[136] Despite these registration requirements, there was no formal statutory prohibition to prevent foreigners from making contributions to American political campaigns.[137] Rather, the prohibitions of the time were aimed at corporations and unions. In 1907, Congress passed the Tillman Act, which prohibited corporations from making contributions to influence elections.[138] 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."[139]

In the 1960s, calls for more regulation of foreign activity in the United States came again, this time after it had been revealed that numerous foreign interests had been contributing funds to U.S. federal election campaigns with the hope of gaining sympathy in Washington.[140] Sugar manufacturers from the Philippines, seeking to influence legislation concerning sugar import quotas, were among the major sources of these contributions.[141] The chairman of the Senate Foreign Relations Committee at the time, Senator J. William Fulbright of Arkansas, opened hearings on this issue.[142] These hearings revealed

134. *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. *Id.* The Alien Enemies Act allowed aliens whose home countries were at war with the United States to be deported. *Id.* Finally, the Sedition Act "made it a crime to publish 'false, scandalous and malicious' writings against the [U.S.] government." *Id.*

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

136. 22 U.S.C. § 612 (2006) (discussing who needs to be registered as a foreign principal).

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

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

139. *See* Labor Management Relations Act of 1947, 61 Stat. 136 (1947), later codified, as amended, at 29 U.S.C. §§ 151–166 (2006); *see also* Vega, *supra* note 134, at 969, 969 n.111.

140. Vega, *supra* note 134, at 970–71.

141. *Id.* at 971 n.121.

142. *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).

how various foreign interests, through their Washington lawyers and lobbyists, had been channeling campaign funds to sympathetic legislators seeking re-election.[143] Under then-existing U.S. law, it was not illegal for lawyers and lobbyists to make campaign contributions on behalf of foreign principals,[144] and the Fulbright hearings brought to light how large donations were being made by foreign principles through their Washington, D.C.-based agents.[145]

After these hearings exposed how foreign contributions were being channeled to political candidates through agents, Fulbright put forth a bill to amend FARA to prohibit this kind of activity.[146] This bill sought to limit foreign influence over American elections by prohibiting the agent of a foreign principal from making contributions to political candidates.[147] 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 contributions from "foreign principals."[148]

However, language of this prohibition did not entirely solve the problem, for the amended law did not prevent foreign principals from contributing

143. Vega, *supra* note 134, at 993 n.259.

144. Damrosch, *supra* note 137, at 22.

145. *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).

146. Damrosch, *supra* note 137, 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 134, 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*. FARA was also used after World War II to curb communist propaganda. *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* Jahad 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 also 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.

147. Damrosch, *supra* note 137, at 22–23 (explaining the purpose of Senator Fulbright's bill).

148. Foreign Agents Registration Act of 1966, Pub. L. No. 89-486, § 8, 80 Stat. 248–49 (1966) (repealed 1976).

campaign funds directly to the candidates.[149] Donations were not considered illegal under the language of the mew prohibition unless they were distributed through an agent,[150] 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,[151] and he was able to do so because these contributions came from foreigners, rather than from a U.S. agent of a foreign principal.[152] 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 also explains why Nixon was able to accept these foreign contributions without reporting them.[153]

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.[154] In 1974, when Congress was debating its revisions to the Federal Election Campaign Act, Senator Lloyd Bentsen of Texas offered an amendment aimed at preventing foreign nationals from influencing U.S. elections.[155] Bentsen did not think that foreigners had any business influencing American political campaigns. "They cannot vote in our elections so why should we allow them to finance our elections?" Bentsen asked.[156] "Their loyalties lie elsewhere; they lie with their own countries and their own governments."[157] Bentsen proposed a solution that came to be known as the "Bentsen Amendment."[158] In offering it, his purpose was to "ban the contributions of foreign nationals to campaign funds in American political

149. Atieh, *supra* note 146, at 1058–59 (indicating why the amended law failed).

150. *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).

151. *See* Vega, *supra* note 134, at 971–72 (citing the figure of $10 million in foreign donations to Nixon's campaign).

152. *Id.*

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

154. Powell, *supra* note 150, 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).

155. 120 CONG. REC. 8783 (Mar. 28, 1974) (statement of Sen. Bentsen).

156. *Id.*; *see also* Vega, *supra* note 134, at 973 (quoting this same language).

157. 120 CONG. REC. 8783 (Mar. 28, 1974) (statement of Sen. Bentsen).

158. Powell, *supra* note 150, at 961; Vega, *supra* note 134, at 972.

campaigns."[159] The privilege to contribute to campaigns, Bentsen explained, 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."[160]

The Bentsen Amendment added a provision to FECA's 1974 amendments[161]—the same ones that would soon be challenged in *Buckley v. Valeo*[162]—which sought to close one of the major loopholes in FARA.[163] FECA's 1974 amendments struck the words "an agent of a foreign principal" from FARA and inserted the words "a foreign national" in their place.[164] FECA's 1974 amendments then went on to explain that "a foreign national" was being used in the same way as "foreign principal" was defined in FARA, except that the term did not include any citizen of the United States or any individual who is not a citizen but who is lawfully admitted for permanent residence in the United States.[165]

FARA's use of the term "foreign principal" had applied not only to individuals, but to other foreign actors as well.[166] A "foreign principal" also included a corporation "organized under the laws of or having its principal place of business in a foreign country."[167] It included foreign governments and foreign political parties,[168] as well as, of course, non-citizens who did not have permanent residence in the United States.[169] In effect, Congress amended FECA in 1974 to close a loophole that had existed in FARA, a loophole that had allowed foreign principals and corporations to provide campaign funds directly to candidates. In 1976, Congress granted the FEC jurisdiction to

159. 120 CONG. REC. 8782 (Mar. 28, 1974).

160. *Id.* at 8784; *see also* Savrin, *supra* note 150, at 793 n.40 (quoting this same language); Vega, *supra* note 134, at 973 n.133 (quoting similar language).

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

162. 424 U.S. 1 (1976).

163. 120 CONG. REC. 8783 (Mar. 28, 1974).

164. 120 CONG. REC. 8786 (Mar. 28, 1974).

165. *Id.*

166. *See* 22 U.S.C. § 611(b) (2006).

167. 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 150, at 964. The FEC has issued several advisory opinions that have interpreted § 441e to allow domestic subsidiaries of foreign corporations to make contributions to candidates. *Id.* 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.*

168. 22 U.S.C. § 611(b)(1).

169. 2 U.S.C. § 441e(b)(2) (1994).

implement and enforce the Bentsen Amendment.[170] Eventually, the Bentsen Amendment was codified at 2 U.S.C. § 441e.[171] 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.[172]

As initially crafted, the statute only applied to contributions. It prohibited foreign nationals from donating (or promising to donate) money or any "other thing of value" in connection "with an election to any political office."[173] The law also imposed liability on a person who tried to "solicit, accept, or receive" a contribution from a foreign national.[174] This was so regardless of whether the person "knew that the source of the donation is foreign."[175] Congress wanted to ensure broad liability and framed the law to extend beyond only those actors who were contributing foreign money.[176] 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."[177] This meant the provisions applied to federal elections as well as to state and local ones.[178]

Though Section 441e may have provided the origin of America's

170. *See* Vega, *supra* note 134, at 973; *see also* Powell, *supra* note 150, at 958 n.5.

171. 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)).

172. Pub. L. 92–225, title III, §319, formerly §324, as added Pub. L. 94–283, title I, §112(2), May 11, 1976, 90 Stat. 493; renumbered §319, 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)).

173. 2 U.S.C. § 441e(a).

174. § 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").

175. *See* Powell, *supra* note 150, 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).

176. *Id.*

177. 2 U.S.C. § 441e(a) (1976).

178. § 441e(a).

campaign finance nationalism, gaps in the statutory scheme remained. The 1974 restrictions, for example, did not eliminate the possibility that foreign citizens might still influence American election 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 the 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.[179] The Committee found that foreigners had been exploiting the soft money loophole and buying access to American public officials by making contributions to political parties.[180] The Committee also discovered efforts made by the Chinese government to influence U.S. policy through the indirect financing of campaigns.[181]

In response to this controversy, when Congress passed the Bipartisan Campaign Reform Act in 2002 (BCRA),[182] it amended Section 441e to expand the scope of election-related activities that would be banned for foreign nationals. Subsection (a) of Section 441e now read as follows:

> It shall be unlawful for—
>
> (1) a foreign national, directly or indirectly, to make
>
> A contribution of 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

179. *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").

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

181. S. Rep. No. 105-167, at 2501–12; see also Vega, *supra* note 134, at 974.

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

> described in subparagraph (A) or (B) of paragraph (1) from a foreign national.[183]

This new language differed from the old in other 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 new language 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, 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 directly to the candidates themselves, but also, in light of BCRA's new regulatory scheme, from making "[a]n expenditure, independent expenditure, or disbursement for an electioneering communication."[184] Eventually, this last provision would raise First Amendment concerns.

B. Bluman v. Federal Election Commission

The ban preventing foreign nationals from participating in American elections remained unchallenged for thirty-six years. When *Citizens United* was decided, however, it brought that ban into sharp relief.[185] *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.[186] 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.

In *Citizens United*, Justice Kennedy reasoned that corporations could not be prevented from spending their money on elections because "the First

183. 2 U.S.C. § 441e(a).
184. 2 U.S.C. § 441(e)(a)(1)(B).
185. Citizens United v. FEC, 558 U.S. 310 (2010).
186. *Id.* at 365 (overturning prior prohibitions on American corporations' expenditures on elections).

Amendment generally prohibits the suppression of political speech based on the speaker's identity."[187] Whether that dictate applied to the speech of foreigners as well, however, was a question the Supreme Court left deliberately unanswered.[188] In the eyes of some commentators, the only way the Court could strike down a ban on speech for corporations but uphold the same ban for foreigners was by engaging in what Professor Richard Hasen has labelled "doctrinal incoherence."[189]

The Court's opportunity to demonstrate how it would handle foreign campaign spending after *Citizens United* came in *Bluman v. FEC*.[190] In *Bluman*, the Court upheld the ban on foreign spending found in Section 441e.[191] It did so, however, without hearing oral arguments or issuing a written opinion. Rather, the written decision in *Bluman* was handed down by a three-judge panel of the U.S. District Court for the District of Columbia, and it was then summarily affirmed by the Supreme Court.[192] This meant that the Supreme Court agreed with the district court's result, though not necessarily with its reasoning.[193]

The plaintiffs in *Bluman* were foreign citizens who were living and working in the United States on temporary visas. While in the United States, they hoped to spend money on election-related activities.[194] Benjamin Bluman was a Canadian citizen who had come to the United States to attend Harvard Law School.[195] From September 2006 to June 2009, he resided in the United States

187. *Id.* at 350 (Kennedy, J.)

188. *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.").

189. *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 offered that one way the Court could do that 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 was not premised on combating corruption or the appearance of corruption. *Id.*

190. 800 F. Supp. 2d 281 (D.D.C. 2011), *aff'd*, 565 U.S. 1104 (2012).

191. *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.").

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

193. *Id.* at 1104.

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

195. *Id.* at 285 (stating that Bluman came to the United States to attend law school); RICHARD L.

on a student visa.[196] In November 2009, Bluman began working as an associate at a New York law firm, at which point he began residing in the United States on a temporary work visa.[197] 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.[198] 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.[199]

Asenath Steiman, Bluman's co-plaintiff, was a dual citizen of Canada and Israel who was also residing in the United States on a temporary work visa.[200] She was working as a medical resident at a hospital in New York City.[201] 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 government to play a smaller role in people's lives.[202] However, all of these activities were barred by Section 441e, under the amendments enacted to that statue in 2002.

The unanimous opinion for the three-judge district court 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.[203] The plaintiffs argued their desired activity constituted protected speech and that strict scrutiny should apply.[204] By contrast, the FEC argued that Section 441e amounted to a congressional pronouncement on foreign affairs and that rational basis scrutiny should apply.[205] The court explained that the issues implicated were more complicated than the parties acknowledged because

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HASEN, PLUTOCRATS UNITED, *supra* note 18, at 16 (identifying Bluman's law school as Harvard).

196. *Bluman*, 800 F. Supp. 2d at 285.
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*

Section 441e applied limits to both contributions and expenditures, which were traditionally subject to different levels of scrutiny under the First Amendment.[206]

Ultimately, the court reasoned that Section 441e should be upheld even under strict scrutiny. But in coming to that conclusion, the court made an 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."[207] 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."[208] Framing the issue this way, the court proceeded to summarize the many Supreme Court cases in which foreigners were provided the same constitutional rights as U.S. citizens,[209] as well as the many cases in which foreigners had been denied the rights that U.S. citizens enjoy.[210] These denied rights included the right to vote, to serve on a jury, to become a police or probation officer, and work as a public school teacher.[211] The line between these cases, the court found, was that the activities from which foreigners were barred "intimately relate to the process of democratic self-government."[212]

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."[213] This bar included "preventing foreign influence over the U.S. political process."[214] With the issue presented this way, the question the court tried to answer was whether political contributions and express advocacy expenditures were part of the process of democratic self-government. And the court's answer was that they were.[215] "Political contributions and express-advocacy expenditures are an integral aspect of the process by which

206. *Id.* at 285–86.
207. *Id.* at 286.
208. *Id.*
209. *Id.* at 286–87.
210. *Id.* at 287.
211. *Id.*
212. *Id.* (citations omitted).
213. *Id.* at 288.
214. *Id*.
215. *Id.* (stating that "[w]e think it evident that these campaign activities are part of the overall process of democratic self-government").

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 of other activities by which candidates appeal to potential voters."[216]

There were several curious aspects of the opinion in *Bluman*. One was that it 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.[217] Judge Kavanaugh's opinion explained how it found "Justice Stevens's statement to be a telling and accurate indicator of where the Supreme Court's jurisprudence stands on the question of foreign contributions and expenditures,"[218] even though the majority in *Citizens United* expressly stated that it was not addressing this issue. Second, the *Bluman* court expressly limited its ruling to express-advocacy expenditures made by foreigners, and it refused to forbid foreigner nationals from engaging in issue advocacy. The court made 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."[219] This would become a cause for concern later on. Third, the court interpreted the ban on foreign nationals to extend to foreign corporations, explained how its holding means "that foreign corporations are likewise banned" from making contribution and expenditures prohibited by the statute.[220]

Finally, and importantly, the court over and over defined the relevant political community from which foreign nationals were banned as "the American political community." 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."[221] Later, in explaining why lawful permanent residents were not foreign nationals, the court again 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

216. *Id.*

217. *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")).

218. *Id.*

219. *Id.* at 290.

220. *Id.* at 292 n.4.

221. *Id.* at 286.

do."[222] 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 thus that Section 441e's long-standing ban on contributions and expenditures cannot 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 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."[223] The court further clarified that the compelling interest that justifies Congress in restraining foreigners from participating in American elections "does not apply equally to minors, corporations, and citizens of other states and municipalities."[224] That was because "minors, corporations, and citizens of other states and municipalities are all members of the American political community."[225] In other words, foreigners could be prevented from participating in American campaign finance, but citizens of other states and municipalities could not. That reasoning, in essence, served to underpin 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 through reasoning.[226] *Bluman*'s fiercest critic has been Professor Hasen, who, as mentioned, 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.[227] Hasen has attacked several conservative lawyers who have advanced robust views of the First Amendment for what he believes is their inconsistent endorsement of *Citizens United* and *Bluman*.[228] He includes James

222. *Id.* at 291–92.
223. *Id.* at 290.
224. *Id.*
225. *Id*.
226. *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 in *Bluman* "unsurprising").
227. Hasen, Citizens United *and the Illusion of Coherence*, *supra* note 17, at 605–10.
228. HASEN, PLUTOCRATS UNITED, *supra* note 18, at 10–11, 113–17.

Bopp, Floyd Abrams, and Bradley Smith in this camp.[229] For his part, Professor Smith believes that *Bluman* is not inconsistent with *Citizens United*,[230] and he personally comes out as "more or less agnostic on the result in *Bluman*."[231]

The sensible commentary on *Bluman* is that which wrestles with the case's nuances and considers their impact on the American campaign finance system. In an important article, Professor Anthony Johnstone explains one possible take-away from the case as follows: "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."[232] That analysis is perceptive and fairly accurate. Voting remains an issue regulated by the states. Beyond voting, all Americans have the opportunity participate in the politics of their neighboring states.

Where such a state of affairs is the norm, 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.[233] No form of federalism can work, moreover, without some limits being put in place to limit the influence that outside actors have over the internal affairs of any given state.[234] While the plaintiffs in *Bluman* framed their claims in terms of the First Amendment, the court avoided addressing those claims and 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: the lines that delineate American federalism. In short, while upholding the restriction on

229. *Id.* at 113–17.

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

231. *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.*

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

233. *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").

234. Johnstone, *supra* note 232, 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").

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 restrict strictly to their own residents, apart from the activities of voting and holding office. The logic here should be apparent. After all, some would-be campaign contributors are not part of a state's political community, even if, under *Bluman*, they happen to be part of the American political community. Several states have understood these nonresident contributors to be part of separate political communities and have tried to ban these out-of-state residents from funding their elections. However, our campaign finance nationalism has not made their efforts easy.

IV. THE LIFE OF CAMPAIGN FINANCE NATIONALISM

A. The Fate of 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 their candidates. Four states have tried to impose a semblance of federalism on their state campaign finance systems by passing statutes that impose nonresident contribution limits that bar out-of-state residents from influencing their elections.[235] In three of these states—Oregon, Alaska, and Vermont—these statutes have been struck down.[236] In the fourth state, Hawaii, the prohibition on nonresident contributions is still good law, though it may not be for long.[237]

Efforts to ban nonresident contributions emerged from the efforts to several states to invigorate a form of campaign finance federalism. A small movement to ban nonresident contributions emerged in the mid-1990s, when

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

236. *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).

237. *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).

several small states tried to limit the ability of their elected officials to receive campaign contributions from beyond their borders.[238] All of the states that imposed such bans did so using a similar strategy.[239] In each case, they proceeded through indirect means.[240] Rather than placing limits on what nonresident contributors could give, they instead adopted laws to regulate what in-state candidates could accept.[241] On their face, these laws seemed to target in-state candidates, not out-of-state contributors. The laws also did not bar all outside contributions, but rather only those exceeding a set limit or cap.[242] In other words, they prevented in-state candidates from receiving out-of-state contributions only above a certain ceiling.[243] Typically, these laws prohibited in-state candidates from receiving either nonresident contributions over a specific dollar amount or contributions that rose a certain percentage above what the candidate's total in-state contributions might have been.[244]

In some cases, local governments—in addition to state legislatures—have also tried to impose restrictions on nonresident contributions. For instance, the city of 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.[245] A federal district court struck down the city's ordnance.[246] Austin, Texas, tried another tactic when it imposed an aggregate limit on contributions that came from outside the Austin area. Austin's city code prohibited candidates from accepting "an aggregate contribution 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."[247] When a former Austin city councilman

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

239. *Id.* (reviewing the strategies used by these states and stating that, "[i]n every state that has implemented nonresident contribution limits, the laws operate in a similar way").

240. *See id.* at 606.

241. *See id.*

242. *See id*.

243. *See id.*

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

245. *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).

246. *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 resided elsewhere, from contributing to their preferred candidate).

247. *See* AUSTIN, TEX. CODE, Art. III, § 8(A)(3) (1997). The limits of $30,000 and $20,000, respectively, were also adjusted for inflation, and they had risen to be $36,000 and $24,000, respectively,

challenged these limits by claiming they forced him to change campaign tactics when he could no longer solicit contributions from outside the Austin area,[248] a federal district court dismissed his complaint for lack of standing—a decision that the U.S. Court of Appeals for the Fifth Circuit later affirmed.[249]

But the laws restricting nonresident contributions that are of interest to us here are those that have been enacted at the state level.[250] In total, four states have passed laws restricting nonresident contributions. These laws have not fared well in the courts.[251] In 1994, Oregon became the first state to impose such contribution limits.[252] Oregon's voters passed a ballot initiative that amended the state's constitution to prohibit political candidates from receiving significant out-of-district (but not out-of-state) contributions.[253] The stated purpose of this ballot initiative 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.'"[254]

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.[255] The second punished a candidate who accepted more than 10% of his contributions from out-of-district residents by preventing him from holding public office for a time twice as long as the tenure of the office he sought.[256] The third prevented in-district residents from contributing funds on behalf of out-of-district residents.[257] The fourth made violating

when this nonresident provision was challenged in court in 2015. *See* Zimmerman v. City of Austin, 881 F.3d 378, 382 (5th Cir. 2018).

248. *Id.* at 389.

249. *Id.* at 388–90.

250. *See* Wallace, *supra* note 238, at 607.

251. *Id.*

252. *Id.*

253. 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.* In other words, the law applied equally to prevent candidates from receiving contributions from Oregon residents who resided within the state but not within the candidate's particular electoral district as it did to preventing out-of-state contributions. *Id.*

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

255. *Id*. at 491.

256. *Id.*

257. *Id.*

this scheme a felony.[258]

In *VanNatta v. Keisling*, a federal district court struck down Oregon's scheme on First Amendment grounds.[259] The district court found that the law 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."[260] The court gave three reasons why this was so. First, the measure prevented non-corrupt, out-of-district contributors from associating with candidates running for state office.[261] "Elected officials in state offices impact all state residents, not just the candidate's constituents within his election district," the court explained.[262] "Therefore, the Measure 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."[263] Second, the law did nothing to thwart so-called "in-district corruption," because it did not prevent a candidate from receiving large amounts of money from the constituents of his district.[264] Finally, the measure did nothing to prevent large contributions from outside an electoral district, so long as they amounted to less than 10% of total contributions.[265] In other words, candidates who were strong fundraisers could still be swayed by "outside special interests" and corruption, because there was no set cap in terms of how much money outsiders could actually give to them.[266]

Shortly after Oregon enacted its constitutional amendment, Alaska passed a bill in 1996 to limit nonresident contributions as well.[267] The bill was passed just as 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 the greater concerns about corruption being voiced by the public.[268] The legislative history of this bill, which

258. *Id.*; *see also id.* at 493 ("Sections 1 and 2 of Measure 6 [as Oregon's initiative was known] 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.").
259. *Id.* at 491.
260. *Id.* at 496–97 (citation omitted).
261. *Id.* at 497.
262. *Id.*
263. *Id.*
264. *Id.*
265. *Id.*
266. *Id.*
267. *See* ALASKA STAT. § 15.13.072 (1997).
268. *See* State v. Alaska Civil Liberties Union, 978 P.2d 597, 601 (Alaska 1999).

became law on January 1, 1997,[269] explains how Alaska's legislature was worried that "organized special interests are responsible for raising a significant portion of all election campaign funds" in Alaska, which meant these interests had the ability to "gain an undue influence over election campaigns and elected officials."[270] 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."[271] This was especially important because, under the previous law, candidates in Alaska were "free to convert campaign funds to personal income," which fostered the "potential for bribery and political corruption."[272]

Alaska's new law prohibited candidates, groups, or political parties from receiving contributions from out-of-state residents if they exceeded specific limits.[273] A candidate seeking the office of governor or lieutenant governor could accept only $20,000 in out-of-state contributions in a calendar year.[274] Meanwhile, a candidate for the state senate could accept only $5,000,[275] and a candidate for state representative or municipal offices could only seek $3,000, respectively, within the same time period.[276] In addition, political parties could accept no more than 10% of their individual contributions from out-of-state donors per year.[277]

In 1999, these out-of-state contribution limits were challenged and upheld by the Alaska Supreme Court in *State v. Alaska Civil Liberties Union*.[278] While plaintiff Alaska Civil Liberties Union relied on *VanNatta v. Keisling* in its arguments, the Alaska Supreme Court found *VanNatta* distinguishable, in that Oregon's out-of-district contribution restrictions burdened both residents and nonresidents of the state.[279] However, the court found that Alaska's restrictions did not burden any Alaska residents.[280] The court also found that

269. *See id.*
270. *Id.*
271. *Id.*
272. *Id.*
273. ALASKA STAT. § 15.13.072.
274. ALASKA STAT. § 15.13.072(e)(1).
275. ALASKA STAT. § 15.13.072(e)(2).
276. ALASKA STAT. § 15.13.072(e)(3).
277. ALASKA STAT. § 15.13.072(f).
278. 978 P.2d 597 (Alaska 1999).
279. *Id.* at 616–17.
280. *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).

Alaska's restrictions were less burdensome on nonresident contributors, because, unlike Oregon, Alaska did not share a contiguous border with any other state.[281] The court explained how the state had the power to preserve its own unique political community by excluding nonresidents from voting.[282] This power was "self-evident,"[283] and, the court added, although it had "not previously affirmed the authority of the state to limit the influence of nonresidents over state elections through regulation of their campaign contributions, such an extension would not be illogical."[284]

After that, 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.[285] In 2018, however, Alaska's out-of-state contribution limits would be challenged again, this time in federal court.[286] This time, a federal district court upheld the nonresident contribution limits,[287] but, in *Thompson v. Hebdon*, the U.S. Court of Appeals for the Ninth Circuit reversed and struck them down.[288] The Ninth Circuit reasoned that Alaska's law did not further the state's important interest in preventing *quid pro quo* 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.[289]

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.[290] When the statute was challenged in federal district court on First

281. *Id.*

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

283. *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").

284. *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 United States 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) (explaining how "[b]oth decisions were denied certiorari").

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

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

287. *Id.* at 1040.

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

289. *Id.* at 1041.

290. *See* 1997 Vermont Campaign Finance Reform Act ("Act 64"), *codified at* VT. STAT. ANN. tit.

Amendment grounds, this provision was struck down by the district court.[291] 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,"[292] because the percentages of out-of-state contributions received had traditionally been very low in Vermont. In fact, 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.[293] 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.[294]

While 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, the district court found this argument to be "not well focused."[295] The state's justification did not account for the fact that people outside of Vermont might have a legitimate interest in Vermont politics as well, and thus a right to participate in Vermont's elections.[296] Many individuals from outside of Vermont, such a second homeowners, were influenced by Vermont's laws, and these individuals may well "have legitimate interests in Vermont politics and policy," the district court explained.[297] Because the court had no evidence before it to suggest that out-of-state contributions were any more corrupting than those that came from in-state sources, it stuck down Vermont's law.[298] The court cited *VanNatta* and explained how the provision of Vermont's law restricting nonresident contributions was not narrowly tailored.[299]

The Second Circuit affirmed the ruling in *Landell*,[300] 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

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.").

291. Landell v. Sorrell, 118 F. Supp. 2d 459 (D. Vt. 2000).
292. *Id.* at 472.
293. *Id.*
294. *Id.* at 472–73.
295. *Id.* at 484.
296. *Id.*
297. *Id.* at 470.
298. *Id.* at 484.
299. *Id.*
300. Landell v. Sorrell, 382 F.3d 91 (2nd Cir. 2002).

all candidate contributions.[301] 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)."[302] The First Amendment, the Second Circuit said, did not permit state governments to preserve their politics from the influence of outsiders.[303] The Second Circuit also reviewed the Oregon statute struck down in *VanNatta* and the Alaska statute originally upheld *Alaska Civil Liberties Union*, and it stated disapprovingly how the "analysis in the Alaska case is a sharp departure from the corruption analysis adopted by the Supreme Court in *Buckley*."[304] 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.[305]

Hawaii was the last state to adopt a statute limiting contributions from nonresident donors.[306] The 2010 version of that statute limited out-of-state contributions to 30% of a candidate's total contributions during an election period,[307] with exemptions made for contributions coming from family members.[308] 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 to require contributions from nonresidents 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 that the federal courts established with similar legislation in Oregon, Alaska, and Vermont, Hawaii's statute seem ripe for

301. *Id.* at 146.
302. *Id.* at 146.
303. *Id.* at 148.
304. *Id.* at 148.
305. *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").
306. *See* HAW. REV. STAT. § 11-362 (2010).
307. 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.").
308. HAW. REV. STAT. § 11-362(b) ("This section shall not be applicable to contributions from the candidate's immediate family.").

challenge.

B. The World 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, regardless of whether they are running for federal or state office, continuously feel the need to seek money from contributors across the country. Over time, many candidates develop two distinct groups of people to whom they owe allegiance: voters and donors. Professor Richard Briffault refers to these as "constituents" and "contributors," and he explains why it can be troubling that they may not constitute the same people.[309] Contributors, especially when they do not reside in the lawmaker's electoral district, may possess very different goals from constituents, and a lawmaker's responsiveness to them may not be in his constituents' best interests.[310]

Research shows that the funding provided to our lawmakers increasingly comes from contributors who happen not to be their constituents.[311] 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.[312] Grenzke's study found that the percentage of within-district and within-state contributions had been steadily declining with each successive election cycle.[313] In 1977–1978, 48% of contributions made to long-term members of Congress in the amount of $500 or more came from outside their congressional districts.[314] By 1979–1980, by comparison, 53% of contributions of $500 or more came from

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

310. *Id.*

311. *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").

312. *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 contributions 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.

313. *Id.* at 85.

314. *Id.* at 85.

outside the district, and by 1981–1982 that figure had jumped to 61%.[315]

Twenty years after Grenzke's study, another study of inter-district campaign transfers 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 the candidate's district.[316] By 2002, that figure was 68%, although in 2004 it dipped slightly to 67%.[317] Moreover, not only did the percentage of outside contributions rise for the average congressman, but so did the number of outside districts from which he received them. In 1996, the study found that the average number of outside districts from which campaign contributions came stood at 55.[318] By 2004, these contributions came from 70 other districts, on average.[319] In most cases, these outside districts were located far away. Only 22% of the individual itemized contributions in the average congressional race came from residents of adjacent districts, while 45% came from far-away districts that were not adjacent to the recipient's district.[320]

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 their districts.[321] In 2016, the equivalent figure for outside contributions was 64.9%,[322] and in 2014 it

315. *Id.* at 85. 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.").

316. *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).

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.* at 378–79.

321. *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 and made available on Friday, February 01, 2019. *Id.*

322. *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).

was 61.2%.[323] When only current House members are included in the data for 2018—in other words, only those candidates who won election—it turns out 71.9% of their contributions came from outside their districts.[324] In 2016, the equivalent figure for current House members was 67.1%,[325] and in 2014 it was 66.3%.[326] As is evident, the percentage of outside contributions made to federal candidates has greatly increased over the years, and it continues to increase with each election cycle.

Some House members receive almost all of their contributions from outside their districts. In 2018, as the table below shows, the number of House members who received 80% or more of their itemized contributions from outside their congressional districts stood at 143 members (32.87% of the House's total membership).[327] That number, an all-time high, rose from 119 members (27.36%) in 2016, 98 members (22.52%) in 2014, and 88 members (20.23%) in 2012.[328] In 2018, 65 members of House (14.94% of the total) received an astounding 90% or more of their contributions from outside their districts.[329] The equivalent figure for those receiving 90% or more from outside their districts stood at 38 members (8.74%) in 2016, 40 members (9.19%) in 2014, and 33 members (7.58%) in 2012.[330] The number of House members who have received 80% or more and 90% or more of their contributions comes from data provided by the Center for Responsive Politics. It is clearly evident that these numbers have increased with each election cycle.

323. *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).

324. *In-District v. Out-of-District: All Current Representatives, Election Cycle 2018*, *supra* note 321.

325. *In-District v. Out-of-District: All Current Representatives, Election Cycle 2016*, *supra* note 322.

326. *In-District v. Out-of-District: All Current Representatives, Election Cycle 2014*, *supra* note 323.

327. *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 author's calculations from data provided by the Center for Responsive Politics for the 2012-2018 elections cycles.

328. *Id.*

329. *Id.*

330. *Id.*

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

The Center for Responsive Politics also classifies a few congressional candidates as receiving 100% of their contributions from outside 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 his district beat an incumbent.[331] In 2016, another candidate who raised 100% from outside his district also won election.[332] In general, raising all of one's campaign funds from outside one's district may not be a recipe for success, but the data clearly shows that raising a significant

331. 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—of which 100% was characterized by the Center for Responsive Politics as coming from outside the district. *See In-District v. Out-of-District: All Current Representatives, Election Cycle 2018*, *supra* note 321. 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 the district for him. *See California District 21 2018 Race: Summary Data*, CTR. FOR RESPONSIVE POLITICS, https://www.opensecrets.org/races/summary?id=CA21&cycle=2018 (last visited May 26, 2019).

332. 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 were categorized by the Center for Responsive Politics as coming from outside the congressional district. *See In-District v. Out-of-District: All Current Representatives, Election Cycle 2016*, *supra* note 322; *see also North Carolina District 13 2016 Race: Summary Data*, CTR. FOR RESPONSIVE POLITICS, https://www.opensecrets.org/races/summary?id=NC13&cycle=2016 (last visited May 26, 2019).

portion of funds from outside is 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.[333] 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, of which 88% came from within his district.[334] In 2014, nine candidates raised 80% or more in contributions within their districts and in 2016 six candidates did so.[335] In each of these years, most of these candidates were incumbents in very safe districts. But by 2018, things 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 these candidates were incumbents—and hardly any were victorious.[336]

Very few successful candidates in this day and age raise significant funds within the districts they represent, and, as I have tried to show, our campaign finance system has become almost entirely national in nature. The 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 "district" for each Senator consists of the

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

334. *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.*

335. *See In-District v. Out-of-District: All Current Representatives, Election Cycle 2014*, *supra* note 323; *In-District v. Out-of-District: Most- In-District (Current Candidates Only): In-District v. Out-of-District: All Current Representatives, Election Cycle 2016*, *supra* note 322.

336. The one exception was Republican Tim Burchette, who was elected to Congress from Tennessee's 2nd Congressional District in 2018. Buchette 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 321; *Tennessee District 02 2018 Race: Summary Data*, CTR. FOR RESPONSIVE POLITICS, 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 POLITICS, https://www.opensecrets.org/races/summary?id=IN03&cycle=2018 (last visited May 26, 2019).

state he or she 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 many times larger than the amounts raised by House candidates.[337]

While one might expect Senators to receive even more of their contributions from out of state, 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.[338] 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 in 2018 stood at 71.9%. Still, in 2018, Heidi Heitkamp (D-ND) received 96.2% of her itemized contributions from outside North Dakota, and Doug Jones (D-AL) received 84.4% of his itemized contributions from outside Alabama.[339] 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).[340] On the other hand, Diane Feinstein (D-CA) received the majority of her itemized contributions—73.9%—from California.[341] All of these Senators managed to raise between $10 and $25 million, which is much more than members of the House raise.[342]

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. Alternatively, sometimes these politicians come from districts where few of their constituents can afford to make campaign contributions. Studies show that the longer a lawmaker is in office, and especially the more power he has over the legislative agenda, the more likely he is to raise a substantial percentage of campaign funds from outside his district.[343] The last time

337. 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.

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

339. *Id.*

340. *Id.*

341. *Id.*

342. *Id.*

343. *See, e.g.*, Grenzke, *supra* note 312, at 89, 94–95. Grenzke posits that one characteristic of 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.

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 his Wisconsin district.[344] Nancy Pelosi also consistently raises a very high percentage of her contributions from outside her district, despite the fact that she represents one of the wealthiest districts in the United States.[345] Pelosi raised 87% of her contributions in 2018, and 85% of her contributions in 2016, from outside her district, which includes most of San Francisco.[346]

Of course, individual itemized contributions made to federal candidates represent only a portion of total money that candidates receive. Other candidate committees, political parties committees, and political action committees set up by corporations and unions (so-called PACs) are also able to make contributions to federal candidates.[347] These committees will typically target ideologically like-minded candidates across the country, but very rarely will they 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 himself. Such independent expenditure groups include 527 and 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 by the public.[348]

On the other hand, Super PACs, unlike 504(c)(4)'s, have to report and disclose the contributions they receive.[349] In recent years, contributions to

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

345. *Id.*

346. 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).

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

348. *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 organized 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).

349. *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 organizational, registration, reporting, and disclosure requirements of other political committees"). In

Super PACs have skyrocketed, in part because the law places no limits on how much can be given to them.[350] Whereas the maximum contribution that an individual can give to a federal candidate is $2,800 for the 2020 election cycle (the amount is pegged to inflation), 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 on campaigns that the federal candidate contribution limits allow.[351]

The data shows that the contributions made to Super PACs are even more geographically concentrated than the contributions made directly to candidates themselves. The Center for Responsive Politics groups contributions to outside spending groups like Super PACs based on various different categories. 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, NY; Stephen Scwarzmann $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.[352] 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 and distinct from the elections it was meant to influence.[353]

addition to Super PACs and 501(c)(4) organization, 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 must disclose them to the IRS and 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 generally* Richard Briffault, *The 527 Problem . . . and the* Buckley *Problem*, 73 GEO. WASH. L. REV. 949 (2005) (explaining how 527's work).

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

351. *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).

352. *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).

353. 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/outsidespending/donor-stats?cycle=2018&type=I (last visited on May 26, 2019); *see also See 2018 Top Donors to Outside Spending Groups*, *supra* note 352.

It is certainly arguable that the national aspects of our campaign finance system make sense when it comes to federal candidates. After all, 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 (and will give advice and consent on the confirmation of ambassadors and federal judges, not to mention Supreme Court justices) in a way that impacts every American, no matter where in the country he lives. But the system makes a lot less sense when it comes to state and local officials, who vote on laws affecting only the people of their state.[354] A state senator from Montana will pass laws that concern only Montanans, and it is unclear why a donor who resides in North Carolina, Maine, or Louisiana should be able to give to his campaign.

Despite this logic, it turns out that the same rules that apply at the federal level also apply 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—including our state races for governor, for state attorney general, and for our state supreme courts.[355] According to one account, out-of-state contributions accounted for an average of 23% of all donations made directly to gubernatorial candidates between 2007 and 2014.[356] In 2013, when New Jersey and Virginia held gubernatorial elections, 49% of contributions came from out of state.[357] In 2013, Terry McAuliffe received 68% of his contributions from out of state in his bid to become governor of Virginia.[358] In 2012, Scott Walker received 60% from out of state for the governor's race in Wisconsin.[359]

Attorney general races and state supreme court races in individual states likewise have received their share of increased out-of-state spending recently.[360] So have local mayoral races and city council race. And then there

354. *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").

355. *See* Roberts, *supra* note 351, at 140.

356. *Id.* at 145.

357. *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.

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

359. *Id.*

360. Scott Greytak et al., *Bankrolling the Bench: The New Politics of Judicial Elections 2013-2014*,

is another type of contest that does not involve supporting a political candidate at all but that draws a larger proportion of out-of-state money than any other election: ballot measures.[361] 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.[362]

The literature has only recently started paying attention to the usual geography of our campaign finance nationalism and to its effects.[363] Professor Briffault, in addition to demonstrating how contributions from outside districts have become an increasingly significant fact of life 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."[364] Many commentators have strongly 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 have defended various aspects of it.[365]

And then there are those who take a more neutral view. Those who fall into this camp have undertaken efforts to understand the practice of out-of-district contributions and spending, and especially its effects, without passing judgment on it. For instance, Professor Johnstone defends the political community principle in *Bluman* as an important exception to the otherwise universal speaker-neutrality rule offered in *Citizens United*, and he offers a "more

BRENNAN CTR. FOR JUSTICE 32 (2015), https://www.brennancenter.org/sites/default/files/publications/The_New_Politics_of_Judicial_Election_2013_2014.pdf (explaining that national groups are playing an increasing role in state judicial elections).

361. Roberts, *supra* note 351, at 150.

362. *Id.*

363. *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.

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

365. *See* Pettys, *supra* note 226, 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 238, at 625–27 (maintaining that allowing non-resident contributions preserves federalism and strengthens the First Amendment).

complicated" view of out-of-state contributions, accepting that they can come from outside electoral districts but not from foreigners.[366] Other work has sought to document how our campaign finance system creates a new constituency for politicians, one separate from the voters they are elected to represent.[367]

The problem with this new constituency is the effect it has on policymaking. The receipt of a large portion of a lawmaker's war chest from outside his district serves to shift that lawmaker's policies so that they align closer to the wishes of his donors. One consequence of our campaign finance nationalism, in other words, is that it works to shift the policy preferences of lawmakers away from their median constituents to align more with their median contributors.[368] However, the wealthy political donors and spenders who influence elections are not representative of the American voting population.[369] These donors tend to be significantly more conservative on economic issues, in their views on social welfare spending, and on issues like affirmative action.[370]

Given the dissimilarities in the demographics of voters and donors, the resulting misalignment in policy is perhaps not altogether surprising. The alignment problem has been documented by Nicholas Stephanopoulos and other scholars, and it is a significant consequence of the current system.[371] Our campaign finance nationalism leads to a situation where a politician has two masters, voter and donors, who possess very different policy preferences. Despite this, donors tend to have much more influence on legislative decisionmaking because most politicians cannot keep their jobs without them. Candidates rely on wealthy donors to back their electoral campaigns. Once elected,

366. Johnstone, *supra* note 232, at 120.

367. Briffault, *supra* note 9, at 43 (explaining how, "[f]or better of worse, outside donors have become a new constituency, albeit one quite different from the usual meaning of the term").

368. 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 351, at 15960. This happens when wealthy donors increasingly contribute and spend across state lines to pursue a national approach for causes. *Id.* at 164.

369. *See* Mazo & Kuhner, *supra* note 102, at 6–7.

370. *Id.*

371. *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).

these candidates have no choice but to please the donors who supported them, given that the alternative is that they will not have enough money to run for re-election.[372]

To battle the effects of outside money, a very weak form of campaign finance federalism has developed in the states. This campaign finance federalism 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 to these donors regardless of whether they are located within the state or outside it. The tables in the Appendix summarize these contribution limits for all 50 states. Only 11 states allow unlimited contributions to be made to candidates who run in their gubernatorial races. In addition, a total of 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 nonetheless is still "weak" because it cannot prevent out-of-state individuals or entities from contributing to any particular state candidate. Nor can it prevent those candidates from soliciting campaign funds from outside 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 own citizens. In addition, a state's unique contribution limit becomes ripe for challenge when it is made too low, although some low limits have been upheld.[373] On the other hand, state expenditure limits will always be unconstitutional.

372. *See* Mazo & Kuhner, *supra* note 102, at 7.

373. *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); *and* 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).

V. THE DEATH OF CAMPAIGN FINANCE NATIONALISM

A. Foreigners Participation in American Elections

Thus far, I have been arguing that our political system is characterized by its "campaign finance nationalism." I 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. This give rise to a political system in which everyone is free to donate across state lines, although only residents can vote. One consequence of our campaign finance nationalism is that states governments are unable to prevent contributions from out-of-state forces that may wish to influence their local politics. Another consequence of it is that politicians, regardless of the level of government at which they serve, are forced to fundraise all over the country. The more expensive the campaign, in fact, the wider one's fundraising net must be cast.

When it comes to our campaign finance nationalism, the attributes of federalism that permeate the rest of election law do not apply. At the same time, given the mandate of Section 441e and the decision in *Bluman*, it is safe to say that our campaign finance system was almost certainly also designed to prevent "campaign finance internationalism" from taking root. In other words, the American campaign finance system was not designed to be global. American citizens, permanent resident aliens (LPRs), and various American corporate entities 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, and often they have been successful. One way foreigners have tried to exert their influence is by sending assistance to American political candidates. Foreigners give money to Americans candidates in the hope of swaying their decision-making once these candidates become officeholders, in the same way domestic contributors do. Though our current campaign finance system is designed to prevent foreign interference, the system actually 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.

Despite the prohibitions on foreign nationals that Section 441e was designed to prevent, foreign money has a way of making its way into American campaign coffers. Richard Nixon's receipt of $10 million during the 1972

presidential race—which served, in part, as the impetus for FECA's 1974 amendments and for the eventual adoption of the ban on foreign contributions and expenditures—was not the first time foreign money had made its way to a domestic campaign. Nor would it be the last. In the 1990s, foreign governments tried to influence U.S. policy by giving money directly to political parties. 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 Governmental Affairs Committee to conduct an investigation. As a result of that investigation, Congress banned soft money in federal elections when it passed the Bipartisan Campaign Reform Act in 2002.

The law at that point had made it fairly difficult for foreign nationals to participate in American electoral campaigns. It was not only that Section 441e barred foreign nationals from "directly or indirectly" making contributions or donating any other "thing of value" to any federal, state, or local election. The law also prohibited foreign nationals from making expenditures, including independent expenditures or electioneering communications. Further, the FEC's regulations barred foreign nationals from influencing decisions about how unions, corporations, party committees, or political committees participated in American campaigns.[374]

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.[375] Through a PAC, the subsidiary could make a contribution of $5,000 per year to a federal candidate. Despite the fact that the subsidiary was foreign-controlled, it was not considered a "foreign national" by the FEC as long as it was incorporated and had its principle place of business in the United States.[376] There were important restrictions imposed by the FEC on PAC contributions made by such subsidiaries. One was that foreign nationals could not influence or participate in the activities of the subsidiary's PAC.[377] Another was that any foreign national who sat on the subsidiary's board had to abstain from voting on issues related to its PAC.[378]

374. *See* 11 C.F.R. § 110.20 (2004).

375. *See* Powell, *supra* note 150, at 964.

376. *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).

377. *See* Powell, *supra* note 150, at 965.

378. *Id.* at 965–66; *see also* FED. ELECTIONS COMM'N, ADVISORY OP. 1995-15 (June 30, 1995),

Furthermore, the subsidiary had to produce real income in the United States to fund its PAC,[379] and foreign nationals could not contribute any money to the PAC.[380] Still, despite these restrictions, the amount of contributions made by PACs to candidates began increasing. We continue to see this increase in contributions today. In 2018, a record number 238 different PACs belonging to the U.S. subsidiaries of foreign corporations supported political candidates in the United States,[381] contributing more than $23.5 million in total to American electoral campaigns.[382] That is more than such PACs have ever contributed before.

The PAC contributions of these U.S.-based subsidiaries are not the real threat, however, to our campaign finance nationalism—or rather, they are not the only real threat. Another threat is the ability of these U.S.-based subsidiaries to make unlimited independent expenditures, an avenue that became open to them thanks to *Citizens United*. This was the issue that Justice Stevens repeatedly raised in his dissent in that case.[383] Soon after *Citizens United* struck down the ban prohibiting corporations and unions from making independent expenditures, a case decided by the U.S. Court of Appeals for the D.C. Circuit, *Speechnow.org v. FEC*,[384] held that limiting contributions to PACs that only make independent expenditures violated the First Amendment.[385] Overnight, the "Super PAC" was created.[386] Super PACs are political action committees that only make independent expenditures. Since they do not contribute to candidates, there is no one for them to "corrupt," and they are not subject to spending limits. As such, Super PACs are able to raise unlimited amounts of money, regardless of whether it comes from individuals

https://www.fec.gov/files/legal/aos/1995-15/1995-15.pdf.

379. FED. ELECTIONS COMM'N, ADVISORY OP. 1995-15 (June 30, 1995), https://www.fec.gov/files/legal/aos/1995-15/1995-15.pdf.

380. Powell, *supra* note 150, *at* 965; *see also* FED. ELECTIONS COMM'N, ADVISORY OP. 1989-20 (October 27, 1989), https://www.fec.gov/files/legal/aos/1989-20/1989-20.p

381. *Foreign-connected PACs: Election Cycle 2018*, CTR. FOR RESPONSIVE POLITICS, https://www.opensecrets.org/pacs/foreign.php (last visited May 27, 2019).

382. *Id.*

383. *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").

384. 599 F.3d 686, 694–95 (D.C. Cir. 2010).

385. *Id*.

386. *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).

or other corporations, and to spend unlimited amounts of money as well.

Citizens United and *Speechnow.org* provided a route for the U.S. subsidiaries of foreign-based corporations to contribute millions of dollars to Super PACs and to 501(c)(4) organizations. 501(c)(4) organizations, as mentioned earlier, are social welfare organizations that are regulated by the IRS, not the FEC. Unlike Super PACs, 501(c)(4)'s also do not have to disclose their 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, was no longer restricted to making contributions to candidates through PACs. Now the same subsidiary was also free to spend its own money on advertisements purchased through 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 gotten into this game.[387]

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.-based subsidiaries, even if that influence is indirect. Those who run the U.S subsidiary of a foreign corporation are naturally going to be 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 them have recently given to outside spending groups to influence the course of 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 $1.2 million to Super PACs in 2018.[388] Rarely are the activities of these subsidiaries policed. In 2018, the FEC hit Right to Rise, a Super PAC supporting Jed Bush, with a large fine for soliciting $1.3 million in contributions during the 2016 presidential primaries from a U.S.-based subsidiary, American Pacific International Capital (APIC), which is owned by Chinese nationals.[389] APIC had earlier contributed also to

387. *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 POLITICS (Mar. 22, 2019), https://www.opensecrets.org/news/2019/03/citizens-united-foreign-owned-corporations-put-millions-in-us-elections/.

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

389. *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 POLITICS (March 12, 2019), https://www.opensecrets.org/news/2019/03/chinese-owned-company-gave-illegal-

a liberal Super PAC that supported Hillary Clinton.[390]

It is not clear that the FEC's fines were 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."[391] Even the time lag of FEC's enforcement action is revealing. The illegal contributions to the Super PAC were given in March and June 2015, whereas the FEC announced its fines in March 2019, which was years later.[392] By that time, the election that these illegal contributions were meant to influence was over. Here, the benefit of violating the law was less than the penalty, and when that is the case, such violations will continue. As another scholar explains, "The regulation of political expenditures by foreign corporations is the 800-pound gorilla that the Supreme Court has never confronted."[393]

The independent expenditures of U.S. subsidiaries of foreign corporations are not totally free from regulation, of course. These corporations are only supposed to use the money they earn in the United States for their political activities.[394] A foreign corporation cannot replenish any of their funds.[395] The problem with enforcing these regulations is that often the spending of these subsidiaries remains undisclosed. As mentioned earlier, "dark money" refers to the contributions made to 501(c)(4) organizations, which do not have to disclose their donors, and it offers foreign nationals ways to hide their activities from American voters and law enforcement officials. It is impossible to know whether foreign citizens, foreign corporations, or foreign governments use 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 will spend the money on advertisements to influence an election. If the original contribution comes

1-3-million-to-jeb-bush-super-pac/.

390. *Id.*

391. *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 the fine it received from the FEC, still came out ahead given that, "[i]n 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").

392. *Id.*

393. Vega, *supra* note 134, at 992.

394. *Id.* at 977.

395. *Id.* at 978.

from a foreign source, there is no way for the public to find out. Investigations have revealed these kinds of groups accepting at least some money linked to foreign governments.[396] The lack of transparency makes it difficult to know if these funds are being used for elections.[397]

Even if we manage to find ways to close the loopholes related to foreign corporations and dark money, we will still be confronted with other kinds of attempts by foreign governments to influence American elections. The leading narrative concerning the 2016 presidential contest involved just that scenario, as Russia, a foreign power, tried to influence an American election.[398] Russia's interference in 2016 presidential election exposed cracks in the security of America's electoral system. Hackers working on behalf of the Russian government targeted several state and local voter registration databases. Indeed, they also managed to gain access to the election machinery of a number of states.[399]

In addition to 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. Russia's use of Facebook and other social media tested the limits of America's campaign finance

396. *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 a 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 Turmp through its 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).

397. *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.

398. *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) (targeting the stages of Russia's influence campaign during the 2016 American presidential election).

399. 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 (explaining how the voter registration database of a small county in the Florida panhandle was breached by Russian government hackers in 2016).

nationalism, exposing the cracks in the system.[400] One of those important cracks is that the regulatory scheme underpinning our federal 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 and do so outside the electioneering communications window.

We have *Bluman* partly to thank for this state of affairs. 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."[401] In its opinion, the court explained how Section 441e "does not restrain foreign nationals from speaking about issues or spending money to advocate views about issues."[402] 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."[403]

What this means is that foreigners are free to speak about political issues in the United States—and, of course, to spend money to speak about such issues—as long as they do not expressly urge the election or defeat of a candidate, and as long as they 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 financial resources, would be on firm legal ground in attacking Hillary Clinton in its ad, as long as that ad runs more than 60 days before a general election or 30 days before a primary.[404] It also appears that Benjamin Bluman, a Canadian citizen, would be free to spend money to print and distribute flyers in Central Park, if all these flyers do is mention the benefits of free trade, or the harms of smoking, or the

400. *See* Gaughan, *supra* note 398.

401. 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, the Supreme Court has explained, if it "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id*. at 285.

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

403. *Id.*

404. 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/.

emotional pain of getting an abortion, without urging that any candidate be defeated. 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 implications of this opinion.[405] The *Bluman* court explained that it had to read Section 441e this way because of an earlier Roberts Court campaign finance decision, *Wisconsin Right to Life v. FEC*,[406] which had defined issue advocacy narrowly.[407] The result is unfortunate, in large part because the issue advocacy loophole promises to become the exception that swallows the rule.

Foreign money spent on issue advocacy is not the last loophole in our campaign finance nationalism. Another is that the ban on foreign spending also only applies to willful violations of the law. The *Bluman* court explained 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."[408] The problem with this is that there are "many aliens in this country who no doubt are unaware of the statutory ban on foreign *expenditures*, in particular."[409] Indeed, most foreigners will not be aware that the law applies to them, and this lack of awareness may ultimately absolve them of liability. Finally, it also remains unclear whether the ban of foreign spending in American elections applies to ballot measures. In 2015, the FEC deadlocked in an enforcement action concerning whether the ban on foreign nationals applied to local ballot initiatives. In that case, a Luxembourg-based company and a domestic subsidiary contributed money to oppose a Los Angeles ballot initiative.[410] The FEC could not resolve the issue one way or the other, and thus created another loophole in our campaign finance system that provides a legal means for foreign nationals to be able to fund American elections.

405. *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')").

406. 551 U.S. 449 (2007).

407. 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").

408. *Id*. at 292.

409. *Id.*

410. *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. Efforts to Close the Door to Foreign Nationals

To the extent that our system of campaign finance nationalism should continue to function as it had before, what should be done to preserve it? Scholars, citizens, and legislators have suggested three kinds of remedies that would prevent foreign nationals from influencing American elections: overrule *Citizens United* judicially, ratify a constitutional amendment to overrule that decision constitutionally, or have Congress pass new laws to prevent foreign spending in American elections legislatively. So far, none of these options have been successfully implemented. All are proposals that have received various stages of consideration.

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, overruled two prior Supreme Court decisions in the area of campaign finance law.[411] Certainly, the Court's liberal justices were on the side of overruling *Citizens United*. A number of them have stated as much in their public appearances and judicial pronouncements.[412] Before the 2016 presidential election, some scholars advanced the idea of overruling *Citizens United* as the best path to achieving campaign finance reform.[413] 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

411. *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).

412. *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.").

413. *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*").

overturned.[414]

Of course, Hillary Clinton lost the presidency—in part because of foreign interference, ironically enough.[415] 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 seat after Scalia's death, and 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, of course, had authored the opinion in *Bluman*. 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.[416]

Activists had no choice but to pivot to another strategy, and some sought to amend the Constitution. 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.[417] Thus there is precedent for using the amendment process to overturn unpopular Supreme Court rulings. After the amendment movement began gathering steam, a dozen distinct amendment bills circulated through Congress.[418] After extensive collaboration between the House and Senate sponsors of these bills and input from several grassroots advocacy organizations—including Public Citizen, People for the American Way, Free Speech for People, and Common Cause, all of which are committed to getting big money out of politics—the proposed amendments circulating through 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.[419]

The text of the DFAA is broken up into three sections. Section 1 of the

414. *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 degree . . . .").

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

416. *See* Mazo & Kuhner, *supra* note 102, at 12.

417. *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).

418. *Id.* at 386.

419. *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).

amendment is designed to allow Congress and the states to set limits on the raising and spending of money by candidates and others who seek to influence elections.[420] The language would allow limits to be set not only on contributions but also on expenditures. 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."[421] The language of Section 2 is important for closing the loophole that allows foreign spending by the U.S. subsidiaries of foreign corporations. Finally, Section 3 of the DFAA consists of a savings clause that provides that nothing in the amendment "shall be construed to abridge the freedom of the press."[422] 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*.[423]

The DFAA, it deserves to be mentioned, is only one of the vehicles for changing the law 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.[424] Other language has also been introduced since *Citizens United*. Indeed, thirteen different campaign finance-related amendment bills were introduced in the 114th Congress (2014-2016), eleven were introduced in the 115th Congress (2016-2018), and, as of this writing, six different ones have already been introduced in the 116th Congress (2018-2020).[425] Most of these amendments 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

420. 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.

421. 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." H.R.J. RES. 2 § 2.

422. H.R.J. RES. 2 § 3.

423. *See* Fein, *supra* note 417, at 384–88.

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

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

corporate expenditures, however, would close an important loophole that currently allows foreign nationals to spend their money to influence elections.

Ratifying a constitutional amendment is a difficult endeavor, of course. 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).[426] 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 again, just as with the first method.[427] Most reformers today are not looking to begin with Congress, as Ronald Fein explains, but rather to take a "bottom-up, state-by-state, grassroots-orientated approach," one that starts at the state level and puts pressure on state legislatures.[428] Amendment activists are pressuring state legislatures to act first, in order to put pressure on Congress.

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

Back in 2010, the House of Representatives introduced the DISCLOSE Act.[429] It sought to prohibit foreign interference in American elections by extending the ban on contributions and expenditures that is currently in place for foreign nationals to the U.S. subsidiaries of foreign corporations.[430] The DISCLOSE Act would have required the highest ranking official of any such U.S. subsidiary, before making any contribution, independent expenditure, or

426. U.S. CONST. art. V.
427. *Id.*
428. *See* Fein, *supra* note 417, at 395–96; *see also* Sparks, *supra* note 386, at 264.
429. 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.
430. H.R. Res. 5175 § 102.

disbursement for an electioneering communication in regard to a federal election, to file a certificate with the FEC affirming that the subsidiary was not carrying out prohibited activity.[431] The act would also have extended the ban on foreign nationals to these U.S. subsidiaries by making them ineligible to contribute to political 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.[432]

The DISCLOSE Act passed through the House in June 2010, but it failed in the Senate.[433] 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 "DISCLOSE Act 2.0."[434] This time the bill did not seek to regulate the activities of foreign nationals directly, but instead was aimed at deterring corporate spending on electioneering. However, Republicans opposed the measure again, 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 of Representatives, which sought to apply the ban on contributions and expenditures by foreign nationals to domestic corporations that are foreign-controlled, foreign-influenced, or foreign-owned.[435] Most recently, after they won a majority in the House of Representative during the mid-term election of 2018, Democrats introduced a sweeping reform bill that they called the "For the People Act of 2019," though it is commonly known as H.R. 1.[436] This bill targeted foreign activity in American elections in a number of ways, including by prohibiting foreign nationals to direct, control, or participate in the decision-making process of any corporation, labor union, political committee, or political organization with regard

431. H.R. Res. 5175 § 102(b).

432. H.R. Res. 5175 § 102(a)(3).

433. 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 134, at 908 n.179; Sparks, *supra* note 386, at 260.

434. *See* S. 3369, 112th Cong. (2012), https://www.congress.gov/bill/112th-congress/senate-bill/3369; *see also* Sparks, *supra* note 386, at 260 (describing how this legislation "was revived in 2012 as the so-called 'DISCLOSE Act 2.0'").

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

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

to election-related activity;[437] by requiring the FEC to conduct an audit after each election to determine the influence of illicit foreign activity that took place;[438] by prohibiting foreign nationals from making contributions to influence the outcome of ballot initiatives and referenda;[439] and by prohibiting them from making contributions, expenditures, independent expenditures, or disbursements for electioneering communications for online advertising.[440]

Other ideas have also been proposed. 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.[441] 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 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 online platforms, and it would require these persons and groups to disclose who paid for these ads, similar to the way this is currently done on TV.[442] 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.[443] 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,[444] making paid internet or digital communications that refers to a clearly identified candidate for office and that are disseminated within 60 days before a general election or 30 days before a primary regulated in the same way as electioneering communications.[445] The provisions of the PAID Ads Act would prohibit foreign nationals from buying broadcast or internet ads that promote, attack, support or oppose a candidate, regardless of whether the

437. H.R. 1 § 4101(a)(3).
438. H.R. 1 § 4103.
439. H.R. 1 § 4104.
440. H.R. 1 § 4105.
441. *See* S. 1989, 115th Cong. (2017), https://www.congress.gov/bill/115th-congress/senate-bill/1989/actions.
442. S. 1989 8(a).
443. S. 1989 8(a).
444. *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.
445. H.R. 2135 § 4(a)(2)(F).

ads engage in express advocacy.[446] The law would also prohibit spending by foreign governments for broadcast and internet ads that discuss national legislative issues of public importance during a regularly scheduled general election year for federal office, even if those ads do not mention the specific names of candidates. The legislation is designed to cover the types of ads run by Russia in the 2016 election.

The problem with all of this legislation that has been introduced recently concerning foreign spending—including the proposals to amend FECA that would require additional verification for online credit card contributions, that would prohibit U.S. companies with a certain percentage of foreign ownership from making campaign contributions or expenditures, that requires tax-exempt organizations to certify that they do not accept foreign funds to use in U.S. elections, and that would prohibit foreign nationals from making contributions or expenditures in state and local ballot initiatives and referenda[447]—is that our political parties not agree of them. 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 grants foreign actors some entry into the system. The Supreme Court, meanwhile, has been reluctant to wade 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, in his retirement, has opposed the idea that people should be able to influence a candidate's election even though they cannot vote for him. In a recent book, he explains 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."[448] In a system of campaign finance nationalism, corporations and nonresidents are given that power, and the available evidence suggests that they wield it with increasing frequency and effectiveness. Whether they should have that power depends on one's theory of representation in a

446. H.R. 2135 § 4(a)(2)(H).
447. *See* Garrett, *supra* note 410, at 2.
448. JOHN PAUL STEVENS, SIX AMENDMENTS: HOW AND WHY WE SHOULD CHANGE THE CONSTITUTION 59 (Little, Brown & Co., eds., 2014).

federal system.[449]

Scholars like Todd Pettys and Jessica Bulman-Pozen celebrate the fact that our campaign finance system allows an increase in political engagement across state lines.[450] They view cross-border political activity as an important feature of American federalism.[451] These scholars applaud how our system brings a national agenda to local contests and how it suits a mobile electorate.[452] They see no tension between voting rights federalism and campaign finance nationalism. For them, the speaker-neutrality mandate of *Citizens United* can also co-exist with the decision in *Bluman* because they simply place foreigners in a different category and believe they do not warrant the protections of the First Amendment. Most Americans probably subscribe to this view, too, without ever really thinking about it. Most Americans do not question why our politicians are allowed to seek their campaign contributions from interstate donors, just as they do not question why most serious candidates for national office today are supported by a Super PAC. Most Americans view our campaign finance nationalism as an integral part of our federalism.

On the other hand, other scholars subscribe to a different theory of representation and disapprove of our campaign finance nationalism. These scholars do not believe that spending money to influence voters in other districts advances democratic self-government.[453] Rather, they argue that the First Amendment's guarantee of the freedom of speech is not the only ideal that should be advanced by our campaign finance system. The system should also advance the ideal of self-government. When courts consider whether campaign finance laws are constitutional, they should consider the ideal of self-government, fought for by the Framers, as an equally important value that needs to be protected.[454]

Scholars who follow this latter line of thinking have an easier time explaining why our campaign finance system should be closed to foreigners: namely, because their participation interferes with democratic self-

449. *See* Pettys, *supra* note 226, at 81.
450. *See* Bulman-Pozen, *supra* note 365, at 1135.
451. *See* Pettys, *supra* note 226, at 86.
452. *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).
453. Briffault, *supra* note 9, at 68.
454. *See* Hellman, *supra* note 15, at 59–60, 66–77.

government.[455] Just as the principle of democratic self-government can be used to restrict campaign contributions from foreigners, so should it be used to restrict the contributions of nonresident Americans. Of course, *Bluman* found resident and nonresident Americans to be part of the same political community, but whether they are or not depends on one's theory of representation in a federal system. For some, casting a vote and influencing the vote that another will cast are not separate enough activities that they should be governed by different bodies of law. They are not separate enough that the first activity should be restricted to a state's residents while the second activity should not be. Following this line of thinking, Justice Stevens argues that allowing campaign contributions to flow across state lines amounts to "picking other people's congressmen, not your own."[456] Evidently, our campaign finance nationalism does not make sense to everyone. The current Court has been reluctant to wade into 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.

455. *Id.* at 67.

456. *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. 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.

TABLE 1: STATE CONTRIBUTIONS LIMITS FOR INDIVIDUALS, STATE PARTIES & PACS

	Individual			**State Party**			**PAC**		
State	**Governor**	**Senate**	**House**	**Governor**	**Senate**	**House**	**Governor**	**Senate**	**House**
AL	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited
AK	$500	$500	$500	$100,000	$15,000	$10,000	$1,000	$1,000	$1,000
AZ	$5,100	$5,100	$5,100	$80,100	$10,100	$10,100	$10,100	$10,100	$10,100
AR	$2,700	$2,700	$2,700	$2,700	$2,700	$2,700	$2,700	$2,700	$2,700
CA	$29,000	$4,400	$4,400	Unlimited	Unlimited	Unlimited	$29,000	$8,800	$8,800
CO	$575	$200	$200	$569,530	$20,500	$14,805	$5,675	$2,250	$2,250
CT	$3,500	$1,000	$250	$50,000	$10,000	$5,000	$5,000	$1,500	$750

DE	$1,200	$600	$600	$75,000	$5,000	$3,000	$1,200	$600	$600
FL	$3,000	$1,000	$1,000	$250,000	$50,000	$50,000	$3,000	$1,000	$1,000
GA	$6,600	$2,600	$2,600	$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	$6,600	$4,000	$2,000
ID	$5,000	$1,000	$1,000	$10,000	$2,000	$2,000	$5,000	$1,000	$1,000
IL	$5,600	$5,600	$5,600	Unlimited	Unlimited	Unlimited	$55,400	$55,400	$55,400
IN	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited
IA	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited
KS	$2,000	$1,000	$500	Unlimited	Unlimited	Unlimited	$2,000	$1,000	$500
KY	$3,000	$3,000	$3,000	Unlimited	Unlimited	Unlimited	$3,000	$3,000	$3,000
LA	$5,000	$2,500	$2,500	Unlimited	Unlimited	Unlimited	$10,000	$5,000	$5,000
ME	$1,600	$400	$400	$1,600	$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
MA	$1,000	$1,000	$1,000	$3,000	$3,000	$3,000	$500	$500	$500
MI	$6,800	$2,000	$1,000	$136,000	$20,000	$10,000	$68,000	$20,000	$10,000
MN	$4,000	$1,000	$1,000	$40,000	$10,000	$10,000	$4,000	$1,000	$1,000

MS	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited
MO	$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	$10,610	$800	$400
NE	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited
NV	$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
NJ	$3,800	$3,000	$3,000	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
NY	$44,000	$11,000	$4,400	Unlimited	Unlimited	Unlimited	$44,000	$11,000	$4,400
NC	$5,200	$5,200	$5,200	Unlimited	Unlimited	Unlimited	$5,200	$5,200	$5,200
ND	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited
OH	$12,708	$12,708	$12,708	$716,719	$142,963	$71,164	$12,708	$12,708	$12,708
OK	$2,700	$2,700	$2,700	$25,000	$10,000	$10,000	$5,000	$5,000	$5,000
OR	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited
PA	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited

RI	$1,000	$1,000	$1,000	$25,000	$25,000	$25,000	$1,000	$1,000	$1,000
SC	$3,500	$1,000	$1,000	$50,000	$5,000	$5,000	$3,500	$1,000	$1,000
SD	$4,000	$1,000	$1,000	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited
TN	$4,000	$1,500	$1,500	$393,800	$63,000	$31,600	$11,800	$11,800	$7,800
TX	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited
UT	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited
VT	$4,080	$1,530	$1,020	Unlimited	Unlimited	Unlimited	$4,080	$1,530	$1,020
VA	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited
WA	$2,000	$1,000	$1,000	$4,235,390	$86,437	$86,437	$2,000	$1,000	$1,000
WI	$1,000	$1,000	$1,000	$1,000	$1,000	$1,000	$1,000	$1,000	$1,000
WV	$20,000	$2,000	$1,000	Unlimited	Unlimited	Unlimited	$86,000	$2,000	$1,000
WY	$2,500	$1,500	$1,500	Unlimited	Unlimited	Unlimited	Unlimited	$5,000	$5,000

TABLE 2: STATE CONTRIBUTION LIMITS FOR CORPORATIONS & UNIONS

	Corporation			Union		
State	**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	Unlim-ited	Unlim-ited	Unlimited
MO	Prohib-ited	Prohib-ited	Prohib-ited	Prohib-ited	Prohib-ited	Prohibited
MT	Prohib-ited	Prohib-ited	Prohib-ited	Prohib-ited	Prohib-ited	Prohibited
NE	Unlim-ited	Unlim-ited	Unlim-ited	Unlim-ited	Unlim-ited	Unlimited
NV	$5,000	$5,000	$5,000	$5,000	$5,000	$5,000
NH	$1,000	$1,000	$1,000	Prohib-ited	Prohib-ited	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	Prohib-ited	Prohib-ited	Prohib-ited	Prohib-ited	Prohib-ited	Prohibited
ND	Prohib-ited	Prohib-ited	Prohib-ited	Prohib-ited	Prohib-ited	Prohibited
OH	Prohib-ited	Prohib-ited	Prohib-ited	Prohib-ited	Prohib-ited	Prohibited
OK	Prohib-ited	Prohib-ited	Prohib-ited	Prohib-ited	Prohib-ited	Prohibited
OR	Unlim-ited	Unlim-ited	Unlim-ited	Unlim-ited	Unlim-ited	Unlimited
PA	Prohib-ited	Prohib-ited	Prohib-ited	Prohib-ited	Prohib-ited	Prohibited
RI	Prohib-ited	Prohib-ited	Prohib-ited	Prohib-ited	Prohib-ited	Prohibited
SC	$3,500	$1,000	$1,000	$3,500	$1,000	$1,000
SD	$4,000	$1,000	$1,000	$4,000	$1,000	$1,000
TN	$11,800	$11,800	$7,800	$11,800	$11,800	$7,800
TX	Prohib-ited	Prohib-ited	Prohib-ited	Prohib-ited	Prohib-ited	Prohibited
UT	Unlim-ited	Unlim-ited	Unlim-ited	Unlim-ited	Unlim-ited	Unlimited
VT	$4,080	$1,530	$1,020	$4,080	$1,530	$1,020
VA	Unlim-ited	Unlim-ited	Unlim-ited	Unlim-ited	Unlim-ited	Unlimited
WA	$2,000	$1,000	$1,000	$2,000	$1,000	$1,000

WI	Prohib-ited	Prohib-ited	Prohib-ited	$1,000	$1,000	$1,000
WV	Prohib-ited	Prohib-ited	Prohib-ited	Prohib-ited	Prohib-ited	Prohibited
WY	Prohib-ited	Prohib-ited	Prohib-ited	Prohib-ited	Prohib-ited	Prohibited

TABLE 3: 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