

## NONCITIZENS AND *CITIZENS UNITED*

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*Citizens United v. Federal Elections Committee barred Congress from restricting independent expenditures by corporations and trade unions simply because of their source. Yet the opinion declined to answer whether the Bipartisan Campaign Reform Act's (BCRA) ban on independent expenditures from foreign sources fell under this rule. The Court's silence on this issue did little to mute criticisms that—as Barack Obama declared in his 2010 State of the Union Address—Citizens United would open the floodgates to foreign spending in domestic elections. This Article considers whether Citizens United should be extended to protect foreign independent expenditures. Although foreign nationals have limited constitutional rights, the First Amendment protects foreign speech expressed in United States territories. And if corruption is the primary concern over foreign money in domestic elections, independent expenditures constitute a far more transparent channel of influence than the status quo of lobbying and the use of Political Action Committees (PACs). Moreover, both the text and purposes of the First Amendment support protecting foreign independent expenditures. Finally, the BCRA's ban on foreign independent expenditures is also a content-based restriction on speech that forecloses alternative channels of communication and is vastly over-inclusive.*

### I. INTRODUCTION

To what extent can foreigners participate in American elections? The Constitution limits holding federal office and certain voting rights to United States citizens.<sup>1</sup> Apart from these two provisions, the constitutional status of foreigners who seek to influence domestic elections is less clear. Does the First Amendment, for example, give refuge to a foreigner who buys a

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1. U.S. CONST. art. I, § 2, cl. 2 (limiting Representative office to U.S. citizens); U.S. CONST. art. I, § 3, cl. 3 (limiting Senatorial office); U.S. CONST. art. II, § 1, cl. 4 (limiting Presidential office); U.S. CONST. amend. XV. The Constitution only limits the right against discriminatory denial of the vote to citizens; therefore, noncitizens may enjoy voting rights if a state or local government decides to enfranchise its noncitizens. See David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?*, 25 T. JEFFERSON L. REV. 367, 370 n.12 (2003).

thirty-second television advertisement lauding the virtues of a particular candidate a few days before an election? Since the 1970s, Congress has answered no—a foreign national who makes an independent expenditure tied to a federal election commits a felony.<sup>2</sup> To date, the ban on foreign independent expenditures has escaped judicial scrutiny.<sup>3</sup> The recent Supreme Court decision, *Citizens United v. Federal Elections Commission*, however, held that the First Amendment bars Congress from restricting independent expenditures on account of their source.<sup>4</sup> The question follows whether the ban on independent expenditures from foreign sources impermissibly conflicts with the First Amendment.

*Citizens United* struck down federal restrictions on corporate and trade union independent expenditures.<sup>5</sup> Citing both history and logic, the Court declared that speech does not lose First Amendment privileges “simply because of its source.”<sup>6</sup> The opinion, however, put history and logic at loggerheads in another context: foreign speech. *Citizens United* ruled that Congress cannot distinguish among classes of speakers. Yet Congress has drawn precisely such a distinction in permitting independent expenditures by United States citizens but not by foreign nationals.<sup>7</sup> The Court expressly declined to reach the question of whether the government may ban independent expenditures from foreigners.<sup>8</sup> By drawing a legal distinction between domestic and foreign speakers, the Court retreated from its bold declaration that the First Amendment protects speech regardless of its source.

The Court’s silence on the issue hardly muted commentary that *Citizens United* signaled the demise of restrictions on foreign involvement in domestic elections. In dissent, Justice Stevens argued that the majority’s

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2. 2 U.S.C. § 441e(a)(1)(C) (2006). Section 441e(a)(1)(C) reads: “It shall be unlawful for . . . a foreign national, directly or indirectly, to make . . . an expenditure, independent expenditure, or disbursement for an electioneering communication . . .” *Id.*

3. *Corporate America vs. The Voter: Examining the Supreme Court’s Decision to Allow Unlimited Corporate Spending in Elections: Hearings Before the Comm. on Rules and Admin., 111th Cong. 10-11 (2010)* [hereinafter *Hearings*] (testimony of Prof. Heather Gerken). The lack of scrutiny of the ban on foreign independent expenditures is especially notable given that many other sections of the Bipartisan Campaign Reform Act (BCRA) were immediately litigated. Shortly after the BCRA’s passage, for example, Senator Mitch McConnell initiated a lawsuit joined by members of the House of Representatives, state political organizations, interest groups, and private citizens to challenge the BCRA’s constitutionality. See Evan C. Zoldan, *Strangers in a Strange Land: Domestic Subsidiaries of Foreign Corporations and the Ban on Political Contributions from Foreign Sources*, 34 LAW & POL’Y INT’L BUS. 573, 574 (2003).

4. *Citizens United v. Fed. Elections Comm’n*, 130 S. Ct. 876 (2010).

5. *Id.* at 913.

6. *Id.* at 900 (quoting *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978)).

7. See generally *id.*; see also 2 U.S.C. § 441e (2006).

8. *Citizens United*, 130 S. Ct. at 911.

reasoning would give the same First Amendment protections to wartime propaganda from foreign adversaries and independent expenditures from foreign corporations as those enjoyed by individual Americans.<sup>9</sup> Approximately one week after the Court issued the opinion, President Barack Obama criticized *Citizens United* for “revers[ing] a century of law that . . . will open the floodgates for special interests—including foreign corporations—to spend without limit in [American] elections.”<sup>10</sup> Senator Charles Schumer and Congressmen Chris Van Hollen entered the fray by proposing a bill that would ban foreign corporations and their domestic subsidiaries from spending money on American elections.<sup>11</sup> The ban on foreign independent expenditures received further support from academics intent on limiting the reach of *Citizens United*.<sup>12</sup>

The effect of *Citizens United* on foreign independent expenditures remains unclear. Federal restrictions on foreign involvement in American elections have deep roots. The Constitution, for example, contains

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9. *Citizens United v. Fed. Elections Comm’n*, 130 S. Ct. 876, 947-48 (2010) (Stevens, J., dissenting). Justice Stevens criticized the majority’s holding that the First Amendment protections apply indifferently with respect to the source of the speech. He argued:

[The majority’s] assumption that the identity of a speaker has *no* relevance to the Government’s ability to regulate political speech would . . . have accorded the propaganda broadcasts to our troops by “Tokyo Rose” during World War II the same protection as speech by Allied Commanders. More pertinently, it would appear to afford the same protection to multinational corporations controlled by foreigners as to individual Americans. . . .

*Id.*

10. Barack Obama, U.S. President, The 2010 State of the Union Address (Jan. 27, 2010), <http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address>. President Bill Clinton used similar language in his 1997 State of the Union Address. He lauded the “tough and fair” campaign finance policy that would “ban contributions from noncitizens” and “all corporate sources.” William Clinton, U.S. President, The 1997 State of the Union Address (Feb. 4, 1997), <http://www.american-presidents.com/bill-clinton/1997-state-of-the-union-address>.

11. See generally DISCLOSE Act, H.R. 5175, 111th Cong., (2d Sess. 2010). In an official press release, President Obama commented that the DISCLOSE Act would “prohibit foreign entities from manipulating the outcomes of American elections and help close other special interest loopholes.” Press Release, Barack Obama, U.S. President, Statement by the President on the DISCLOSE Act (Apr. 29, 2010), <http://www.whitehouse.gov/the-press-office/statement-president-disclose-act>.

12. See *Hearings*, *supra* note 3, at 10-11; see also Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH L. REV. 581 (2011) (“[T]hrough the arguments banning foreign campaign spending are sensible and appealing, they seem to counter the majority opinion in *Citizens United*.”); Justin Levitt, *Confronting the Impact of Citizens United*, 29 YALE L. & POL’Y REV. (forthcoming 2011); Andre Douglas Pond Cummings, *Procuring ‘Justice’?: Citizens United, Caperton v. Massey and Partisan Judicial Elections* (manuscript 2010); Daniel J.H. Greenwood, ‘Citizens United’ *Should Be Corrected*, NEW YORK LAW JOURNAL, Mar. 26, 2010, at 1, available at [http://people.hofstra.edu/Daniel\\_J\\_Greenwood/pdf/NYLJ.pdf](http://people.hofstra.edu/Daniel_J_Greenwood/pdf/NYLJ.pdf) (“If First Amendment law permits managers to spend corporate money to influence elections, they must do so whenever it is in the corporate interest to do so. That way leads to the death of the market in favor of crony capitalism.”).

numerous provisions designed to shield American sovereignty from foreign corruption.<sup>13</sup> The ban on foreign independent expenditures has a similar design, as it was enacted by Congress in the 1970s after reports surfaced of political campaigns receiving large sums of money from abroad.<sup>14</sup> Yet the ban's longevity is no guarantee of its fate after *Citizens United*. Were the Court to consider the merits of the ban on foreign independent expenditures, the five Justices in the *Citizens United* majority would surprise few people in ruling that the only way to stop discrimination on the basis of a speaker's identity is to actually stop discriminating on the basis of a speaker's identity.<sup>15</sup>

Supporters of the ban argue that it deserves different treatment than other campaign finance restrictions because it only applies to noncitizens.<sup>16</sup> Foreign nationals, after all, enjoy fewer constitutional protections than United States citizens.<sup>17</sup> For example, in immigration and equal protection decisions, the Supreme Court has deferred to state and federal authority to treat citizens differently than noncitizens. But the ban implicates expression in the United States rather than the conditions of alienage—i.e., the conditions under which a noncitizen may enter or stay in the United States. Apart from the federal and state power over alienage, the Court has held that noncitizens enjoy First Amendment protections for speech expressed in the United States.<sup>18</sup> The ban thus appears subject to First Amendment scrutiny.

The ban on foreign independent expenditures should fail under the

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13. For example, some Philadelphia delegates to the Constitutional Convention contacted Prince Henry of Prussia to explore the possibility of the prince serving as America's constitutional monarch. See LOUISE BURNHAM DUNBAR, A STUDY OF "MONARCHIAL" TENDENCIES IN THE UNITED STATES FROM 1776 TO 1801, at 54-75 (1922); WILLIAM M. WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION 42-50 (1972). This helps explain why the Framers limited the Presidency to natural-born citizens of the United States. U.S. CONST. art. II, § 1, cl. 4.

14. See Note, "Foreign" Campaign Contributions and the First Amendment, 110 HARV. L. REV. 1886, 1887 (1997).

15. Chief Justice Roberts used this same line of reasoning to strike down racial classifications used to allocate slots in public high schools. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."). Justices Scalia, Thomas, and Alito joined Chief Justice Roberts' opinion for the Court, with Justice Kennedy concurring in the judgment. *Id.* These same five Justices comprised the majority in *Citizens United*.

16. See, e.g., *Hearings*, *supra* note 3, at 10-11; Hasen, *supra* note 12, at 608.

17. See, e.g., *Denmore v. Kim*, 538 U.S. 510, 521 (2003) (quoting *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976)) ("Congress regularly makes rules that would be unacceptable if applied to citizens"); see generally *Galvan v. Press*, 347 U.S. 522 (1954) (upholding law barring foreign nationals from owning land in the United States).

18. See *Bridges v. Wixon*, 326 U.S. 135, 161 (1945); see also *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, 310 n.5 (1970); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 n.5 (1953).

level of scrutiny traditionally applied by the Supreme Court to campaign finance restrictions. Since *Buckley v. Valeo*,<sup>19</sup> and with exceptions that *Citizens United* overruled,<sup>20</sup> the Court has permitted only campaign finance restrictions that prevent real or apparent corruption.<sup>21</sup> *Citizens United* narrowed the corruption inquiry to the question of whether a given campaign financing practice has enough connection with political *quid pro quo* to justify their restriction.<sup>22</sup> The decision also found that independent expenditures fail to present anything more than a hypothetical risk of political *quid pro quo*.<sup>23</sup> Under this logic, the Roberts Court has struck down every limit on independent expenditures it has reviewed.<sup>24</sup>

The ban on foreign independent expenditures deserves to be struck down for the same reason: a foreign source does not increase the risk of *quid pro quo* corruption any more than a domestic source. Rather, the ban on independent expenditures may increase the risk of corruption by pushing foreign nationals with a stake in American policy to advance their interests through channels more prone to corruption, such as lobbying and campaign contributions through Political Action Committees (PACs) and subsidiaries. As history shows, foreign influence in American politics is inevitable.<sup>25</sup> Independent expenditures constitute a relatively transparent means to exert foreign influence on American policy. The corruption-prevention logic of *Buckley* and *Citizens United* gives the Court firm grounds on which to invalidate the ban on foreign independent expenditures.

Other First Amendment interests support extending the logic of *Citizens United* to protect foreign independent expenditures. First, the plain

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19. *Buckley v. Valeo*, 424 U.S. 1, 33 (1974) (per curiam) (“Since the danger of corruption and the appearance of corruption apply with equal force to challengers and to incumbents, Congress has ample justification for imposing the same fundraising constraints upon both.”).

20. See *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 659-60 (1990), overruled by *Citizens United v. Fed. Elections Comm’n*, 130 S. Ct. 876 (2010). In *Austin*, the Court held that a law restricting corporate and union spending of their treasury funds was justified to prevent “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.” *Id.* While the Court referred to this antidistortion interest in preventing “corruption,” a better interpretation is that it “really represented an embrace of the equality rationale (at least as regards corporations) that the Court had rejected in *Buckley*.” Richard L. Hasen, *What the Court Did—and Why*, AM. INT. ONLINE, July-August 2010, <http://www.the-american-interest.com/article-bd.cfm?piece=853>.

21. See *Citizens United v. Fed. Elections Comm’n*, 130 S. Ct. 876, 900, 909 (2010).

22. *Id.* at 908-09 (citing *Buckley*, 424 U.S. at 47).

23. See *id.* at 902.

24. See generally *id.*; *Randall v. Sorrell*, 548 U.S. 230, 253 (2006) (striking down Vermont’s limitations on independent expenditures).

25. See generally PAT CHOATE, *AGENTS OF INFLUENCE* (1990) (describing the successful efforts of various foreign countries to influence American policy).

language of the First Amendment gives Congress no foothold with which to distinguish between foreign and domestic speakers.<sup>26</sup> Second, the ban undermines the First Amendment purposes of facilitating self-governance and the discovery of truth. Finally, the ban is an improperly tailored content-based restriction on speech.

This Article uses *Citizens United* as a backdrop to explore the relationship between the First Amendment and foreign involvement with American elections. It proceeds by outlining the federal restrictions on foreign involvement in domestic elections in Part II. Part III then considers the extent to which the Constitution protects noncitizens and finds that the ban on foreign independent expenditures falls squarely within the ambit of the First Amendment. Part IV examines the ban against the background of *Citizens United* and other campaign finance cases. Part V highlights other aspects of the First Amendment that conflict with the ban. Part VI concludes that *Citizens United* has promise to the extent that it hastens the demise of the historical discrimination against foreign speech directed at United States citizens.

## II. FEDERAL POLITICAL PROCESS PROTECTIONS

Fears of foreign manipulation of America's political processes run deep in this country's history. The Framers inserted residence and citizenship qualifications in the Constitution to prevent foreigners from assuming leadership positions in America's fledgling government.<sup>27</sup> Shortly after the ratification of the Constitution, federal officials seized foreign newspapers and pamphlets circulating in the United States heralding Jacobin politics.<sup>28</sup> Just over a century later, Congress sought to suppress Nazi, fascist, and communist propaganda by enacting the Foreign Agents

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26. In full, the First Amendment reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend I.

27. U.S. CONST. art I, § 2, cl. 2 ("No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."); U.S. CONST. art II, § 1, cl. 4 ("No Person except a natural born Citizen . . . shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States."). Elbridge Gerry explained the basis for reserving federal offices to United States citizens as necessary because "[f]oreign powers will intermeddle in our affairs, and spare no expence to influence them." *Notes of James Madison* (Aug. 13, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 265, 268 (Max Farrand ed., rev. ed. 1966) [hereinafter CONVENTION RECORDS].

28. See, e.g., JOHN CHESTER MILLER, CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS 31, 126, 187 (1951).

Registration Act (FARA).<sup>29</sup> FARA combated foreign propaganda by requiring the agents of foreign principals to register with the Secretary of State and to disclose the source of their funds.<sup>30</sup>

The fight against foreign influence shifted once the “spectre”<sup>31</sup> of revolutionary politics waned in Europe, with Congress focusing more on the threat of foreign money in domestic elections.<sup>32</sup> In 1966, Congress amended FARA to enact the first ban on campaign contributions from foreign nationals.<sup>33</sup> The FARA amendments made it a felony for foreign principals to use domestic agents as a means to funnel contributions to election campaigns.<sup>34</sup> Congress adopted the FARA amendments after hearings established that foreigners had donated funds to domestic federal election campaigns through domestic agents.<sup>35</sup> The ban reflected the new threat of foreign influence, as Congress aimed to stop “the lawyer-lobbyist and public relations counsel whose object [was] not to subvert or overthrow the U.S. government, but to influence its policies to the satisfaction of his particular client.”<sup>36</sup>

The FARA safeguards had limited reach, as the 1972 Nixon campaign showed when it sidestepped FARA by fundraising directly from foreign sources.<sup>37</sup> Congress closed this loophole with the Federal Election Campaign Act (FECA) Amendments of 1974.<sup>38</sup> These amendments banned political contributions from all foreign nationals except for resident aliens.<sup>39</sup>

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29. 22 U.S.C. §§ 611-621 (2006).

30. *Id.*; see also Mark Baker, *Updating the Foreign Agents Registration Act to Meet the Current Economic Threat to National Security*, 25 TEX. INT’L L.J. 24, 25 (1990).

31. KARL MARX & FRIEDRICH ENGELS, *THE COMMUNIST MANIFESTO* 13 (Bantam Books 1992) (1848) (“A SPECTRE is haunting Europe—the spectre of Communism.”).

32. Congress has pursued various other means to prohibit foreign influence on American politics aside from electoral financing restrictions. From the Alien and Sedition Acts of 1798 to statutes designed to rid the country of communism, these efforts often conflict with First Amendment values. See GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW* 52-53 (1996) (describing the goals of the Alien and Sedition Acts of 1798 to block French influence on Americans); Immigration and Nationality Act, H.R. 5678, 82d Cong., 66 Stat. 163, 182-88 (1952) (codified as amended at 8 U.S.C. §§ 1101-1537) (barring communists from entering the United States).

33. See S. 693, 89th Cong., 80 Stat. 244, 244-49 (1966) (codified at 22 U.S.C. §§ 611-621 (2006)).

34. See *id.*

35. See Note, *supra* note 14, at 1887.

36. S. Rep. No. 143, at 4 (1965) (report of congressional committee’s findings).

37. Bruce D. Brown, *Alien Donors: The Participation of Non-Citizens in the U.S. Campaign Finance System*, 15 YALE L. & POL’Y REV. 503, 510 (1997).

38. Federal Election Campaign Act (FECA) Amendments of 1974, 93d Cong., 88 Stat. 1263 (codified as amended in scattered sections of titles 2, 18, and 26 of the United States Code).

39. 2 U.S.C. §§ 431-455 (2006).

They also forbade foreign nationals from making independent expenditures, which the FECA amendments defined as spending “relative to a clearly identified candidate [in federal elections.]”<sup>40</sup> The FECA amendments further required disclosure of the source of funds for contributions and independent expenditures directed to influence the nomination or election of candidates for federal office.<sup>41</sup> Senator Lloyd Bentsen proposed the amendments because he did “not think foreign nationals [had] any business in our political campaigns. They cannot vote in our elections so why should we allow them to finance our elections? Their loyalties lie elsewhere; they lie with their own countries and their own governments.”<sup>42</sup> FECA’s ban on campaign financing from foreign sources remains binding today, with the latest version codified as 2 U.S.C. § 441e in the Bipartisan Campaign Reform Act of 2002 (BCRA).<sup>43</sup>

### III. THE CONSTITUTION AND SPEECH FROM FOREIGN SOURCES

Inquiring into the constitutional merits of the ban on foreign independent expenditure begins by looking at the extent to which the Constitution applies to noncitizens. The Court may conclude that the First Amendment simply does not apply to foreign speakers in foreign lands. Indeed, no constitutional rights have ever been extended to foreigners for activity conducted outside the territory of the United States.<sup>44</sup>

But noncitizens engaged in activity in the United States enjoy some degree of constitutional protection. James Madison—the architect of the Bill of Rights—understood the Bill of Rights as extending to protect noncitizens. In his Report on the Virginia Resolutions, Madison explained

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40. Federal Election Campaign Act (FECA) Amendments of 1974, 93d Cong., 88 Stat. 1263, 1265 (codified at 18 U.S.C. § 608(e)(1) (Supp. IV 1975) (repealed 1976)).

41. *Id.* § 410(a), 88 Stat. 1263 (codified at 2 U.S.C. § 434(e) (2006)). The FECA Amendments of 1974 built on reporting requirements already in place on campaign contributions. See HERBERT ALEXANDER, *THE FEDERAL ELECTION CAMPAIGN ACT 20* (1981).

42. 120 CONG. REC. 8783 (1974). Congress subsequently gave the Federal Elections Commission authority to implement and enforce the Bentsen Amendment. See 2 U.S.C. § 441e (2006).

43. 2 U.S.C. § 441e (2006).

44. See, e.g., *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) (limiting Fourth Amendment protections to “persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community”); *Johnson v. Eisentrager*, 339 U.S. 763, 782-90 (1950) (aliens captured and imprisoned abroad had no rights to a writ of habeas corpus under the Fifth Amendment); *id.* at 771 (“[I]n extending certain Constitutional protections [to resident aliens] . . . [it is] the aliens’ presence within [United States] territorial jurisdiction that gave the Judiciary power to act.”); *U.S. ex rel. Turner v. Williams*, 194 U.S. 279 (1904) (aliens barred from entering the United States lacked First Amendment rights).

that, just as noncitizens in the United States “owe, on one hand, a temporary obedience [to American laws], they are entitled in return to their protections and advantage.”<sup>45</sup> The Supreme Court has endorsed Madison’s view.<sup>46</sup> The constitutional rights afforded to foreigners follows the standard set in *Johnson v. Eisentrager*, where the Court declared:

The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and *ascending scale of rights* as he increases his identity with our society. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand those of full citizenship upon naturalization.<sup>47</sup>

The Court later refined the “ascending scale of rights” inquiry in *Verdugo-Urquidez v. United States*.<sup>48</sup> There, the Court announced that noncitizens only “receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country.”<sup>49</sup> *Verdugo-Urquidez* involved a Mexican citizen who sought constitutional protections after Mexican officials apprehended him in Mexico and brought him to the United States border, where he was then taken into custody by United States marshals.<sup>50</sup> The Court rejected his claim that the United States Constitution applied to his arrest, finding that Verdugo-Urquidez had no previous voluntary connection to the United States<sup>51</sup> and that his arrest occurred outside American territory.<sup>52</sup> Although the First Amendment was not implicated in this case,

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45. James Madison, *James Madison’s Report on the Virginia Resolutions*, in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 556 (Jonathan Elliot ed., 2d ed. 1836).

46. See Posting of Eugene Volokh to The Volokh Conspiracy—Constitutional Rights of Non-Citizens, <http://volokh.com/posts/1235007104.shtml> (Feb. 18, 2009, 20:31 EST) (detailing the Supreme Court’s acceptance of Madison’s view in terms of the criminal procedure, equal protection, and speech protections in the Bill of Rights).

47. *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950) (emphasis added). A Magistrate Court in the Southern District of Florida recently cited *Johnson v. Eisentrager* to support the statement that, “[n]either foreign nationals who have not yet reached our shores, nor illegal aliens who have done so unlawfully and without the Attorney General’s permission, are entitled to the full panoply of rights to citizens or even resident aliens.” *United States v. Boffil-Rivera*, No. 08-20437, at 12 (S.D. Fla. Aug. 12, 2008).

48. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990).

49. *Id.* at 271 (citing *Plyler v. Doe*, 457 U.S. 202, 212 (1982); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953)).

50. *Id.* at 262.

51. *Id.* at 271.

52. *Id.* at 275 (“If there are to be restrictions on searches and seizures which occur incident to such American action, they must be imposed by the political branches through diplomatic

*Verdugo-Urquidez* offers support for withholding First Amendment protections from independent expenditures by foreign nationals because their speech is directed from abroad and they may have no other connection to the United States.

A closer look at foreign independent expenditures, however, cautions against construing *Verdugo-Urquidez* to authorize their restriction. The ban on foreign independent expenditures does not apply to foreign speech that stays outside the country. Instead, it aims to prevent foreign speech from entering the United States and influencing voters in federal elections.<sup>53</sup> Foreign independent expenditures may have extraterritorial origin, yet they are both transmitted and received in American territory. The Supreme Court has made clear that non-citizens enjoy unrestrained First Amendment rights for speech expressed within the United States.<sup>54</sup>

And in *Lamont v. Postmaster General of the United States*, the Court relied on the First Amendment to invalidate a part of FARA that required the post office to detain and destroy communist propaganda mailings from foreign countries.<sup>55</sup> Even though the mailings originated from countries hostile to the United States, *Lamont* held that the First Amendment protected political advocacy on American soil regardless of its origin.<sup>56</sup> Foreign independent expenditures in American political elections thus appear to meet the *Verdugo-Urquidez* requirement that speech “come within the territory of the United States.”<sup>57</sup>

It is less certain whether an independent expenditure itself constitutes a “substantial connection” under *Verdugo-Urquidez*. A foreign national who never sets foot in the United States, but pays \$10,000 to place a political advertisement in favor of a particular candidate before an election, may have difficulty showing enough of a connection to the United States to

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understanding, treaty, or legislation.”).

53. The ban on foreign independent expenditures only applies to “electioneering communications,” which limits the scope of § 441e to communications mentioning a candidate that is broadcast to the candidate’s electorate within 60 days before an election or 30 days before a primary. See 2 U.S.C. § 434(f)(3)(A)(i) (2006).

54. See, e.g., *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, 310 n.5 (1970); *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (Murphy, J., concurring); see also *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 497 (1999); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 n.5 (1953).

55. *Lamont v. Postmaster Gen. of the U.S.*, 381 U.S. 301, 302-03, 305 (1965); see also *Procnier v. Martinez*, 416 U.S. 396, 408-09 (1974) (holding that censorship of prisoners’ outgoing mail violated the rights of non-prisoners to whom the mail was addressed).

56. *Lamont*, 381 U.S. at 302-03, 305. The Court framed the First Amendment not as protecting the right of foreigners to speak but as protecting the right of the “addressees” to receive the mailings. *Id.*

57. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990).

receive First Amendment protection. On the other hand, by placing the advertisement, the foreign national has “purposefully avail[ed] [herself] of the privilege of conducting activities,”<sup>58</sup> in the United States and could potentially be subject to jurisdiction in the United States for defamation liability.<sup>59</sup>

While this issue is debatable, the ban on all independent foreign expenditures remains vastly overbroad. The ban restricts independent expenditures by foreign corporations that have large operations in the United States, by foreign nationals that reside in the United States, and by any other foreign entity with substantial connections to the United States.<sup>60</sup> Section 441e facially restricts the broad quantum of foreign speech that satisfies the *Verdugo-Urquidez* test.

#### A. FEDERAL IMMIGRATION AUTHORITY AND THE FIRST AMENDMENT

In the immigration arena, Congress can permissibly discriminate on the basis of nationality, even when the First Amendment is implicated. Congress has long enjoyed plenary power to exclude foreigners from entering the country.<sup>61</sup> The Supreme Court has rejected challenges to deportations for such expressive activity as the lauding of anarchy<sup>62</sup> or of communism.<sup>63</sup> In affirming this plenary power, the Court has used broad language to describe the limitations of foreigners’ First Amendment rights. In *United States ex rel. Turner v. Williams*, for example, the Court ruled that an excludable foreign national was not entitled to First Amendment protection from deportation because “[h]e does not become one of the

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58. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

59. *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 402(1)(c) (1987) (“[A] state has jurisdiction to prescribe law with respect to . . . conduct outside its territory that has or is intended to have substantial effect within its territory . . . .”); *see also* *Heroes, Inc. v. Heroes Found.*, 958 F. Supp. 1, 5 (D.D.C. 1996) (holding that jurisdiction was proper because, by placing an advertisement in a newspaper, the defendant transacted business and caused tortious injury in the forum state); *EDIAS Software Int’l, L.L.C. v. BASIS Int’l Ltd.*, 947 F. Supp. 413, 420 (D. Ariz. 1996) (holding that allegedly libelous statement on an internet forum established jurisdiction based on the “foreseeable injury felt in the forum state”); *Tonka Corp. v. TMS Entm’t, Inc.*, 638 F. Supp. 386, 391 (D. Minn. 1985) (holding that a defendant who knows their message will be broadcast in Minnesota is subject to suit in Minnesota).

60. 2 U.S.C. § 441e (2006).

61. *See, e.g.*, *Chae Chan Ping v. United States*, 130 U.S. 581, 607-09 (1889) (upholding the prohibition of Chinese laborers from entering the United States); *see also* *Boutilier v. INS*, 387 U.S. 118, 123 (1967) (citing *Chae Chan Ping*, 130 U.S. 581) (“Congress has plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.”).

62. *United States ex rel. Turner v. Williams*, 194 U.S. 279, 294-95 (1904).

63. *See* *Kleindienst v. Mandel*, 408 U.S. 753, 761-62 (1972) (upholding deportation based on communist political ideology); *Harisiades v. Shaughnessy*, 342 U.S. 580, 592 (1952).

people to whom these things are secured by our Constitution by an attempt to enter, forbidden by law.”<sup>64</sup> The Court announced in another immigration case that “[t]o preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation.”<sup>65</sup> If Congress can exclude foreigners from entering the United States because of their speech without violating the First Amendment, perhaps Congress can exclude foreign speech as a means of protecting the country from “foreign aggression and encroachment” through independent expenditures.<sup>66</sup>

The Court’s treatment of foreign speech loses force outside of the immigration context. The bounds of the Constitution cannot be set without reference to the right to free speech being limited. The immigration cases involved First Amendment challenges directly related to Congress’s power to control whether a person could either enter or stay in the country. The ban on independent foreign expenditures, by contrast, has no necessary bearing on the exclusion or deportation of foreign nationals. Section 441e bans speech, not people, from entering the United States.<sup>67</sup> As an illustration of why this distinction is important, consider if Congress construed its plenary power over immigration to ban Karl Marx’s *Communist Manifesto* or the British Broadcasting Corporation’s *Teletubbies*. While Congress can legally prevent Marx and the *Teletubbies* from physically entering the country, the Court would almost certainly strike down a prohibition on their expression entering the country as violating the First Amendment. Likewise, the Court is not likely to conflate Congress’s immigration powers with Congress’s First Amendment obligations when evaluating § 441e’s constitutional merits.

## B. EQUAL PROTECTION AND THE RIGHTS OF NONCITIZENS

The federal and state power to set the conditions of alienage, however, may undercut any equal protection challenge to the ban on foreign independent expenditures. Strict scrutiny generally applies to claims of alienage discrimination brought under the Equal Protection Clause.<sup>68</sup> The Court has drawn an exception to this rule and applied rational basis review

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64. United States *ex rel.* Turner v. Williams, 194 U.S. 279, 292 (1904).

65. Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889). The Court in *Chae Chan Ping* expressed special concern that the federal government’s power to conduct foreign affairs depended on having absolute control over immigration policy. *Id.* at 609.

66. *Id.* at 606.

67. See 2 U.S.C. § 441e(a)(1)(C) (2006).

68. See *e.g.*, Bernal v. Fainter, 467 U.S. 216, 219 (1984) (“As a general matter, a state law that discriminates on the basis of alienage can be sustained only if it can withstand strict judicial scrutiny.”); *Graham v. Richardson*, 403 U.S. 365, 376 (1971) (applying strict scrutiny to invalidate state laws that refused public benefits to noncitizens).

to alienage classifications by state and local governments when they implicate “political functions.”<sup>69</sup> In *Foley v. Connelie*, for example, the Court upheld two state laws under rational basis review that barred noncitizens from employment as police officers.<sup>70</sup> Noting that “a democratic society is ruled by its people,” the Court held that because police officers are vital to self-government, state and local government decisions to exclude noncitizens from these positions did not warrant close judicial scrutiny.<sup>71</sup> A later case explained the “political functions” rationale as follows:

The exclusion of aliens from basic governmental processes is not a deficiency in the democratic system but a necessary consequence of the community’s process of political self-definition. Self-government, whether direct or through representatives, begins by defining the scope of the community of the governed and thus of the governors as well: Aliens by definition are those outside of this community.<sup>72</sup>

The political functions exception applies to state and local laws that deny noncitizens eligibility to vote or hold political office,<sup>73</sup> to serve on juries,<sup>74</sup> and to work as public school teachers<sup>75</sup> or probation officers.<sup>76</sup> A court may similarly decline to closely scrutinize a state-level restriction on foreign independent expenditures under the Equal Protection Clause.<sup>77</sup>

No state, however, currently has an equivalent to § 441e.<sup>78</sup> If a state were to enact its own version of § 441e, a court might still apply strict scrutiny in an equal protection inquiry. Campaign financing certainly implicates the political function of self-governance. Yet beyond this general connection, campaign financing does not fit the narrow contours of the political functions exception. The exception applies only to restrictions on direct participation ““in the formulation, execution, or review of broad public policy.””<sup>79</sup> Political speech may influence the formation of public policy, but it does so only indirectly—that is, by influencing citizens before

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69. See *Cabell v. Chavez-Salido*, 454 U.S. 432, 439-40 (1982).

70. *Foley v. Connelie*, 435 U.S. 291, 300 (1978).

71. *Id.* at 296.

72. See *Cabell*, 454 U.S. at 439-40.

73. See, e.g., *Sugarman v. Dougall*, 413 U.S. 634, 646-47 (1973) (noting that a ban on noncitizens holding political office may be constitutional if it furthers a legitimate government interest).

74. *Perkins v. Smith*, 426 U.S. 913 (1976), *aff’g* 370 F. Supp. 134, 138 (1974).

75. *Ambach v. Norwick*, 441 U.S. 68, 80-81 (1979).

76. *Cabell v. Chavez-Salido*, 454 U.S. 432, 445-46 (1982).

77. U.S. CONST. amend XIV, § 1.

78. See *Brown*, *supra* note 37, at 524.

79. See *Bernal v. Fainter*, 467 U.S. 216, 221-22 (1984) (quoting *Cabell*, 454 U.S. at 440).

they enter the voting booth. In *Bernal v. Fainter*, the Court construed the exception to apply only to positions of direct responsibility for the functioning of representative government.<sup>80</sup> The responsibilities associated with work as a police officer or as a member of a jury do not similarly constrain an individual engaged in political speech, who owes no special duty to conform her speech with a particular purpose or inquiry. For these reasons, a court may plausibly decline to broaden the political functions exception to include foreign independent expenditures.

The Supreme Court has also crafted an exception to strict scrutiny under the Equal Protection Clause for federal law that discriminates against noncitizens. In *Mathews v. Diaz*, a noncitizen challenged a statute that made Medicare benefits available only to citizens.<sup>81</sup> The Court applied rational basis review to the statute out of deference to Congress's power over immigration and foreign policy,<sup>82</sup> noting that "a host of constitutional and statutory provisions rest on the premise that a legitimate distinction between citizens and aliens may justify attributes and benefits for one class not accorded to the other . . . [.]"<sup>83</sup> The Court then cited to examples of these "attributes and benefits" and included the ban on foreign independent expenditures among them.<sup>84</sup> The Court thus implied that federal power over immigration and foreign policy not only warrants relaxed judicial scrutiny of alienage classifications under the Equal Protection Clause, but also under the First Amendment. Moreover, the Medicare subsidies involved neither the admission nor deportation of noncitizens, which suggests that the Court may interpret Congress's power to control immigration and foreign policy to extend beyond deciding who can enter and stay in the United States.<sup>85</sup>

While *Mathews* and the political functions line of cases will perhaps defeat an equal protection challenge to the ban on foreign independent expenditures, they give less guidance as to § 441e's merits with respect to the First Amendment. *Mathews* explicitly framed the distinction between citizens and noncitizens in terms of the regulation of a welfare program, in

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80. See *Bernal v. Fainter*, 467 U.S. 216, 225 (1984). In *Cabell*, the Court specified that the political function exception only applies to "persons holding state elective or important nonelective executive, legislative, and judicial positions." *Cabell v. Chavez-Salido*, 454 U.S. 432, 440 (1982) (quoting *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973)).

81. *Mathews v. Diaz*, 426 U.S. 67, 69-70 (1976).

82. *Id.* at 83, 87.

83. *Id.* at 78-79.

84. *Id.* (citing 18 U.S.C. § 613(2) (Supp. IV 1975)—the precursor to 2 U.S.C. § 441e).

85. See *Moving Phones P'ship L.P. v. FCC*, 998 F.2d 1051, 1056 (D.C. Cir. 1993) (applying rational basis review to a policy limiting foreign ownership of broadcast or common carrier radio stations).

which Congress can reserve the “bounty” of public benefits to citizens alone.<sup>86</sup> The Court further noted that the restriction on Medicare imposed “no impairment of the freedom of association of either citizens or aliens.”<sup>87</sup> The ban on foreign independent expenditures, in contrast, does not reserve public welfare subsidies to citizens but does hinder the speech of foreigners available to citizens. And neither *Mathews* and its progeny, nor the political functions cases, involved a law burdening a fundamental constitutional right. *Mathews* included language suggesting that Congress cannot deny noncitizens rights even if Congress can deny them federal subsidies.<sup>88</sup> Similarly, the political functions line of cases centered on whether states may reserve administrative and legislative positions for citizens, not whether states can abridge the fundamental protections outlined in the Bill of Rights.<sup>89</sup> Given these distinctions, the Court’s equal protection precedent is unclear as to whether the ban on foreign independent expenditures violates the First Amendment.

#### IV. CAMPAIGN FINANCE LAW AND FOREIGN INDEPENDENT EXPENDITURES

*Mathews*’ inclusion of the ban on foreign independent expenditures in the list of “attributes and benefits” properly reserved to citizens suggests that the Supreme Court may either apply a relaxed level of scrutiny to § 441e or hold that it advances a sufficient state interest. As a campaign finance restriction, § 441e is more appropriately analyzed under the Court’s First Amendment campaign finance precedent. From the perspective of *Citizens United*, this Part explores how the ban on foreign independent expenditures fits among other cases examining limits placed on domestic independent expenditures.

##### A. THE INHERITED LOGIC OF *CITIZENS UNITED*

*Buckley v. Valeo* is a watershed Supreme Court decision concerning the modern treatment of federal campaign finance restrictions. *Buckley* established that limits on campaign contributions and disclosure requirements can survive First Amendment scrutiny, but limits on independent expenditures likely cannot.<sup>90</sup> In *Austin v. Michigan Chamber*

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86. *Mathews v. Diaz*, 426 U.S. 67, 80 (1976).

87. *Id.* at 87.

88. *Id.* at 86 (“This case . . . involves no state impairment of the right to travel nor indeed any impairment whatever of the right to travel within the United States . . .”).

89. See generally *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982); *Ambach v. Norwick*, 441 U.S. 68 (1979); *Foley v. Connelie*, 435 U.S. 291 (1978); *Perkins v. Smith*, 426 U.S. 913 (1976); *Sugarman v. Dougall*, 413 U.S. 634 (1973).

90. *Buckley v. Valeo*, 424 U.S. 1, 143-44 (1976) (per curiam) (sustaining limits on individual

of *Commerce*, the Court crafted an exception to *Buckley*'s central holding and upheld a ban on independent expenditures made by corporations.<sup>91</sup> In 2007, the Citizens United Corporation asked the Court to overrule *Austin* in a First Amendment challenge to the BCRA's ban on independent expenditures by corporations and trade unions.<sup>92</sup> Citizens United produced a movie critical of Hillary Clinton and sought to make it publicly available within thirty days of the 2008 Democratic primary elections.<sup>93</sup> Citing *Buckley*, the Court held that § 441b's prohibition on corporate independent expenditures constituted a ban on speech.<sup>94</sup> The Court reasoned that the "purpose and effect" of the ban is to "silence entities whose voices the Government deems to be suspect."<sup>95</sup> Speaker-based restrictions present two related problems: (1) they deprive certain speakers of their speech rights, and (2) they deprive the audience of the right to hear certain speech. The Court wrote:

By taking the right to speak from some and giving it to others, the Government *deprives the disadvantaged person or class* of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. The Government may not by these means *deprive the public* of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each.<sup>96</sup>

Moreover, the silenced voices at issue were engaged in political speech, which activates the "fullest and most urgent application" of the First Amendment.<sup>97</sup> Because the restriction applied only to certain speakers when engaged in political speech, the Court subjected the ban on corporate and trade union expenditures to strict scrutiny.<sup>98</sup>

The government argued that the interest advanced by § 441b was the

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contributions and disclosure provisions but not the limitations on independent expenditures).

91. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 659-60 (1990), *overruled by* *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010).

92. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 888 (2010).

93. *Id.* at 887-88.

94. *Id.* at 898 (citing *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (per curiam)). The *Citizens United* Court stated: "As 'a restriction on the amount of money a person or group can spend on political communication during a campaign,' [§ 441b] 'necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.'" *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (per curiam)).

95. *Id.*

96. *Id.* at 899 (emphasis added).

97. *Id.* at 898 (citing *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989)).

98. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 898, 914 (2010).

prevention of corruption or the appearance of corruption from independent expenditures by wealthy associations of people.<sup>99</sup> In response, the Court quoted *Buckley* again, this time for the proposition that “[t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.”<sup>100</sup> Hence, because the corporate and trade union expenditures are “asymmetrical to preventing quid pro quo corruption . . . ,” the expenditure bans failed to advance a compelling governmental interest.<sup>101</sup> Accordingly, the Court struck down § 441b.<sup>102</sup>

As discussed in Part I, the majority declined to reach the issue of whether the First Amendment protected foreign independent expenditures.<sup>103</sup> The majority did discuss the scope of the First Amendment in terms of American citizens, however, noting that “[i]f the First Amendment has any force, it prohibits Congress from fining or jailing *citizens*, or associations of *citizens*, for simply engaging in political speech.”<sup>104</sup> Here, the Court framed the essential function of the First Amendment—and the rest of the Bill of Rights—as protecting the rights of citizens.

Elsewhere, by contrast, the Court cast the thrust of the First Amendment less as protecting the right of citizens to speak than as protecting the right of citizens to hear. For example, the Court wrote:

When Government seeks to use its full power . . . to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves.<sup>105</sup>

The importance of the electorate’s right to a wide domain of information received repeated emphasis throughout the opinion and the precedent cited therein.<sup>106</sup> Given this emphasis, the Court showed that a

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99. *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 908 (2010).

100. *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 47 (1976) (per curiam)).

101. *Id.* at 911 (emphasis omitted).

102. *Id.* at 913.

103. *Id.* at 911.

104. *Id.* at 904 (emphasis added).

105. *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 908 (2010).

106. *See id.* at 898 (“The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it”); *see also id.* at 899 (“The Government may not . . . deprive the public of the right and

principal concern with speaker-based restrictions is that they deprive citizens of their right to hear from certain subsets of speakers, which may possibly include foreign speakers.

### B. RECONCILING *CITIZENS UNITED* WITH THE LAW ON FOREIGN INDEPENDENT EXPENDITURES

Although the Court has not evaluated campaign finance restrictions on foreign nationals, *Citizens United* suggests that the ban on foreign independent expenditures violates the First Amendment. The ban applies only to certain speakers—foreign nationals—and thereby conflicts with *Citizens United*'s central holding.

The majority opinion, however, attracted vigorous dissents from the four-member minority. Arguing in favor of the ban on corporate and trade union expenditures, Justice Stevens' dissent in *Citizens United* listed examples in which the Court has allowed speech restrictions based on the identity of the speaker.<sup>107</sup> He cited the "special restrictions" on the speech rights of students, prisoners, members of the military, foreigners, and government employees.<sup>108</sup> Justice Stevens' inclusion of foreigners in this list makes it appear as if the Court has already affirmatively answered the question of whether the government can ban foreign independent expenditures.

Justice Stevens' dissent falters upon closer examination. First and foremost, Justice Stevens misstated the law. Justice Stevens cited the provision of the BCRA banning independent expenditures by foreigners to support his statement that the Court has permitted speaker-based restrictions on foreigners.<sup>109</sup> The majority opinion, however, expressly declined to reach the issue of the First Amendment implications of the BCRA ban on independent expenditures from foreign sources.<sup>110</sup> Nor has any court has considered the permissibility of limits on foreign independent expenditures.<sup>111</sup> Justice Stevens erred by saying that the Court has permitted this distinction. Congress has made the distinction; the Court has

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privilege to determine for itself what speech and speakers are worthy of consideration"); *id.* ("[I]t is inherent in the nature of the political process that voters must be free to obtain information from diverse sources in order to determine how to cast their votes"); *id.* at 907 (quoting *United States v. CIO*, 335 U.S. 106, 144 (1948) (Rutledge, J., concurring in result)) ("[T]he electorate' has been 'deprived of information, knowledge and opinion vital to its function.'").

107. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 945 (2010) (Stevens, J., concurring in part and dissenting in part).

108. *Id.*

109. *Id.*

110. *Id.* at 911(majority opinion).

111. See *Hearings*, *supra* note 3, at 10-11.

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The majority also rejected Justice Stevens' logic as applied to corporations and trade unions. Justice Kennedy's majority opinion explained that the Court has only upheld speech restrictions that disadvantage certain persons when these restrictions are designed to prevent interference with "governmental functions."<sup>112</sup> These government functions are limited to enterprises that traditionally require speech restrictions in order to operate, like schools, prisons, and the military.<sup>113</sup> The majority contrasted these functional restrictions with the restriction on corporate political speech by noting that "it is inherent in the nature of the political process that voters must be free to obtain information from diverse sources in order to determine how to cast their votes."<sup>114</sup> Likewise, foreign independent expenditures constitute a diverse source of political information and do not fit within a government function. Any restriction on political speech in the political process, like § 441e, receives extremely close scrutiny.<sup>115</sup> The exceptions highlighted by Justice Stevens prove the rule that speaker-based restrictions in campaign finance regulations warrant strict scrutiny.

Under strict scrutiny review, the ban on foreign independent expenditures suffers from the same problems that the Court cited when invalidating limits on domestic independent expenditures. As discussed in Part II, the Supreme Court has upheld campaign finance restrictions only when justified by the interest of corruption prevention.<sup>116</sup> Both *Buckley* and *Citizens United* barred Congress from limiting domestic independent expenditures because they do not pose enough risk of real or apparent corruption.<sup>117</sup> To distinguish § 441e from this precedent, the government must show that the foreign source of independent expenditures creates a threat of corruption that the domestic source does not. Foreign money in the political process may be alarming for various reasons. When this money is channeled through independent expenditures, however, it is difficult to see how it presents any greater threat of corruption than the expenditures of American citizens.<sup>118</sup> In other words, foreign independent

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112. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 899 (2010).

113. *Id.* at 899-900.

114. *Id.* at 899.

115. See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995); *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

116. See *supra* Part II.

117. See *Citizens United*, 130 S. Ct. at 908-11; *Buckley v. Valeo*, 424 U.S. 1, 26-27 (1976) (per curiam).

118. A proponent of § 441e might claim that contributions by those ineligible to vote pose a greater threat of corruption. This argument is groundless; however, because many American

expenditures do not resemble political *quid pro quo* any more than the domestic version. *Buckley* and its progeny, as a consequence, do not offer a plausible basis for distinguishing between foreign and domestic speakers.

### C. THE HYDRAULICS OF FOREIGN MONEY IN DOMESTIC ELECTIONS

Foreign independent expenditures also present less of a risk of corruption than many alternative means of foreign influence. Transnational influence has grown apace with the growth of globalization. The dogmas of mercantilism and protectionism have lost favor as more countries pursue shared interests in promoting cultural and economic exchange.<sup>119</sup> Increases in international exchange entail increases in international influence. The United States has led this movement towards international integration.<sup>120</sup> Unsurprisingly, the United States now has a larger stake in the policies of other countries, just as other countries now have a larger stake in American policy.<sup>121</sup> Restrictions on foreign contributions and independent expenditures mark one of the last bulwarks against this trend towards interdependence.

Yet, even with the ban on foreign contributions and independent expenditures in place, foreign entities have ample access to the United States electoral system. The Federal Election Commission (FEC) has interpreted the BCRA as permitting domestic subsidiaries of foreign corporations to make contributions to candidates.<sup>122</sup> A domestic subsidiary may be controlled from abroad, but the BCRA forbids foreign national

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citizens are ineligible to vote and enjoy full First Amendment protections—including the right to make independent expenditures and campaign contributions. *See infra* note 145 and accompanying text.

119. *See generally* KEVIN H. O'ROURKE & JEFFREY G. WILLIAMSON, *GLOBALIZATION AND HISTORY: THE EVOLUTION OF A NINETEENTH-CENTURY ATLANTIC ECONOMY* 1-2 (1999).

120. In drafting the Constitution, the Framers expressed concern that America's small size made it particularly vulnerable to foreign manipulation; they saw dangerous parallels between the size of their young republic and the size of Holland, which they perceived to have been corrupted by French influence. *See Notes of James Madison* (June 16, 1787), in 1 CONVENTION RECORDS, *supra* note 27, at 254 (noting that Holland "had been seduced into the views of France" on account of its small size."). With the United States now one of the most wealthy and powerful countries in the world, the concerns of the Framers that larger countries would topple American government no longer seem realistic.

121. *See, e.g.,* Earl H. Fry, *The U.S. States and Foreign Economic Policy: Federalism in the "New World Order,"* in FOREIGN RELATIONS AND FEDERAL STATES 122, 125 (Brian Hocking ed., 1993) (noting the "imperatives of complex global interdependence").

122. *See* F.E.C. Advisory Op. 2006-15; F.E.C. Advisory Op. 1992-16; *see also* Evan C. Zoldan, Note, *Strangers in a Strange Land: Domestic Subsidiaries of Foreign Corporations and the Ban on Political Contributions from Foreign Sources*, 34 L. & POL'Y INT'L BUS. 573, 579 (2003). FECA contained a similar exemption. *See* Daniel S. Savrin, Note, *Curtailing Foreign Financial Participation in Domestic Elections: A Proposal to Reform the Federal Election Campaign Act*, 28 VA. J. INT'L L. 783, 783 (1988).

involvement in decisions to spend funds for political purposes.<sup>123</sup> The BCRA also limits these funds to the earnings from businesses located in the United States.<sup>124</sup> Although these qualifications apply to the independent expenditures of the subsidiary, the BCRA permits the subsidiary to spend unlimited amounts of money to lobby Congress or to promote or oppose state ballot measures.<sup>125</sup>

Subsidiaries of foreign corporations can also create and pay the expenses of PACs,<sup>126</sup> which can spend unlimited amounts in political races and make direct contributions to candidates.<sup>127</sup> In the 2008 election cycle, PACs of subsidiaries of foreign corporations contributed \$16.9 million to federal candidates alone.<sup>128</sup> Despite the BCRA's restrictions on subsidiaries, the decision of how a subsidiary spends money in elections will tend to reflect foreign interests. Former FEC Commissioner Thomas E. Harris acknowledged the overlapping interests in his observation that, "[t]he PAC is always controlled by the top management of the corporation. . . . The notion that no decisions as to the activities of the proposed political [action] committee will be dictated or directed by foreign nationals strikes me as extremely naïve."<sup>129</sup>

Nor are foreign corporations limited to corporate subsidiaries to

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123. 2 U.S.C. § 441a(a)(5) (2006), *declared unconstitutional* by *SpeechNow.org v. Fed. Elections Comm'n*, 599 F.3d 686 (D.C. Cir. 2010). Section 441a(a)(5) states:

For purposes of the limitations provided by paragraph (1) and paragraph (2), all contributions made by political committees established or financed or maintained or controlled by any corporation, labor organization, or any other person, including any parent, subsidiary, branch, division, department, or local unit of such corporation, labor organization, or any other person, or by any group of such persons, shall be considered to have been made by a single political committee . . . .

*Id.*

124. A domestic subsidiary of a foreign corporation is exempt from § 441e only if the subsidiary "can demonstrate that no funds from the foreign parent were used to make the contribution." *Zoldan*, *supra* note 122, at 579.

125. In *First National Bank of Boston v. Bellotti*, the Court noted that referenda present very little risk of corruption from corporate expenditures. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978). This may explain why Congress banned expenditures by foreign nationals in federal, state, and local elections, but not in referenda. *See* 2 U.S.C. § 441e (2006). A bill was introduced to ban foreign involvement in state referenda, but the bill never made it out of committee. *See* H.R. 1628, 103d Cong. (1993).

126. *See* 2 U.S.C. § 441e(a) (2006); *see also* Richard L. Hasen, *Campaign Finance Laws and the Rupert Murdoch Problem*, 77 TEX. L. REV. 1627, 1632-33 (1999) (describing similar FECA provision).

127. 2 U.S.C. § 441a(a)(2)(A) (2006).

128. *See Foreign-connected PACs*, OPENSECRETS.ORG, <http://www.opensecrets.org/pacs/foreign.php?cycle=2008> (last visited Jan. 27, 2011).

129. MARTIN & SUSAN TOLCHIN, *BUYING INTO AMERICA: HOW FOREIGN MONEY IS CHANGING THE FACE OF OUR NATION* 19 (1988) (quoting Thomas E. Harris, former Commissioner of the FEC).

influence American politics. Foreign corporations may push their business partners in the United States to make political contributions and create PACs to advance their joint interests. A group of American vehicle importers, for example, set up the Auto Dealers and Drivers Free Trade PAC (AUTOPAC) to influence United States trade policy after foreign corporations lobbied American automobile dealers to fund and direct the AUTOPAC.<sup>130</sup> In some circumstances, foreign corporations may even refuse to conduct business with American entities unless they set up a PAC.<sup>131</sup>

Aside from PACs, the ability of foreign actors to influence the American electoral system through lobbying poses perhaps the most severe danger of corruption. The Pakistani government, for example, recently hired a team of lobbyists to advance their interests with United States leaders and government officials.<sup>132</sup> These lobbyists also contributed heavily to political campaigns.<sup>133</sup>

Lobbying presents a far greater risk of corruption than independent expenditures. The dealings among interested parties and political officials behind closed doors often entail exchanges of money for policy.<sup>134</sup> Independent expenditures, on the other hand, pose less danger of corruption principally because expenditures fund speech directed at the American public rather than the discreet funding of speech to persons with influence.

Those who make independent expenditures also must report the source of funding.<sup>135</sup> Although federal law mandates some disclosures by lobbyists,<sup>136</sup> it does not require lobbyists to disclose the specific issues or policies they are hired to advance.<sup>137</sup> And whereas a person who makes an

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130. See CHOATE, *supra* note 25, at 111.

131. 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, 968 (1996).

132. U.S. DEP'T OF JUSTICE, EXHIBIT A TO A REGISTRATION STATEMENT PURSUANT TO THE FOREIGN AGENTS REGISTRATION ACT AS AMENDED (Oct. 4, 2007), *available at* <http://www.fara.gov/docs/5643-Exhibit-AB-20071004-4.pdf>.

133. Zephyr Teachout, *Extraterritorial Electioneering and the Globalization of American Elections*, 27 BERKELEY J. INT'L L. 162, 163 (2009) (citing OPENSECRETS.ORG CENTER FOR RESPONSIVE POLITICS, <https://opensecrets.org/usearch/searchresults.php?drill=Cassidy+%26+Assoc%2FInterpublic+Group&type=O> (last visited Oct. 22, 2008)).

134. See *generally* ROBERT G. KAISER, *SO DAMN MUCH MONEY: THE TRIUMPH OF LOBBYING AND THE CORROSION OF THE AMERICAN GOVERNMENT* (2009).

135. 2 U.S.C. § 434(b)(4)(H)(iii) (2006).

136. Lobbying Disclosure Act of 1995, 2 U.S.C. §§1601-1612 (2006). The Lobbying Disclosure Act (LDA) requires lobbyists to disclose their clients' names, their issue areas, and the amounts they spend. *Id.*

137. Anita S. Krishnakumar, *Towards A Madisonian, Interest-Group-Based, Approach to*

independent expenditure must include the disclosure in the expressive material itself, lobbying disclosures are made available to the public primarily in hard copy at the Legislative Resource Center and at the Senate Office of Public Records in Washington, D.C.<sup>138</sup>

The First Amendment protects lobbying to the extent that it is either speech or a petition to the government for redress of grievances.<sup>139</sup> Yet, as *Buckley* attests, some First Amendment activity creates a greater threat of corruption than other First Amendment activity.<sup>140</sup> By pushing foreign funds out of the public's view into the shaded corridors where lobbyists ply their trade, § 441e may increase the threat of corruption rather than prevent it.

The channels by which foreigners can influence American policy requires transparency because foreigners will persist in pursuing their interests in the United States. Many foreign nationals—individuals and corporations—have legitimate interests in United States policy. Budweiser, Dreyer's Grand Ice Cream, and Pepsi are just three of the many foreign owned corporations that have extensive connections with the United States.<sup>141</sup> In an increasingly interconnected world, foreign entities that conduct business with the United States, employ American workers, and subject themselves to American law deserve some degree of input into the American political process. To be sure, foreign entities can pursue traditional diplomatic channels to advance their interests. Yet, foreigners have consistently gone beyond these channels and used as many levers of influence as America makes available.<sup>142</sup> Pamela Karlan and Samuel

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*Lobbying Regulation*, 58 ALA. L. REV. 513, 521 (2007).

138. See *Lobbying Disclosure*, OFFICE OF THE CLERK, UNITED STATES HOUSE OF REPRESENTATIVES, <http://disclosures.house.gov/ld/ldsearch.aspx> (last visited Mar. 2, 2011); *Lobby Filing Disclosure Program*, UNITED STATES SENATE OFFICE OF PUBLIC RECORDS, <http://sopr.senate.gov/> (last visited Aug. 18, 2010). The LDA-required disclosures are posted online to a more limited extent. See Krishnakumar, *supra* note 136, at 521.

139. See *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 522 (1991) (holding that the First Amendment protects one's right to hire a lobbyist); *Meyer v. Grant*, 486 U.S. 414, 424 (1988) (same). For an outline of the First Amendment's relationship to lobbying, see Andrew P. Thomas, *Easing the Pressure on Pressure Groups: Toward a Constitutional Right to Lobby*, 16 HARV. J.L. & PUB. POL'Y 149 (1993).

140. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 883 (citing *Buckley v. Valeo*, 424 U.S. 1, 49 (1976) (per curiam)).

141. See David Schepp, *PepsiCo, Anheuser-Busch InBev Team up to Save Costs, Rule the World*, DAILY FINANCE, Oct. 15, 2009, <http://www.dailyfinance.com/story/company-news/pepsico-anheuser-busch-inbev-team-up-to-save-costs-rule-the-wo/19195479/> (PepsiCo and Budweiser); *Nestle Buys US Ice Cream Firm*, BBC NEWS, June 17, 2002, <http://news.bbc.co.uk/2/hi/business/2050788.stm> (Dreyer's).

142. See, e.g., Brown, *supra* note 37, at 506 (discussing examples of foreign efforts to influence American elections); William Safire, *The Asian Connection*, N.Y. TIMES, Oct. 7, 1996, at A17

Issacharoff noted this dynamic in reckoning that campaign finance regulations do not stop money from entering the electoral process but instead determine the channels where interested parties will spend.<sup>143</sup> Rather than lobbyists and PACs constituting the primary channels, foreigners should be able to direct their appeals to American citizens in an open platform.<sup>144</sup> Independent expenditures may not be a perfect platform for such a dialogue, but they mark an improvement over the status quo of lobbying and campaign contributions.

## V. FOREIGN SPEECH IN THE HEART OF THE FIRST AMENDMENT

Other core First Amendment interests support striking down the ban on foreign independent expenditures. The ban contravenes both the text and the purposes of the First Amendment. And if the interest of corruption prevention will not save the ban on independent expenditures, the ban will also likely fail as a content-based restriction of speech. Furthermore, § 441e does not leave adequate alternative channels of communication for foreign nationals. Finally, even assuming § 441e advances a sufficient government interest, the statute would not survive strict scrutiny or a less exacting standard because it is over-inclusive and perhaps under-inclusive.

### A. THE FIRST AMENDMENT AS WRITTEN

Interpreting the First Amendment to protect foreign independent expenditures is consistent with the amendment's text. The First Amendment reads in pertinent part: "Congress shall make no law . . . abridging the freedom of speech . . . ."<sup>145</sup> The language suggests that the First Amendment functions by constraining Congress rather than by creating an individual right held by citizens. The amendment certainly grants individuals a right against government censorship. But focusing only on the individual speech right misses at least half of the amendment's meaning.<sup>146</sup> The text of the First Amendment plainly reflects a design to

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(detailing links between Indonesian business interests and the Democratic National Committee).

143. See Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1708 (1999) ("[p]olitical money, like water, has to go somewhere.").

144. David Cole emphasizes the importance of including foreign voices in America's political discourse in writing that, "[a]t a minimum, those who can vote need to hear from those who cannot if the democratic process is to have any hope of taking their interests into account." Cole, *supra* note 1, at 378.

145. U.S. CONST. amend. I.

146. See Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1641 (1967). Jerome Barron, for example, framed the First Amendment less as granting speakers a right to be heard than as advancing America's interest in hearing a diverse

free American discourse from censorship. This textual design is indifferent to the source of speech, as Justice Scalia noted in his *Citizens United* concurrence:

The [First Amendment] is written in terms of “speech,” not speakers. Its text offers no foothold for excluding any category of speakers, from single individuals to partnerships of individuals, to unincorporated associations of individuals, to incorporated associations of individuals . . . . Indeed, to exclude or impede corporate speech is to muzzle the principal agents of the modern free economy. We should celebrate rather than condemn the addition of this speech to the public debate.<sup>147</sup>

Nor does the text of the First Amendment offer a foothold with which to exclude foreign nationals from protection for their speech expressed in the United States.<sup>148</sup>

Tellingly, the First Amendment does not qualify its grant of speech protections with “the people.”<sup>149</sup> The phrase “the people” is roughly equated with citizenship in other parts of the Constitution.<sup>150</sup> For instance, the Second Amendment secured for “the people” the common law right to keep and bear arms.<sup>151</sup> Under the common law, this right was understood to be held only by citizens, not by every person on American soil.<sup>152</sup> Hence the reference to “the people” in the Second Amendment arguably reserved the right to keep and bear arms only to citizens.

“The people” also appears in the First Amendment, as it qualifies the right to peaceably assemble and petition the government for redress of

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range of speakers. *Id.*

147. *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 929 (2010) (Scalia, J., concurring).

148. See *Kwong Hai Chew v. Colding*, 344 U.S. 590, 598 n.5 (1953) (insisting that the First Amendment permit no distinctions between citizens and noncitizens residing in the United States).

149. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (2000) (affirming the reading of “the people” as a term of art selectively used in the Constitution). The Court supported the importance of the phrase by expressly rejecting the suggestion of *amici curiae* that “the people” served merely as a device “to avoid [an] awkward rhetorical redundancy.” *Id.* (quoting Brief for American Civil Liberties Union et al. as *Amicus Curiae* 12, n.4).

150. See, e.g., U.S. CONST. pmb. (declaring that the Constitution is ordained and established by “the People of the United States.”); U.S. CONST. art. I, § 2, cl. 1 (“The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . .”) (emphasis added).

151. U.S. CONST. amend II.

152. See David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588, 626-27 (2000) (“The average citizen whom the Founders wish to see armed was a man of republican virtue—a man shaped by his myriad ties to his community, the most important for this purpose being the militia.”).

grievances.<sup>153</sup> The assembly and petition clauses, however, are separated from the speech and press clauses by a semi-colon,<sup>154</sup> indicating a distinction between the restraint on Congress from interfering with speech and the press and the rights held by “the people” to freely assemble and petition their government.<sup>155</sup>

Although it may be impossible to divine the precise intent of the Framers from the language of the First Amendment, the relevant text only asserts a restriction on Congress rather than a right reserved exclusively for “the people” of the United States. The Framers went to great lengths to draft the Bill of Rights as carefully as possible so that inartful language would not weaken the Constitution’s protections by unintentionally expanding Congress’s power.<sup>156</sup> The ban on foreign independent expenditures constitutes a law made by Congress abridging speech, which is clearly—and without qualification—prohibited by the First Amendment.<sup>157</sup>

## B. THE PURPOSES OF THE FIRST AMENDMENT

The values advanced by the First Amendment affirm reading its text to bar restrictions on foreign independent expenditures. Among other reasons, the First Amendment protects speech in order to promote self-governance and the discovery of truth. These values are interrelated, with each reliant on the premise that American citizens can be trusted to interpret and evaluate the merits of speech without governmental intervention. Each of these rationales also supports extending full First Amendment protections to foreign independent expenditures.

### 1. FOREIGN SPEECH AND SELF-GOVERNANCE

Political speech lies at the core of the First Amendment’s protections because political speech is essential to democratic self-governance. The importance of unrestrained political speech follows from the premises that

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153. U.S. CONST. amend. I.

154. *Id.* (“Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

155. In the Eighteenth Century, petitions were usually only directed to local governments and these governments almost always answered them. RAYMOND C. BAILEY, POPULAR INFLUENCE UPON PUBLIC POLICY: PETITIONING IN EIGHTEENTH CENTURY VIRGINIA 29-31 (1979).

156. See AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 328 (2005).

157. In his 2010 Commencement Address at Harvard University, however, Justice David Souter argued that a “fair reading” of the text of the Constitution is often impossible. See David H. Souter, U.S. Supreme Court Justice, Harvard Commencement Remarks (May 27, 2010), in HARVARD GAZETTE, <http://news.harvard.edu/gazette/story/2010/05/text-of-justice-david-souters-speech/>.

the American people are capable of evaluating the merits of speech without government intervention and that more political speech is better than less.<sup>158</sup> Thomas Jefferson captured these ideas in his first inaugural address: “If there be any among us who would wish to dissolve this Union, or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated, where reason is left free to combat it.”<sup>159</sup> The Court has followed Jefferson’s lead, declaring that the ability to engage in political expression without government hindrance is “the central meaning of the First Amendment.”<sup>160</sup> Restraints on political speech thus receive the most scrutiny from the Court.<sup>161</sup>

The premises of voter rationality and of speech-maximization show that foreign independent expenditures further First Amendment and democratic values. Like a domestic political minority, foreigners often have viewpoints outside the mainstream of American discourse.<sup>162</sup> And the expenditure ban only eliminates political speech. Suppressing political speech from abroad deprives Americans of the opportunity of hearing it and weighing the merits of its content.

Perhaps more troublingly, the movement to curb foreign influence implicitly presumes that foreign speech will mislead American citizens at the voting booth. This presumption conflicts fundamentally with a central tenet of the First Amendment “that people are ordinarily the best judges of their own interests.”<sup>163</sup> Individuals certainly act irrationally at times,<sup>164</sup> and

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158. Lyrisa Barnett Lidsky, *Nobody’s Fools: The Rational Audience As First Amendment Ideal*, 2010 U. ILL. L. REV. 799, 800-01 (detailing and critiquing the Supreme Court’s presumption that more speech is better than less); see also *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 258-59 (2003) (Scalia, J., concurring in part and dissenting in part) (“The premise of the First Amendment is that the American people are neither sheep nor fools . . . . Given the premises of democracy, there is no such thing as *too much* speech.”).

159. Thomas Jefferson, First Inaugural Address (Mar. 4, 1801), in *THE ESSENTIAL JEFFERSON* 55, 56 (Jean M. Yarbrough ed., 2006).

160. *N.Y. Times v. Sullivan*, 376 U.S. 254, 273 (1964).

161. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 49 (1976) (per curiam) (“Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution”); see also *Time Inc. v. Hill*, 385 U.S. 374, 388 (1967) (“[G]uarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government.”).

162. See, e.g., *THE REALITY OF PRECAUTION: COMPARING RISK REGULATION IN THE UNITED STATES AND EUROPE* (Jonathan B. Wiener et al. eds., 2011).

163. Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 557-58 (1991); see also *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 791 n.31 (1978) (“The First Amendment rejects the ‘highly paternalistic’ approach of statutes . . . which restrict what the people may hear”); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 212 (1983) (“The Court has long embraced an ‘antipaternalistic’ understanding of the first amendment.”).

164. See, e.g., Derek E. Bambauer, *Shopping Badly: Cognitive Biases, Communications, and*

cognitive defects can produce galling, if unsurprising, political decisions.<sup>165</sup> Yet, the First Amendment shows that the United States decided early on that the benefits of self-governance outweigh the costs.<sup>166</sup> The American form of democracy promoted by the First Amendment assumes that voters are capable of extracting the signal from the noise of speech, even if cognitive psychology sometimes says differently.<sup>167</sup> Andrew Ferguson illustrates this assumption:

[Trusting the rational faculty of citizens is] a democratic impulse, a sign of neighborly deference. A regulator who always assumed that man was other than rational was inviting himself into a position where he could exert a control over his fellow citizens that wasn't proper for a true democrat. Self-government demands this deference. It won't work otherwise.<sup>168</sup>

The First Amendment demands this deference to citizens' ability to independently assess the merits of foreign speech as well. Section 441e should not be viewed as advancing a legitimate—much less compelling—government interest.

## 2. ADVANCING TRUTH THROUGH THE GLOBAL MARKETPLACE OF IDEAS

The ban on independent expenditures also conflicts with the First Amendment's purpose of advancing the discovery of truth through a robust marketplace of ideas. Justice Oliver Wendell Holmes used the "marketplace of ideas" metaphor to explain that "the best test of truth is the power of thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried

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*the Fallacy of the Marketplace of Ideas*, 77 U. COLO. L. REV. 649, 696 (2006); Paul Horwitz, *Free Speech as Risk Analysis: Heuristics, Biases, and Institutions in the First Amendment*, 76 TEMP. L. REV. 1, 8-9 (2003).

165. See BRYAN CAPLAN, *THE MYTH OF THE RATIONAL VOTER: WHY DEMOCRACIES CHOOSE BAD POLICIES* 3 (2007) (explaining that democracy has a built-in externality whereby voter irrationality finds purchase in a democracy because other people pay for the cost of unwise policies).

166. *United States v. Stevens*, 130 S. Ct. 1577, 1585 (2010). In *United States v. Stevens*, the Court made clear that "[t]he First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits." *Id.*

167. See Bambauer, *supra* note 164, at 696. Professor Robert Post has argued that a contrary assumption, even if taken in order to advance democratic goals, "would necessarily lose what [it] hope[s] to achieve." Robert C. Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1132, 1136 (1993).

168. Andrew Ferguson, *Nudge, Nudge, Wink, Wink: Behavioral Economics—The Governing Theory of Obama's Nanny State*, THE WEEKLY STANDARD, Apr. 19, 2010, <http://weeklystandard.com/articles/nudge-nudge-wink-wink>.

out.”<sup>169</sup> This is not to say that the First Amendment embodies a rich epistemology of truth.<sup>170</sup> Rather, the First Amendment’s design assumes that if ideas ever rise to the level of truth, public discourse remains the most appropriate method of identification.

Like any other speech, foreign independent expenditures contribute to this “marketplace.” The unique source of foreign independent expenditures adds to the potential for this speech to advance the discovery of truth. The very reason why Congress seeks to ban foreign expenditures shows the value of that speech—it comes from a perspective influenced by interests often not found in the American discourse. Again, the presumption of § 441e is that foreign speech will lead citizens to vote against the nation’s interests. But the national interest is no monolith; it is the product of “the people” and their decision of who to elect into political office.<sup>171</sup> For citizens to make informed decisions and determine the nation’s interest, the First Amendment protects the right to hear voices from outside the country.

Justice Thurgood Marshall emphasized the importance of foreign voices as they relate to discovery of truth in his argument that, “[i]f Americans want to hear about Marxist doctrine, even from advocates, government cannot intervene simply because it does not approve of the ideas. It certainly may not selectively pick and choose which ideas it will let into the country.”<sup>172</sup> In other words, American interests are served not by banning the advocacy of communism or other ideas of foreign origin, but by an open dialogue about whether these ideas have merit.

### C. SECTION 441E AS AN OVERBROAD, CONTENT-BASED RESTRICTION ON SPEECH

Restrictions on speech are content-neutral when the justification for the restriction is unrelated to the ideas, message, or subject matter of the speech.<sup>173</sup> Such restrictions must serve an important government interest, they must leave open ample alternative channels of communication,<sup>174</sup> and

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169. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

170. Aditi Bagchi, *Deliberative Autonomy and Legitimate State Purpose Under the First Amendment*, 68 ALB. L. REV. 815, 830 (2005).

171. Professor Post praises the “[t]raditional First Amendment doctrine, with its quaint focus on autonomy and the indeterminacy of national identity [as] one of the last remaining areas of constitutional law seriously to engage the project of self-determination.” Post, *supra* note 166, at 1137.

172. *Kleindienst v. Mandel*, 408 U.S. 753, 780 (1972) (Marshall, J., dissenting).

173. See *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972).

174. See *City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994) (“[E]ven regulations that do not foreclose an entire medium of expression, but merely shift the time, place, or manner of its use,

they cannot be over-inclusive.<sup>175</sup> The ban on independent foreign expenditures fails each of these requirements for content-neutrality.

### 1. THE CONNECTION BETWEEN IDENTITY-BASED AND CONTENT-BASED SPEECH RESTRICTIONS

Section 441e is facially content-based. The ban on independent expenditures restricts speech about a particular candidate for political office, yet permits speech by foreign nationals that falls outside the definition of “electioneering communications.”<sup>176</sup> The Court has treated facially content-based restrictions as content-neutral when justified by concerns other than the expressive content of speech.<sup>177</sup> Two such concerns might include the prevention of corruption or the limiting of foreigners’ input in American elections. Neither concern, however, prevails under First Amendment scrutiny.

First, § 441e restricts foreign conduct with expressive impact not in order to prevent corruption, but to prevent the dissemination of foreign ideas. As discussed in Part III, independent expenditures do not pose enough danger of *quid pro quo* corruption to justify their restriction by Congress. If the danger of foreign independent expenditures is not that they threaten a higher risk of *quid pro quo* corruption, it is that these expenditures will advance foreign interests in the political process.<sup>178</sup> The majority in *Citizens United* explained, however, that “[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content.”<sup>179</sup> The Court’s warning in *Citizens United* builds on First

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must ‘leave open ample alternative channels for communication.’” (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

175. See Eugene Volokh, *Freedom of Speech and Speech About Political Candidates: The Unintended Consequences of Three Proposals*, 24 HARV. J.L. & PUB. POL’Y 47, 60-69 (2000) (outlining the requirements for a content-neutral restriction on speech).

176. See *id.* at 68 n.60 (arguing that limits on independent expenditures are facially content-based).

177. See, e.g., *Boos v. Barry*, 485 U.S. 312 (1988) (“So long as the justifications for regulation have nothing to do with content . . . the regulation [is] properly analyzed as content neutral”); *City of Renton v. Playtime Theatres*, 475 U.S. 41, 48 (1986) (speech restrictions are “content-neutral” when they “are justified without reference to the content of the regulated speech” (emphasis omitted) (quoting *Va. State Bd. Of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976))).

178. See Note, *supra* note 14, at 1893 (citing 143 Cong. Rec. E172 (daily ed. Feb. 5, 1997) (statement of Rep. Marcy Kaptur)). Representative Marcy Kaptur argued that “[t]here is no reason to . . . permit foreign interests to buy access to our elected lawmakers and thereby put their imprint on public policy in this country.” 143 Cong. Rec. E172 (daily ed. Feb. 5, 1997) (statement of Rep. Marcy Kaptur).

179. *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, (2010); see also *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995) (citing *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (“In the realm of private

Amendment precedent that “[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.”<sup>180</sup> Section 441e restricts foreign speech out of a concern that its origin entails a viewpoint harmful to American interests, and thereby conflicts impermissibly with the First Amendment.

A proponent of § 441e might argue further that the government has a content-neutral interest in limiting direct participation in the political process to United States citizens and resident aliens. The Constitution itself bars non-citizens from voting or holding federal offices.<sup>181</sup> From a structuralist perspective<sup>182</sup> of the Constitution, political restrictions on non-citizens appear unproblematic. Professor Heather Gerken, for example, has cited the Constitution’s voting and office-holding provisions as evidence that the Court will likely “find that protecting U.S. elections from [foreign] influence is a legitimate state interest, sufficient to justify appropriately tailored regulations.”<sup>183</sup>

The Constitution’s restrictions on the ability to vote and to hold office, however, do not warrant limiting the scope of the First Amendment. The exclusion of non-citizens from exercising these rights forms an explicit part of the Constitution itself—i.e., these clauses cannot be subjected to First Amendment scrutiny that would apply had they been legislatively enacted.<sup>184</sup> Limits on the right to spend money for political purposes, on the other hand, are not explicitly rooted in the Constitution’s text and thus fall under the purview of the First Amendment. Furthermore, a person’s ineligibility to vote or hold office has no necessary bearing on their First Amendment rights. Felons and children cannot vote but still receive full First Amendment protections.

The Constitution also bars United States citizens under the age of

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speech or expression, government regulation may not favor one speaker over another.”).

180. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) (citing *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983)).

181. U.S. CONST. art. I, § 2, cl. 2 (limiting Representative office to U.S. citizens); U.S. CONST. art. I, § 3, cl. 3 (limiting Senatorial office); U.S. CONST. art. II, § 1, cl. 4 (limiting Presidential office); U.S. CONST. amend. XV.

182. *See, e.g., Poe v. Ullman*, 367 U.S. 497, 521 (1961) (explaining that the right to privacy “emanates from the totality of the constitutional scheme under which we live”) (Douglas, J., dissenting); William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 433 (1986) (“Our amended Constitution is the lodestar for our aspirations.”); *see also* MARTIN H. REDISH, *THE CONSTITUTION AS POLITICAL STRUCTURE* 6 (1995); CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 3-32 (1969).

183. *Hearings*, *supra* note 3, at 10-11.

184. Note, *supra* note 14, 1899-1900.

thirty-five from serving as the President.<sup>185</sup> Yet the exclusion of certain citizens from the presidency does nothing to limit their First Amendment rights to speak for or against presidential candidates.<sup>186</sup> Similarly, the constitutional limits on noncitizens' participation in America's political process should not be construed to limit their First Amendment rights.

## 2. ALTERNATIVE CHANNELS OF EXPRESSION

The Court has struck down campaign finance provisions that imposed less restrictive limits on speech than § 441e because the provisions limited the speaker's ability to communicate.<sup>187</sup> In *Buckley*, for instance, the Court struck down FECA's limits on independent expenditures because it restricted "the extent of the reasonable use of virtually every means of communicating information."<sup>188</sup> Eugene Volokh has argued that even a \$1000 limit on independent expenditures leaves speakers "with virtually no effective alternative means of reaching their intended audience."<sup>189</sup> Through its ban on independent expenditures and contributions by foreign nationals, § 441e restricts the alternatives available to foreign nationals even further.

Apart from independent expenditures, those living in the United States have relatively easy access to forums to express their political preferences. Foreigners living abroad lack such access, resulting in substantially fewer opportunities to communicate with American citizens about political candidates.

While noncitizens living abroad may have fewer alternatives available with respect to independent expenditures, the extent to which this predicament affects the treatment of alternative channels remains unclear. The Supreme Court has only considered the alternative channels available to speakers as they apply to citizens. And a noncitizen living abroad will naturally receive less sympathy from the Court for having fewer alternatives for expression on account of their physical distance from the United States. Still, the ban on independent expenditures leaves foreigners with few alternatives to speak with American citizens about American elections and, as a result, likely fails under the traditional analysis of content-based speech

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185. U.S. CONST. art. II, § 1, cl. 4.

186. *Id.* The Constitution restricts the presidency to "natural born Citizen[s]" and this political limitation also has no bearing on the First Amendment rights of foreign-born citizens. *Id.*

187. *See Buckley v. Valeo*, 424 U.S. 1, 18 n.17 (1976) (per curiam); *see also City of Ladue v. Gilleo*, 512 U.S. 43, 57 (1994) (invalidating restriction on a medium of speech because it prevented speaker's from reaching their intended audience).

188. *Buckley*, 424 U.S. at 18 n.17 (1976).

189. Volokh, *supra* note 175, at 64-65.

restrictions.

### 3. TAILORING THE REGULATION OF FOREIGN INDEPENDENT EXPENDITURES

Finally, § 441e is certainly over-inclusive, and possibly under-inclusive as well. Foreigners within the United States enjoy First Amendment freedoms.<sup>190</sup> But § 441e bars foreign expenditures regardless of whether the expenditure is made on American soil or from abroad.<sup>191</sup> As discussed in Part III, the ban restricts speech in the United States by foreign nationals with substantial and enduring connections to the United States. As a result, § 441e is an over-inclusive violation of the First Amendment.<sup>192</sup>

The ban might also violate the First Amendment for its under-inclusiveness—that is, § 441e fails to reach much of the speech that implicates the government’s interest in excluding foreigners from domestic political processes. Evidence of under-inclusiveness suggests not only that a law is clumsily tailored to an interest but also that the interest is not compelling. Section 441e raises these concerns because it permits a substantial amount of speech that harms the government’s interest.<sup>193</sup>

Federal election law permits foreigners to use diplomatic channels, PACs, subsidiaries, and lobbyists to engage in political speech. These channels let foreigners use an American subsidiary or their political allies to make independent expenditures. Worse, these channels are available only to those foreign entities with enough resources to attract the state department’s attention, to hire lobbyists, to fund PACs, and to mobilize their subsidiaries. The ban on foreign independent expenditures—and foreign campaign contributions—leaves ample wiggle room for wealthy noncitizens to influence elections by funding speech.

Viewed from a different angle, § 441e’s under-inclusiveness looks less troubling. Section 441e forbids all independent expenditures by foreign nationals. The Supreme Court has been reluctant to strike down laws regulating one type of expression that advances a particular interest simply because another type of expression implicating the same interest

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190. *Bridges v. Wixon*, 326 U.S. 135, 148 (holding that the First Amendment protects aliens on U.S. soil); *see also* *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953).

191. 2 U.S.C. § 441e(a) (2006).

192. *See* *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 120-21 (1991); *Fed. Elections Comm’n v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 500-01 (1985).

193. *See, e.g.*, *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 793 (1978); *see also* *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985).

remains unregulated.<sup>194</sup> Consider, for example, the under-inclusiveness of the ordinance in *City of Renton v. Playtime Theatres*, which banned adult theaters but not adult magazines from certain areas.<sup>195</sup> The Court upheld the ordinance by reasoning that the city was free “to address the potential problems created by one particular kind of adult business.”<sup>196</sup> Yet, even in *City of Renton*, the Court based its ruling on the assumption that the city would, “in the future, amend its ordinance to include other kinds of adult businesses that have been shown to produce the same kinds of secondary effects as adult theaters.”<sup>197</sup> The Court may have difficulty adopting a similar assumption with § 441e because of the equivalent threat of *quid pro quo* corruption from domestic independent expenditures and the many other channels of political influence available to foreigners.

The question of under-inclusiveness turns on how broadly the domain of relevant speech is set: is it all speech by foreign nationals affecting United States elections, just foreign independent expenditures, or somewhere in between? Once a court answers this threshold issue, it will then have to make an empirical judgment about whether § 441e is too under-inclusive relative to the interests it purportedly advances.<sup>198</sup> This Article does not endeavor to fully answer this question, but notes that while § 441e is fatally over-inclusive, whether it is also under-inclusive is subject

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194. See *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 653 (1990), *overruled by* *Citizens United v. Fed. Elections Comm’n*, 130 S. Ct. 876 (2010) (“Section 54(1) is not rendered underinclusive by its failure to regulate the independent expenditures of unincorporated labor unions that also have the capacity to accumulate wealth, because the exclusion does not undermine the State’s compelling interest in regulating corporations whose unique form enhances such capacity”); *Ry. Express Agency v. New York*, 336 U.S. 106, 110 (1949) (rejecting argument that an ordinance’s underinclusiveness violated the Equal Protection Clause because the clause does not require legislators to eradicate “all evils of the same genus . . . or none at all” when making economic classifications). *But see* *Entm’t Software Ass’n v. Granholm*, 426 F. Supp. 2d 646, 654 (E.D. Mich. 2006) (“Not only does the Act not materially advance the State’s stated interests, but it appears to discriminate against a disfavored ‘newcomer’ in the world of entertainment media”); *Entm’t Software Ass’n v. Blagojevich*, 404 F. Supp. 2d 1051, 1075 (N.D. Ill. 2005) (“[T]he underinclusiveness of this statute—given that violent images appear more accessible to unaccompanied minors in other media—indicates that regulating violent video games is not really intended to serve the proffered purpose [of giving parents the power to protect children from harmful images]” (citing *Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989))).

195. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

196. *Id.* at 57 (citing *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488-89 (1955)); *see also* *Burson v. Freeman*, 504 U.S. 191, 207 (1992) (“We do not . . . agree that the failure to regulate all speech renders the statute fatally underinclusive.”).

197. *City of Renton*, 475 U.S. at 53.

198. See Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2424 (1996) (noting that in weighing the over- and under-inclusiveness of a speech restrictions courts must make “primarily empirical judgments—judgments about the closeness of the fit between the law and the interest—rather than normative ones”).

to interpretations, which may vary given different facts.

Given § 441e's over-inclusiveness, a narrower restriction on foreign independent expenditures has a greater chance of surviving First Amendment scrutiny. For example, if Congress prohibited foreign expenditures from agents of hostile governments—the “Tokyo Rose” scenario mentioned by Justice Stevens in his *Citizens United* dissent<sup>199</sup>—or expenditures from members of terrorist groups, the Supreme Court may be persuaded that the law is properly tailored to the government's interest in national security.<sup>200</sup> Indeed, in the same term that the Court decided *Citizens United*, the Court upheld a federal ban on the supply of “material aid” to terrorist groups in *Holder v. Humanitarian Law Project*.<sup>201</sup> The Court acknowledged that the ban was a content-based restriction on speech because it only applied to speech aiding certain groups—terrorists.<sup>202</sup> The Court then applied a “rigorous,” if otherwise undefined, level of scrutiny to the ban.<sup>203</sup> However, the ban survived this level of scrutiny, because the Court found that it advanced the compelling government interest in combating terrorism<sup>204</sup> and only restricted “material support coordinated with or under the direction of a designated foreign terrorist organization.”<sup>205</sup> The ban at issue in *Humanitarian Law Project* did not apply to the speech of terrorist organizations or speech independent of terrorist organizations.<sup>206</sup> Still, *Humanitarian Law Project* shows that the Court will defer to Congress's authority over foreign affairs in restricting speech when these restrictions are narrowly drawn. By contrast, § 441e forbids *all* foreign independent expenditures and is therefore not properly tailored to withstand First Amendment scrutiny.

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199. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 947 (2010) (Stevens, J., concurring in part and dissenting in part).

200. *See, e.g., Korematsu v. United States*, 323 U.S. 214, 222-23 (1944) (upholding constitutionality of the evaluation of Japanese-Americans).

201. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2730-31 (2010).

202. *Id.* at 2723 (holding that the ban on material support to terrorist organizations “regulates speech on the basis of its content”).

203. *Id.* at 2724.

204. *Id.* The Court explained that “the Government's interest in combating terrorism is an urgent objective of the highest order.” *Id.*

205. *Id.* at 2726.

206. *Id.* at 2728. Yet, the Court noted that the ban did not impose “any restriction on independent advocacy, or indeed any activities not directed to, coordinated with, or controlled by foreign terrorist groups.” *Id.*

## VI. CONCLUSION

*Citizens United* sparked vigorous debate over the role of corporations and trade unions in American elections. At the Supreme Court confirmation hearings for then-Solicitor General Elena Kagan, Senator Al Franken called the decision “shocking” and responsible for tearing “a gaping hole in our election laws.”<sup>207</sup> Senator Franken’s statement reflected the views of many, as *Citizens United* became a rallying point for critics of the Roberts Court. In a column entitled *The Decision That Threatens Democracy*, Ronald Dworkin reckoned that “[n]o Supreme Court decision in decades has generated such open hostilities among the three branches of our government as has [*Citizens United*.]”<sup>208</sup>

*Citizens United* gave corporations and trade unions clearance to make independent expenditures, but the extent to which these organizations will utilize this freedom is by no means clear,<sup>209</sup> as significant corporate support can signal to voters a politician’s devotion to special interests rather than to their interests.<sup>210</sup>

While the effect of *Citizens United* on corporate and trade union speech may underwhelm, the decision has the potential to dramatically transform the law regarding foreign-sourced speech. The long-standing ban on foreign independent expenditures marks one of the few pieces of campaign finance legislation that has gone unchallenged. And after *Citizens United*, the ban on foreign independent expenditures is the only federal source-based restriction on independent expenditures remaining.

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207. *Nomination of Elena Kagan, to be Associate Justice of the Supreme Court of the United States, Hearings before the S. Comm. on the Judiciary*, 111th Cong. (2nd Sess. June 28, 2010) (Remarks of Sen. Al Franken), available at [http://franken.senate.gov/?p=press\\_release&id=888](http://franken.senate.gov/?p=press_release&id=888).

208. Ronald Dworkin, *The Decision that Threatens Democracy*, THE NEW YORK REVIEW OF BOOKS, Apr. 29, 2010, <http://www.nybooks.com/articles/archives/2010/may/13/decision-threatens-democracy/>. *But see* Floyd Abrams, *Citizens United and Its Critics*, 120 YALE L.J. (ONLINE) 77 (2010), <http://yalelawjournal.org/2010/9/29/abrams.html> (“[*Citizens United*] is based on the most firmly established and least controversial First Amendment principles.”).

209. *See, e.g.*, Michael Luo, *Money Talks Louder than Ever in Midterms*, N.Y. TIMES, Oct. 7, 2010, at A13 (“So far, however, the nightmare situation envisioned by some campaign finance watchdogs—droves of commercial corporations vying for voters’ attention through a Super-Bowl-style frenzy of advertising bearing their company logos—has not materialized.”).

210. CAPLAN, *supra* note 165, at 179. For Caplan, a candidate’s spending may signal that candidate’s lack of integrity. Caplan reasons: “The more a politician spends on advertising, the more money he must have; the more money he has, the more illicit favors he must have sold. Lots of ads equal lots of corruption. If the public thought like this, no politician would advertise in the first place.” *Id.* Caplan discusses campaign contributions here, but the logic applies to independent expenditures as well.

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Lifting the ban on foreign expenditures will invite new voices into American political discourse. This invitation will extend beyond powerful foreign organizations to every foreign national who wishes to speak to United States citizens about United States elections. The First Amendment protects the right of United States citizens to hear foreign speech. *Citizens United* deserves praise at least to the extent that it brings the Supreme Court closer to fully protecting this right.