

Alien Donors: The Participation of Non-Citizens in the U.S. Campaign Finance System

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In the closing weeks of the 1996 presidential race, press reports uncovered that the Democratic National Committee (DNC) had received large contributions from a number of individuals in the United States who were not American citizens. The articles publicized a little-scrutinized but longstanding set of legal standards governing the participation of aliens in the campaign finance system. Among those rules is a prohibition on donations from foreign sources. Because some of the immigrants who gave to the Democrats retained connections to overseas business interests, their contributions looked suspicious—and a scandal was born. That controversy now threatens to push Congress in the direction of taking a constitutionally suspect policy and making it worse.

Campaign finance controls have been described as providing “a formal, public opportunity for the people of a state through their lawmaking organs to decide whether foreign participation in their elections should be permitted or prohibited.”¹ More than thirty years ago, Congress decided, for the first time, to take steps to limit this manifestation of overseas influence in the U.S. political scene. Federal law currently prohibits “foreign nationals” (defined to include foreign governments and corporations, as well as temporary visitors from abroad) from making contributions in connection with any campaign for elective office.² Rulemaking by the Federal Election Commission (FEC) in 1989 extended these statutory restrictions—which reach federal, state, and local elections but not ballot initiatives—to all expenditures as well.³

However, immigrants admitted to the U.S. for permanent residence are exempt from these restraints and are thus free to fund U.S. political campaigns. The ability of these legal permanent residents (LPRs) to exercise candidate and party preferences provides them a significant entrée into the American political

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

2. See 2 U.S.C. § 441e (1994).

3. See *Restrictions on Foreign Nationals Extended*, reprinted in 4 Fed. Election Camp. Fin. Guide (CCH) ¶ 9276 (Nov. 17, 1989) [hereinafter *Restrictions Extended*].

community. This campaign finance scheme has thus created an interesting juxtaposition: Resident aliens, a group which has not enjoyed the franchise for state or federal office anywhere in the country since 1926,⁴ have the capacity to "vote" with campaign dollars. Is their participation a dangerous anomaly, or does it properly reflect the fact that speech and associational rights, such as those implicated by election spending, are broader than formal voting rights?

On the other hand, the current system shuts out the diverse and numerous group of non-citizens known as nonimmigrants (NIs) who are only admitted to the United States on a short-term basis, such as asylees and those with student visas.⁵ To date, neither the federal statutory provision banning NI contributions nor the later FEC regulation on expenditures has been tested in court.⁶ The federal government has thus not been required to defend its interest in enacting these controls. Nor has it been asked to justify its disparate treatment of LPRs and NIs for the purposes of campaign finance. Given that courts have broadly construed the plenary power of Congress in the field of immigration, one might expect a presumption of deference toward this policy. Lawmakers, after all, had a pressing motivation—they believed that they were acting to protect the country's national security by screening out overseas influences from domestic politics. The statute's line drawing may also reflect the notion that, compared to LPRs, NIs are less attached to the country and therefore have less of a claim to (and pose more of a risk by) participation in election-related activities.

Furthermore, alien political freedoms have long been limited by state laws.⁷ Indeed, state governments have wide authority, consistent with equal protection principles, to determine the extent to which non-citizens can join the democratic life of their communities. Consequently, while the prohibition against campaign spending by foreign nationals creates a significant disability, it exists against a backdrop of aliens being denied the right to vote, to run for public office, and even to sit on the juries that can convict them of crimes and sentence them to prison or death.

In the years since they have been in place, the controls on campaign spending by non-citizens have received little empirical or theoretical attention.⁸ Press accounts surfaced during the 1980s on supposed efforts by the Marcos government in the Philippines to circumvent U.S. law and pump money into

4. Arkansas was the last state to withdraw the vote from aliens. See Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meaning of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1397 (1993).

5. See definition of "foreign national" in § 441e.

6. See *Foreign Nationals*, FEC Press Statement, Apr. 1996 (on file with author).

7. See *infra* Section II.A.

8. One indication of this lack of attention was the reaction to the proposed rulemaking changes in 1989—not a single public response was filed with the FEC. See *Restrictions Extended*, *supra* note 3.

presidential elections.⁹ A passing article or two focused on the connection between foreign interests and domestic political action committees.¹⁰ Yet the emerging tale of Democratic fundraising during the last election cycle has pushed the rules—and the question of what should be done if they are being evaded—onto center stage.¹¹

The current interest was sparked when newspapers began to report on the activities of DNC official John Huang, a former executive at Indonesia's Lippo conglomerate, who secured several substantial contributions for the party from LPRs linked to the Asian business world.¹² The first articles to materialize addressed the more than \$400,000 donated by an Indonesian couple living in Virginia.¹³ While the pair were legally entitled to give because of their status as resident aliens, their own modest means combined with the fact that they had family ties to the Lippo conglomerate ignited a classic Washington "follow-the-money" media chase. Within months, a larger fundraising controversy had begun to unfold, prompting the DNC's decision to return millions of dollars in questionable contributions, many of them from LPRs.¹⁴ Allegations also surfaced that foreign governments such as China may have attempted to channel cash to the Democrats.¹⁵

A number of probes are underway to explore whether the DNC broke any laws in its fundraising operations.¹⁶ The Justice Department has a special task

9. See Jeff Gerth, *Plan for Contributions to Reagan and Carter Found in Marcos Files*, N.Y. TIMES, Mar. 19, 1986, at A1.

10. See Martin Tolchin, *U.S. Elections Got More Foreign Cash*, N.Y. TIMES, May 24, 1987, at A21; Martin Tolchin, *U.S. May Ban PACs with Foreign Ties*, N.Y. TIMES, July 4, 1990, at A9; see also MARTIN TOLCHIN & SUSAN TOLCHIN, *BUYING INTO AMERICA* 16-21, 110-17, 279-80 (1988).

11. For comprehensive newspaper treatments exploring the links between DNC fundraising and foreign interests, see Richard T. Cooper, *How DNC Got Caught in a Donor Dilemma*, L.A. TIMES, Dec. 23, 1996, at A1; and Ruth Marcus, *Oval Office Meeting Set DNC Asian Funds Network in Motion*, WASH. POST, Dec. 29, 1996, at A1.

12. See Ruth Marcus & Lena H. Sun, *Democrats Relieve Top Fund-Raiser: DNC Asks for Probe by FEC into Legality of Huang Solicitations*, WASH. POST, Oct. 19, 1996, at A1; David E. Sanger & James Sterngold, *The Conduit: Fund-Raiser for Democrats Now Faces Harsh Spotlight*, N.Y. TIMES, Oct. 21, 1996, at A1.

13. See William Safire, *The Asian Connection*, N.Y. TIMES, Oct. 7, 1996, at A17; Jill Abramson & Glenn R. Simpson, *Foreign Exchange: Legal Loopholes Let Overseas Contributors Fill Democrats' Coffers*, WALL ST. J., Oct. 8, 1996, at A1.

14. See Charles Babcock & Ruth Marcus, *DNC Returns More Big Donations With Foreign Ties*, WASH. POST, Nov. 8, 1996, at A1; Sharon LaFraniere & Lena H. Sun, *DNC Returns Another \$1.5 Million*, WASH. POST, Mar. 1, 1997, at A1; Ruth Marcus & Charles Babcock, *DNC Releases Fund-Raising Details*, WASH. POST, Dec. 21, 1996, at A8; Ruth Marcus & Lena H. Sun, *DNC Returns \$253,000 Attributed to Thai Donor; Businesswoman, a Legal U.S. Resident, Says Money Actually Came From Mother-in-Law*, WASH. POST, Nov. 21, 1996, at A16.

15. See Bob Woodward & Brian Duffy, *Chinese Embassy Role In Contributions Probed; Planning of Foreign Donations to DNC Indicated*, WASH. POST, Feb. 13, 1997, at A1. The probe of potential Chinese involvement includes looking at whether members of Congress from both parties were intended beneficiaries of illegal overseas cash. See Brian Duffy & Bob Woodward, *FBI Probes China-Linked Contributions; Task Force Examines Influence on Congress*, WASH. POST, Feb. 28, 1997, at A1.

16. One key issue to be determined by the investigations is whether federal law currently prohibits political parties from accepting foreign soft-money contributions—those gifts which are earmarked not for candidate campaigns but only for party-building activities. See Benjamin Wittes & Timothy J.

force looking into the matter, as Attorney General Janet Reno has thus far resisted calls to appoint an independent counsel.¹⁷ The Federal Election Commission, the Senate Governmental Affairs Committee, and the House Committee on Government Reform and Oversight are also conducting investigations.¹⁸ While a principal focus of the inquiries is likely to be whether LPRs were used to funnel illegal foreign contributions from Asia into the hands of the DNC—and then whether the Clinton Administration reciprocated with policy favors to generous overseas supporters¹⁹—the broader issue of fundraising practices in the 1996 campaign, with its record amount of money spent, has come under scrutiny with respect to both parties.²⁰

Whatever conclusions are reached regarding the legality of the DNC's conduct, lawmakers have already proposed a legislative response. Sens. John McCain (R-Ariz.) and Russell Feingold (D-Wis.) have introduced a bill in the

Burger, *DOJ's Indagate Problem: Foreign Soft Money Gifts to the DNC Have Made Headlines. But Do They Break the Law?*, LEGAL TIMES, Jan. 6, 1996, at 1 (quoting Justice Department lawyer's conclusion that "the hallmark of 'soft money' is tha[t] it fall[s] outside of the regulatory web of FECA—441(e) included!" and FEC general counsel's statement that "if the money is not used in connection with a specific election, then 441(e), on its face, may not apply"). But even if the current statute is not interpreted as proscribing soft money gifts from foreign sources—the issue has never been decided by the FEC—using resident aliens as fronts for overseas donors could run afoul of other provisions in the law. See 2 U.S.C. § 441(f) (1988) (forbidding contributions in another's name).

17. See Robert Suro, *Reno Formally Rejects Independent Counsel; Task Force to Continue Campaign Money Probe*, WASH. POST, Apr. 15, 1997, at A1.

18. See Marcus & Sun, *supra* note 12, at A1. On the Senate side, Sen. Fred Thompson (R-Tenn.) is heading up the investigation. See Stephen Labaton, *Panel Issues 52 Subpoenas in Inquiry on Fund Raising*, N.Y. TIMES, Feb. 14, 1997, at A18. The House inquiry is led by Rep. Dan Burton (R-Ind.). See Robert D. Hershey Jr., *Panel Chairman Says Inquiry Into Fund Raising Is Expanding*, N.Y. TIMES, Feb. 17, 1997, at A12.

19. See Paul Blustein & Thomas W. Lippman, *A Major Question: What Did the Indonesians Gain?*, WASH. POST, Oct. 18, 1996, at A35; Ruth Marcus & Charles R. Babcock, *Visit Spurred Indonesians' Gift, Says DNC*, WASH. POST, Oct. 12, 1996, at A21; David E. Sanger, *Administration Moves to Defend Indonesia Policy After Criticism*, N.Y. TIMES, Oct. 17, 1996, at A1; Peter Waldman, *East Meets West: By Courting Clinton, Lippo Gains Stature at Home in Indonesia*, WALL ST. J., Oct. 16, 1996, at A1.

20. See Ruth Marcus & Charles Babcock, *The System Cracks Under the Weight of Cash*, WASH. POST, Feb. 9, 1997, at A1. Another aspect of the emerging picture of the Democratic money machine concerns President Clinton's use of White House facilities to woo and entertain big contributors. See Alison Mitchell, *Courting Donors: The Overview*, N.Y. TIMES, Feb. 26, 1997, at A1. Concern about overseas cash slipping into American politics has arisen in other contexts recently. For example, a major enforcement action targeted the domestic subsidiaries of four South Korean companies for funneling money to Rep. Jay Kim (R-Cal.) in violation of federal election law, including 2 U.S.C. § 441e. See B. Drummond Ayres Jr., *Election-Law Violations Swirl Around Lawmaker*, N.Y. TIMES, May 17, 1996, at A12; David Rosenzweig, *Fourth Firm Indicted in Kim Campaign Case*, L.A. TIMES, Mar. 28, 1996, at B3. The Republican National Committee also accepted some questionable donations with foreign links in 1996. See Thomas B. Edsall, *Dole Outlines Changes For Political Financing*, WASH. POST, Oct. 21, 1996, at A1. On a somewhat related note, the Justice Department looked into the legal propriety of Libyan leader Moammar Gadhafi offering to provide Rev. Louis Farrakhan with one billion dollars to advance the agenda of the Nation of Islam in the United States. See Michael A. Fletcher, *Farrakhan Vows to Take Libya's Aid*, WASH. POST, Feb. 26, 1996, at A1; Michael A. Fletcher, *Farrakhan Gets U.S. Inquiry, Says He Is Not a Foreign Agent*, WASH. POST, Mar. 15, 1996, at A2.

Senate that would bar LPRs from making contributions in federal elections.²¹ (The DNC on its own initiative announced that it would stop accepting contributions from non-citizens.²²) Similar legislation has been proposed in the House by Reps. Christopher Shays (R-Conn.) and Martin Meehan (D-Mass.),²³ and President Clinton endorsed the idea of banning non-citizen campaign donations in his State of the Union message.²⁴

What, then, should 1996's fundraising controversy teach us? Congress is right to be concerned about illegal foreign money leaching into American elections. Yet a U.S. citizen is just as capable as a non-citizen of fronting for overseas contributors. Lawmakers should not use the scandals surrounding the DNC, with their potentially worst-case scenario of abuse, as a reason to choke off donations from legal resident aliens. It is easy in the midst of an ever-expanding web of purported meddling from abroad to lose sight of the broader interests—and rights—of non-citizens residing in this country. But anxiety about foreign nations and corporations using LPRs in the U.S. to flood campaign accounts is not a sufficient reason to infringe on an activity that, according to the Supreme Court, is protected by the First Amendment. This Article will argue that all aliens in the U.S. are as constitutionally entitled as citizens to join in the funding of electoral contests. Indeed, now that the DNC's troubles have given congressional leaders the impetus to revisit the rules screening out foreign political spending, lawmakers should see that the current strategy of barring NIs already suffers from a constitutional defect. This deficiency will only become more pronounced if Congress enacts the first-ever restraints on resident aliens, a group that accounts for four percent of the U.S. population.²⁵

At first blush, the present rules implicate three main areas of legal discourse: equal protection, Congress's role in setting election and immigration policy, and the speech and associational rights of aliens. However, a careful exploration of each area reveals that only the free speech/associational rights claim would prove fruitful in challenging the restrictions. This Article provides such an exploration. Part I examines the evolution of the statutory prohibitions, along with the addition of the 1989 FEC regulations. Part II first considers the measures within the context of equal protection principles, determining that

21. Their proposal would accomplish this purpose by forbidding any person who is unable to register to vote in federal elections from making campaign contributions in federal elections. Thus, children under the age of eighteen and felons in certain states would also be prevented from participating as donors. See S. 25, 105th Cong. § 306 (Jan. 21, 1997).

22. See James Bennett, *Clinton Announces New Limits on Fund-Raising by Democrats*, N.Y. TIMES, Jan. 22, 1997, at A1.

23. See H.R. 493, 105th Cong. § 241 (Jan. 21, 1997).

24. See "We Must Be Shapers of Events, Not Observers" (State of the Union Address), WASH. POST, Feb. 5, 1997, at A18.

25. See American Civil Liberties Union, Press Statement: *Campaign Finance Reform and Legal Immigrants* (on file with author).

because aliens are not a suspect class for the purposes of campaign finance, the law must pass only rational basis scrutiny, which it does. This section next explores the provisions against the congressional immigration plenary power and authority to regulate elections, and finds that lawmakers have not overreached in this instance.

Part III addresses the First Amendment implications of the rules. This Part initially resolves that aliens in the United States, LPRs and NIs alike, are fully protected by the First Amendment. It then proceeds to argue that the current bans are unconstitutional under the standards the Supreme Court established in *Buckley v. Valeo*.²⁶ While the government is not forbidden from regulating aliens' contributions, the present law is flawed because it is not closely drawn. Moreover, the bar erected around all independent expenditure-related activities, set in place by FEC rulemaking, is unlikely to be justified by any compelling state interest and thus violates the First Amendment. Even if a court were to find a compelling interest behind this restriction, it also suffers from imprecise tailoring.

Before proceeding to develop these arguments, it is important to note that LPRs and NIs are similarly situated when it comes to the constitutional right to make contributions and expenditures in American elections. Thus, the conceptual framework presented here, while tailored to the prevailing set of restrictions, would also apply to the McCain/Feingold proposal should it become law.

I. THE EVOLUTION OF CONTROLS ON FOREIGN-NATIONAL POLITICAL SPENDING

The current bar against campaign contributions by foreign nationals has its roots in the 1966 amendments to the Foreign Agents Registration Act (FARA),²⁷ a statute dating from the late 1930s that regulates the activities of all persons, citizens and aliens alike, who are engaged in political activities in the United States on behalf of foreign interests.²⁸ In 1966, Congress added a section to FARA forbidding agents of foreign principals from making monetary

26. 424 U.S. 1 (1976).

27. 22 U.S.C.A. §§ 611-621 (West 1990).

28. Activities covered by FARA range from lobbying Congress to distributing commercial films. Persons subject to the Act must register with the Attorney General and disclose a detailed statement regarding the nature of their work. Supplemental filings are required every six months. The Supreme Court has explained the genesis of the requirements:

[FARA] was a new type of legislation adopted in the critical period before the outbreak of the war. The general purpose of the legislation was to identify agents of foreign principals who might engage in subversive acts or in spreading foreign propaganda, and to require them to make public record of the nature of their employment.

Viereck v. United States, 318 U.S. 236, 241 (1943).

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contributions on behalf of their overseas clients relating to any campaign for elective office.²⁹ Soliciting or accepting any such funds was also barred. These absolute prohibitions were unique in a statutory scheme built largely upon registration, labeling, and reporting requirements. Agents of a foreign principal, as defined by FARA, included persons working on the behalf of foreign individuals, governments, political parties, and corporations. At the time of the 1966 amendments, the modern contours of the federal campaign finance laws did not yet exist. Measures banning contributions by corporations, national banks, and labor unions, however, had long been on the books.³⁰

The legislative history of the 1966 amendment and the scholarly attention focused on it suggest that Congress decided to act in order to prevent foreign interests from gaining a foothold in American politics. Hearings chaired by Sen. William Fulbright (D-Ark.) before passage of the bill raised the specter of elusive foreign power-brokers funneling money into American campaigns in an attempt to influence policy decisions ranging from sugar import guidelines to Central-American diplomacy. Professor Lori Damrosch comments:

[The Fulbright] [h]earings . . . vividly document the efforts of certain foreign interests to ensure the reelection of sympathetic legislators by channeling campaign contributions through lawyers or other agents in Washington. . . . Although some of the activities covered by the hearings involved foreign businesses rather than governments, a key issue was the extent to which foreign governments had attempted to influence U.S. policy through techniques outside normal diplomatic channels.³¹

On the Senate floor, Fulbright spoke of protecting “the integrity of the decision-making process of our Government” and of the concern “about the growing use” by foreign entities “of nondiplomatic means to influence Government policies.”³² In the House, Rep. Emanuel Celler (D-N.Y.) referred to the “highly questionable conduct” and “unethical practices” of the

29. See Pub. L. No. 89-486 § 8(a), 80 Stat. 244 (1966) (codified at 18 U.S.C. § 613 (1994)), repealed by Pub. L. No. 93-283, tit. II, § 201(a), 90 Stat. 496 (1976). Section 613 was entitled “Contributions by agents of foreign principals” and read in part:

Whoever, being an agent of a foreign principal, directly or through any other person, either for or on behalf of such foreign principal or otherwise in his capacity as agent of such foreign principal, knowingly makes any contribution of money or other thing of value, or promises expressly or impliedly to make any such contribution, in connection with an election to any political office or in connection with any primary election, convention, or caucus held to select candidates for any political office; or Whoever knowingly solicits, accepts, or receives any such contribution from any such agent of a foreign principal or from such foreign principal—Shall be fined not more than \$5,000 dollars or imprisoned not more than five years or both.

30. See *infra* Section II.B.

31. Damrosch, *supra* note 1, at 22.

32. 111 CONG. REC. 6984-85 (Apr. 5, 1965) (statement of Sen. Fulbright).

agents of foreign principals, and Rep. William Jennings Bryan Dorn (D-S.C.) "particularly commend[ed]" that section of the bill that attacked these problems by prohibiting "foreign agents from making political contributions."³³

That national security and foreign-affairs management were the impetus for the prohibitions in the 1966 amendments is not surprising. There is a rich history of shielding the American policymaking apparatus from overseas influence. The alien ownership restrictions of the Communications Act of 1934³⁴ and the registration and reporting regime of FARA itself spring from a similar protective impulse—to limit or otherwise control participation by non-citizens in our own marketplace of ideas.³⁵ As the U.S. Court of Appeals for the D.C. Circuit stated in upholding the alien ownership rules against an equal protection challenge, "These . . . restrictions reflect a long-standing determination to 'safeguard the United States from foreign influence' in broadcasting."³⁶

Concerns that money from abroad would saturate American political coffers and turn the country's lawmakers against the best interests of their own citizenry did not diminish in the years after the passage of the FARA prohibitions. Indeed, continuing anxiety was fueled in part by the phrasing of the measure itself, which seemed to permit foreign contributions as long as they were not made through an agent operating in the United States. The 1972 Nixon campaign took advantage of this coverage gap by raising funds directly from foreign sources, a practice that came to light during the Watergate investigation.³⁷ When Congress debated campaign finance reform in 1974, Sen. Lloyd Bentsen (D-Tex.), sponsor of a measure to tighten the controls on foreign contributions, appealed anew to the concern over this overseas influence:

[A]ll of us have heard the stories, I am sure, in recent months of the enormous amounts of money contributed in the last political campaign by foreign nationals. We have heard of the hundreds of thousands of dollars sloshing around from one country to another, going through foreign banks, being laundered through foreign

33. 112 CONG. REC. 10,537-38 (May 16, 1966) (statements of Rep. Celler and Rep. Dorn).

34. 47 U.S.C.S. § 310 (Law. Co-op. 1995 & Supp. May 1996).

35. The Lobbying Disclosure Act of 1995, Pub. L. No. 104-65, 109 Stat. 691 (1995), has altered FARA's applicability to lobbyists: Those who represent foreign individuals, corporations, partnerships, and associations now file under the simpler guidelines of the new law, while agents of foreign governments and political parties still must comply with the more burdensome FARA requirements. *See id.* § 9.

36. *Moving Phones Partnership L.P. v. F.C.C.*, 998 F.2d 1051, 1055 (D.C. Cir. 1993) (quoting *Kansas City Broadcasting Co.*, 5 Rad. Reg. (P & F) 1057, 1093 (1952)).

37. *See Damrosch, supra* note 1, at 23. The military government of Greece was one alleged source of funds for the Nixon camp. *See id.* at 15 n.48; *see also* 120 CONG. REC. S4715 (Mar. 28, 1974) (statement of Sen. Bentsen) ("It is my understanding that the Senate Watergate Committee is digging into contributions by foreign nationals . . .").

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banks; and we have heard allegations of concessions being made by the Government to foreign contributors.³⁸

Bentsen's amendment tackled the problem of foreign contributions not by regulating intermediaries in the United States but by moving directly against the source of the perceived problem. His proposal to prohibit outright the campaign donations of foreign nationals³⁹ passed as part of the 1974 revisions to the Federal Election Campaign Act of 1971 (FECA)⁴⁰ and now forms the basis of 2 U.S.C. § 441e, the current codification of the restrictions on foreign nationals.⁴¹ The justification for eliminating these contributions followed the recurring theme of shielding American campaigns from what was seen as the corrupting influence of those who exist outside of the formal U.S. political community:

I do not think foreign nationals have 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. Many in this country have expressed concern over the inroads of foreign investment in this country, over the attempts by foreigners to control U.S. businesses. Is it not even more important to try to stop some of these foreigners

38. 120 CONG. REC. S4714 (Mar. 28, 1974) (statement of Sen. Bentsen).

39. The relevant language in the Bentsen amendment mandates that "no candidate may knowingly solicit or accept a contribution for his campaign . . . from a foreign national . . ." 120 CONG. REC. S4714 (text of Amendment No. 1083) (Mar. 28, 1974).

40. Pub. L. No. 93-443, tit. I, § 101, 88 Stat. 1263 (1974). The Bentsen revision was incorporated into FECA by Pub. L. No. 94-283, § 112(2), 90 Stat. 493 (1976). In the 1976 amendments, the penalties for knowing breaches were also brought in line with other violations of FECA. *See* H.R. REP. No. 94-1057, at 66-67 (1976); *see generally* 2 U.S.C. § 437g(d) (1994) (describing penalties for FECA violations). Other provisions that may be applied to conscious transgressions of § 441e are 18 U.S.C. §§ 371, 1001, and possibly 1346.

41. Section 441(e) of Title 2 reads:

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

(b) As used in this section, the term "foreign national" means —(1) a foreign principal, as such term is defined by section 611(b) of title 22, except that the term "foreign national" shall not include any individual who is a citizen of the United States; or (2) an individual who is not a citizen of the United States and who is not lawfully admitted for permanent residence, as defined by section 1101(a)(20) of title 8.

Section 611 (b) of Title 22, referred to in the above passage, reads:

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

from trying to control our politics? . . . American political campaigns should be for Americans⁴²

The 1974 FECA amendments also marked an important paradigm shift, whereby Congress recognized that contributions from foreign nationals need not come from overseas accounts but could have a domestic origin. Congress therefore considered the propriety of allowing aliens in the United States to give money to political campaigns. In the same speech in which he suggested that the line between permissible and impermissible contributors should be drawn between those who are allowed to vote in U.S. elections and those who are not, Bentsen made a normative argument for allowing one group of non-voters—LPRs—to “vote” with campaign donations:

My amendment would exempt foreigners with resident immigrant status from the ban on contributions by foreigners. There are many resident immigrants in the United States who have lived here for years and who spend most of their adult lives in this country; they pay American taxes and for all intents and purposes are citizens of the United States except perhaps in the strictest legal sense of the word. These individuals should not be precluded from contributing to the candidate of their choice⁴³

Bentsen was challenged over his plan to allow LPRs to make contributions but to exclude from participation in the campaign finance system all other aliens lawfully admitted to the United States.⁴⁴ Noting that these restrictions would create an “undue and unnecessary burden” on candidates for political office, as well as on the large number of “people who are lawfully in this country, but who are not here as permanent residents,” Sen. Howard Cannon (D-Nev.) questioned why the amendment was not drafted to give more aliens in the United States the privilege to contribute. He proposed drawing a line that simply banned campaign donations from foreign sources or foreign persons living overseas: “If [Bentsen] were to restrict the amendment to money coming from abroad, from foreign nationals abroad, or foreign nationals living abroad, or foreign contributions of any sort, I would completely agree with him”⁴⁵ In reply, Bentsen asserted that LPRs were more deserving than other aliens of the right to participate in the campaign finance system:

[T]his amendment was carefully drawn to try to exclude certain people who might be legally in this country passing through here as tourists. I do not think that they have any legitimate role to play in the political process of this country, nor do

42. 120 CONG. REC. S4715 (Mar. 28, 1974) (statement of Sen. Bentsen).

43. *Id.*

44. Bentsen’s amendment defined foreign national as a “foreign principal” or “an individual who is not a citizen of the United States and who is not lawfully admitted for permanent residence” 120 CONG. REC. S4714 (text of Amendment No. 1083) (Mar. 28, 1974).

45. 120 CONG. REC. S4716 (Mar. 28, 1974) (statement of Sen. Cannon).

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illegal aliens in this country. That privilege to contribute ought to be limited to U.S. citizens and to those who have indicated their intention to live here, are here legally, and are permanent residents. Those people would be and should be allowed to make political contributions in this country.⁴⁶

Bentsen won the day; the definition of “foreign national” was drafted to exempt LPRs. His answer to Cannon’s query was not particularly responsive, however. Numerous aliens in the United States exist on the continuum between mere tourists and LPRs, and, under Bentsen’s amendment, they are all prohibited from making political contributions in American elections.⁴⁷ Lawmakers thus crafted the prohibitions in such a way as not only to confront the national security interests they first invoked in 1966, but also to delineate the terms of legally acceptable campaign donations by persons without American citizenship who nonetheless are situated within American borders. Foreign affairs and federal immigration policy came together.

The restrictions on financial participation in U.S. political campaigns faced by foreign nationals extend beyond the strictures of the Bentsen amendment. In 1989, the FEC issued rules augmenting the statutory measures,⁴⁸ extending the existing prohibitions on contributions⁴⁹ to expenditures⁵⁰ (including independent expenditures).⁵¹ The Commission also formalized a standard that

46. 120 CONG. REC. S4716 (Mar. 28, 1974) (statement of Sen. Bentsen).

47. For a short overview of the variety of alien statuses under the Immigration and Nationality Act, see *Mathews v. Diaz*, 426 U.S. 67, 79 n.13 (1976).

48. See 11 C.F.R. § 110.4 (1996); see also *Restrictions Extended*, *supra* note 3. The rule now reads in relevant parts:

Prohibited contributions: (a) *Contributions or expenditures by foreign nationals.* (1) A foreign national shall not directly or through any other person make a contribution, or an expenditure, or expressly or impliedly promise to make a contribution, or an expenditure, in connection with a convention, a caucus, or a primary, general, special or runoff election in connection with any local, State, or Federal public office. (2) No person shall solicit, accept, or receive a contribution as set out above from a foreign national. (3) A foreign national shall not direct, dictate, control, or directly or indirectly participate in the decision-making process of any person, such as a corporation, labor organization, or political committee, with regard to such person’s Federal or non-federal election-related activities, such as decisions concerning the making of contributions or expenditures in connection with elections for local, State, or Federal office or decisions concerning the administration of a political committee.

11 C.F.R. § 110.4 (1996).

49. The term “contribution” includes— (i) any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for federal office; or (ii) the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose. 2 U.S.C. § 431(8)(A)(i-ii) (1994); see also 11 C.F.R. § 100.7 (1996).

50. See 2 U.S.C. § 431 (9)(A)(i-ii) (1994) (“The term ‘expenditure’ includes—any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office; and a written contract, promise, or agreement to make an expenditure.”); see also 11 C.F.R. § 100.8 (1996).

51. The term “independent expenditure” means an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate, or authorized committee or agent of such a candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such a candidate. See 2 U.S.C. § 431 (17) (1994); see also 11 C.F.R. §§ 100.16, 109.1 (1996). The

had already emerged from its advisory opinions⁵²—that a foreign national could not have a decisionmaking role at any corporation or political committee with regard to its political contributions or expenditures.

These, then, are the basic contours of the campaign finance controls on foreign nationals. The measures are broad in scope and, in many regards, unusual in the federal regulation of election spending. As the FEC noted in an advisory opinion, “Unlike most of the other provisions of the Act, § 441e applies to elections for *any* political office, including state and local as well as Federal elections.”⁵³ The reach of this statutory section contrasts with other subsections of § 441, where one finds many of FECA’s substantive commands. The general contribution and expenditure provisions of § 441a apply only to federal elections.⁵⁴ Section 441b bars certain entities created by Congress—such as national banks and corporations “organized by authority of any law of Congress”—from making contributions and expenditures “in connection with any election to any political office.” This section also forbids “any” corporation or “any” labor organization from making contributions or expenditures—but only for federal contests. Regulation of corporate and union election activity pertaining to state elections was left to the states themselves, some of which still permit these organizations to make direct contributions and expenditures. Under § 441c, federal government contractors are forbidden from making contributions to any “candidate for public office.” While this phrasing is vague, FEC rules have clarified that the prohibition extends only to federal elections, not state and local ones.⁵⁵ (The Commission has also promulgated rules concerning donations by minors, but these regulations likewise do not govern state and local elections.)⁵⁶ Within the sweep of the federal campaign finance laws, the only control that matches the reach of § 441e is § 441b’s

1989 rule explicitly stated that the new language covered “independent expenditures by foreign nationals as well as other kinds of expenditures.” *Restrictions Extended*, *supra* note 3.

52. The FEC’s advisory opinion process is outlined at 2 U.S.C. § 437(f). It provides a mechanism to obtain from the agency an indication of whether particular activities fall under provisions of the federal election laws. In the case of the applicability of § 441(e) to political action committees indirectly controlled by foreign corporations, the commission’s advisory opinions stake out new ground. See AO 1978-21, *reprinted in* 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 5327 (July 17, 1978); AO 1980-100, *reprinted in* 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 5548 (Sept. 19, 1980); A) 1982-10, *reprinted in* 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 5651 (Mar. 29, 1982). On other occasions, the FEC has merely affirmed, albeit in a formal fashion, activities whose lawfulness is self-evident from the statutory scheme itself—that LPRs with green cards may contribute to campaigns for elective office, see AO 1976-4, *reprinted in* 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 5196 (July 9, 1976); AO 1976-9, *reprinted in* 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 5199 (July 9, 1976), and that foreign nationals may donate funds to committees set up in relation to a state ballot initiative, see AO 1989-32, *reprinted in* 2 Fed. Election Camp. Fin. Guide (CCH) ¶ 5989 (July 2, 1990).

53. AO 1989-32, *reprinted in* 2 Fed. Election Camp. Fin. Guide (CCH) ¶ 5989 (July 20, 1990) (emphasis added).

54. See also 11 C.F.R. § 110 (1996).

55. See 11 C.F.R. § 115.2 (1996).

56. See 11 C.F.R. § 110.1(i)(2) (1996).

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limitations on federally chartered banks and corporations—organizations that owe their existence to Congress.

The scope of the restriction is unique in another way. While other sections of FECA establish prohibitions on direct spending from general treasury accounts by corporations, national banks, federal contractors, and labor unions, they by no means completely bar participation. These organizations can create political action committees (PACs) to raise separate funds to channel to favored candidates or parties, or to be spent independently.⁵⁷ Foreign nationals, on the other hand, cannot set up, support, or participate in the decision-making activities of PACs. So the proscriptions in § 441e and 11 C.F.R. § 110.4 choke off virtually all opportunity to take part in financing campaigns. As noted above, this nearly absolute bar is also distinct from the FARA model, which establishes reporting requirements for certain kinds of political expression sponsored by foreign principals but which permits the speech itself to flow.

There is one political arena from which the financial support of foreign nationals is not banned—state ballot propositions and referenda. This exception does not appear to derive from any special public policy considerations regarding aliens; FECA itself does not cover contributions or expenditures pertaining to initiatives, a local process which is arguably insulated from the regulatory reach of federal campaign finance laws. While the legislative record does not reveal why Congress bypassed this issue when considering the foreign-national prohibitions, Supreme Court cases decided since the passage of FECA suggest that the corrupting influence of money in referendum and ballot proposition contests may be a less troubling concern.⁵⁸

Yet despite the general reasons for this deference, it is not evident why state and local elections, but not ballot initiatives, were included within the scope of § 441e, given that lawmakers erected the bans because of the perceived threat of foreign interests hijacking the domestic policymaking process. If this is the concern, what could be more distressing than the notion that contributions from aliens could help a ballot committee enact a law through the mechanism of a referendum? Indeed, some legislators have recognized the existence of this possibility. A bill was introduced in the 103rd Congress to bring ballot propositions within the ambit of § 441e, but it did not move out of committee.⁵⁹

57. See 2 U.S.C. §441(b)(2)(C), (c)(b) (1994).

58. See *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978) ("The risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue.") (citations omitted); see also *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 299 (1981) ("Whatever may be the state interest or degree of that interest in regulating and limiting contributions to expenditures of a candidate or a candidate's committee there is no significant state or public interest in curtailing debate and discussion of a ballot measure.").

59. See H.R. 1628, 103d Cong. (1993).

In addition to state referenda and initiatives, other kinds of political activity similarly remain outside of the reach of FECA, thus arguably providing aliens with a few additional possibilities for electoral spending. A simple reading of the statutory exceptions to the contribution and expenditure definitions indicates some of the avenues that may be open to foreign nationals.⁶⁰ The costs of publishing a newspaper editorial do not constitute an expenditure, for example, so an alien who owns a newspaper in the U.S. and endorses candidates for elections does not engage in prohibited spending.⁶¹ The use of "soft money"—funds applied to local party-building and other organizational activities such as registration and get-out-the-vote efforts⁶²—is also essentially unconstrained by FECA, suggesting that foreign nationals may be able to make contributions to the national political parties for at least some of these purposes.⁶³

The FEC, however, has not issued any policy statements or advisory opinions passing on the legality of foreign nationals' funding of these activities. But the agency has confirmed that aliens can volunteer for political campaigns without making a contribution.⁶⁴ While they may not take out advertisements

60. See 2 U.S.C. § 431(8)(B), 9(B) (1994).

61. Obviously, writing op-eds or letters-to-the-editor is not forbidden. See 2 U.S.C. § 431(9)(B)(i) (1994) ("The term 'expenditure' does not include— (i) any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate."); see also 11 C.F.R. § 100.8(b)(2) (1996).

62. The relevant statute provides:

The term "expenditure" does not include . . . (ii) nonpartisan activity designed to encourage individuals to vote or to register to vote . . . (iv) the payment by a State or local [party] of . . . the costs of . . . a printed slate card or sample ballot . . . (viii) the payment by a State or local [party] of the costs of campaign materials . . . used by such committee in connection with volunteer activities on behalf of nominees of such party . . . (ix) the payment by a State or local party . . . of the costs of voter registration and get-out-the-vote activities conducted by such committee on behalf of nominees of such party for President and Vice President.

2 U.S.C. § 431(9)(B)(ii), (iv), (viii), (ix) (1994). Subsections (viii) and (ix) are qualified by the requirement that "such payments are made from contributions subject to the limitations and prohibitions of this Act." This language suggests that money from foreign nationals may not even fund these activities. See also 2 U.S.C. § 431(8)(B)(x), (xii) (1994).

63. See Wittes & Burger, *supra* note 16. For an explanation of the use of "soft money" in the campaign finance system, see Fred Wertheimer & Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 COLUM. L. REV. 1126, 1144-48 (1994), and Clarisa Long, Note, *Shouting Down the Voice of the People: Political Parties, Powerful PACs, and Concerns About Corruption*, 46 STAN. L. REV. 1161, 1189-90 (1994).

64. Some confusion has existed at the FEC regarding volunteer activity by foreign nationals. Section 441(e) states that persons may not make contributions of money "or other thing of value." But the definition of "contribution" in FECA excludes "the value of services provided without compensation by any individual who volunteers on behalf of a candidate or political committee." 2 U.S.C. § 431(8)(B)(i) (1994). The first time the FEC approached the tension between these two provisions, it ruled that a foreign national could not create a work of art to be used for fundraising purposes by a political committee. See AO 1981-51, *reprinted in* 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 5639 (Jan. 29, 1982). Five years later the commission decided, without overruling its previous opinion, that a Venezuelan student could donate his services to a Presidential campaign. Here, the FEC determined that the enumerated exemptions from the definition of contribution should control, noting that Congress itself anticipated this loophole as permitting some involvement by foreign nationals in American

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expressly advocating for or against clearly identified candidates, they may use paid media to discuss policy issues that surround elections.⁶⁵ Finally, because campaigns can accept anonymous contributions of up to fifty dollars, foreign nationals could presumably exploit this opening to make small donations.⁶⁶

Aliens may also be able to play a similarly surreptitious (and illegal) role under the rules which govern PACs. While the Commission has read § 441e to bar a foreign entity from establishing its own PAC,⁶⁷ it has held in a long line of its advisory opinions that domestic corporations owned by foreign principals may administer PACs, provided that foreign nationals do not serve in decision-making roles regarding the fund's political activities.⁶⁸ More recent agency opinions have also stressed that in jurisdictions where these U.S.-based subsidiaries are permitted to make direct contributions to state and local campaigns, the money must come from domestic sources.⁶⁹ This

campaigns. See AO 1987-25, *reprinted in* 2 Fed. Election Camp. Fin. Guide (CCH) ¶ 5903 (Sept. 17, 1987).

65. The 1989 FEC regulations, as noted above, extended the foreign national prohibitions to independent expenditures, which, for the overall purposes of FECA, are defined as expenditures "by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation with any candidate . . . or any authorized committee or agent of such committee." 2 U.S.C. § 431(17) (1994). The "clearly identified" standard is triggered when "(A) the name of the candidate involved appears; (B) a photograph or drawing of the candidate appears; (C) the identity of the candidate is apparent by unambiguous reference." 2 U.S.C. § 431(18) (1994). A 1984 FEC advisory opinion illustrates the types of ads that can pass muster under these standards. When a foreign national underwrote a series of advertisements by the National Conservative Foundation aimed at exposing liberal bias in the media, the commission ruled that because these spots "mention no candidate for political office, no political party, no incumbent Federal officeholder, no past or future federal election . . . [and no] statements that reflect an election-connected or election-influencing purpose," they would not be deemed "contributions or expenditures for purposes of either 2 U.S.C. § 441(b) or the Act generally, including 2 U.S.C. § 441(e)." AO 1984-41, *reprinted in* 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 5787 (Oct. 12, 1984). (The commission only ruled on three of six proposed advertisements.) This interpretation clarifies that foreign nationals can fund paid media campaigns provided that their advertisements stick to general discussions of public affairs or public policy.

66. See 11 C.F.R. § 110.4(c)(3) (1996).

67. See AO 1977-53, *reprinted in* 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 5294 (Jan. 12, 1978) ("The statutory prohibition against election-related contributions by foreign nationals is unqualified. That is, the exemption from that prohibition which is provided in 2 U.S.C. § 441(b)(4)(C) [for the establishment of a separate segregated fund or PAC] does not extend to Section 441(e) and is not available to foreign nationals . . .") (citation omitted).

68. See AO 1978-21, *reprinted in* 1 Fed. Election Camp. Fin. Guide ¶ 5327 (July 17, 1978); AO1980-100, *reprinted in* 1 Fed. Election Camp. Fin. Guide ¶ 5548 (Sept. 19, 1980); AO1982-10, *reprinted in* 1 Fed. Election Camp. Fin. Guide ¶ 5651 (Mar. 29, 1982); AO1982-34, *reprinted in* 1 Fed. Election Camp. Fin. Guide ¶ 5678 (June 9, 1982); AO1983-19, *reprinted in* 1 Fed. Election Camp. Fin. Guide ¶ 5722 (Aug. 19, 1983); AO1983-31, *reprinted in* 1 Fed. Election Camp. Fin. Guide ¶ 5735 (Nov. 10, 1983); AO1985-3, *reprinted in* 1 Fed. Election Camp. Fin. Guide ¶ 5809 (Mar. 4, 1985). For more recent opinions, see AO 1990-8, *reprinted in* 2 Fed. Election Campaign Finance Guide (CCH) ¶ 5986 (June 18, 1990). Another line of cases address PACs formed by trade associations that include foreign members. See, e.g., AO 1977-53, *reprinted in* 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 5294 (Jan. 12, 1978); AO1980-111, *reprinted in* 1 Fed. Election Camp. Fin. Guide ¶ 5560 (Oct. 16, 1980); AO1981-36, *reprinted in* Fed. Election Camp. Fin. Guide ¶ 5632 (December 9, 1981). For a survey of these advisory opinions, see Tom Durbin, *Foreign Participation in Federal Elections: A Legal Analysis* (Cong. Research Serv. Rep. No 87-554A, 1987).

69. See AO 1989-20, *reprinted in* 2 Fed. Election Campaign Finance Guide (CCH), ¶ 5970 (Oct. 27, 1989); AO1992-16, *reprinted in* 2 Fed. Election Camp. Fin. Guide ¶ 6059 (June 26, 1992).

interpretation of the statute, which was set forth in the 1989 rulemaking, has provoked strong dissents from some commissioners, who believe that the FEC has created an exception to § 441e that has in practice drastically weakened its effectiveness and opened the door to unlawful funding from overseas companies.⁷⁰

II. SECTION 441E, EQUAL PROTECTION, AND THE FEDERAL REGULATION OF ELECTIONS

When devising a constitutional challenge to the campaign finance controls on non-citizens living in the U.S., two questions naturally arise: Can the government treat aliens differently from citizens in this instance? And, given that the current restrictions cover all elections, does Congress have the authority to interfere in state and local political systems for this purpose? These inquiries are worth exploring—particularly because § 441e has never been tested in court—but they would probably not lead to successful litigation strategies. In these areas of jurisprudence, the federal government's plenary power over immigration is strong enough to defeat both claims of discrimination by non-citizens as well as objections from state capitals of unconstitutional interference with their election machinery.

A. *Campaign Finance Controls On Aliens Do Not Violate Equal Protection*

A challenge to § 441e on the grounds that it denies equal protection to non-resident aliens in the U.S. would likely be futile. While the Constitution only specifically entitles Congress to "establish an uniform Rule of Naturalization,"⁷¹ this modest text-based grant of power has burgeoned into a much more sweeping prerogative to legislate in the immigration area. In *Mathews v. Diaz*, the Supreme Court reaffirmed that Congress possesses a plenary authority over immigration and naturalization matters, saying that the legislative branch's "broad power" over these issues enables it to make "rules that would be unacceptable if applied to citizens."⁷² Indeed, while federal

70. See AO 1978-21, reprinted in 1 Fed. Election Campaign Finance Guide (CCH), ¶ 5327 (July 17, 1978) (Harris and Staebler, dissenting); AO1983-31, reprinted in 1 Fed. Election Camp. Fin. Guide ¶ 5735 (Nov. 10, 1983) (Harris and McDonald, dissenting); AO1982-10, reprinted in 1 Fed. Election Camp. Fin. Guide ¶ 5651 (Mar. 29, 1982) (Harris, dissenting). These dissents stress that the Commission is ignoring the statutory language prohibiting contributions through "any other person." The DNC returned a \$250,000 gift from Cheong Am America Inc., a domestic subsidiary of a South Korean electronics firm, after it discovered that the money came from the overseas parent corporation. See Ruth Marcus & Charles R. Babcock, *DNC Releases Fund-Raising Details*, WASH. POST, Dec. 21, 1996, at A8. The legal question remains unanswered, however, whether soft money can come into party coffers from sources that § 441e and 11 C.F.R. § 110.4 prohibit from engaging in more direct kinds of candidate spending.

71. U.S. CONST. art. I, cl. 4.

72. *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976).

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classifications based on race, gender, religion, and national origin trigger heightened scrutiny, congressional and presidential actions governing alienage have received only limited review by the judiciary. As the *Mathews* Court said:

For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government. Since decisions in these matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary. . . . The reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization.⁷³

At issue in *Mathews* was the constitutionality of a congressional statute which conditioned eligibility for a federal Medicare program on citizenship or, for aliens, on admission for permanent residence followed by continuous residence in the United States for a five-year period. Among the three plaintiffs were two non-immigrant aliens and a resident alien who had been in the country for less than five years. The Court held that federal laws not only may favor citizens over aliens but may discriminate among classes of aliens as well:

The fact that all persons, aliens and citizens alike, are protected by the Due Process Clause does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship or, indeed, to the conclusion that all aliens must be placed on a single homogeneous legal classification. For 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 over the other; and the class of aliens is itself a heterogeneous multitude of persons with a wide-ranging variety of ties to this country.⁷⁴

The Medicare provisions were thus subjected only to a limited standard of review and were upheld as not being “wholly irrational.”⁷⁵

73. *Id.* at 81-82 (citations omitted); see also *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 n.21 (1976) (“[T]he power over aliens is of a political character and therefore subject only to narrow judicial review.”). See generally Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255.

74. *Mathews*, 426 U.S. at 78-79. In this passage, the Court cites to 18 U.S.C. § 613(2)—the precursor to 2 U.S.C. § 441e. Other courts have found a rational basis in legislative distinctions between classes of aliens. See, e.g., *Newton v. INS*, 736 F.2d 336, 342 (6th Cir. 1984); *Sadegh-Nobari v. INS*, 676 F.2d 1348, 1351 (10th Cir. 1982); *Narenji v. Civiletti*, 617 F.2d 745, 747 (D.C. Cir. 1979) (upholding presidential order requiring Iranians on student visas to report to government on their status); *Guan Chow Tok v. INS*, 538 F.2d 36, 38 (2d Cir. 1976).

75. *Mathews*, 426 U.S. at 83. In 1996, Congress made resident aliens ineligible for many safety net programs. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193, 110 Stat. 2105 (1996). This decision has been challenged in federal court, see Judith Havemann, *Civil Rights Groups, N.Y. Mayor Challenge Welfare Cutoff for Legal Immigrants*, WASH. POST, Mar. 27, 1997, at A23, but will likely hold up under rational basis review.

But the restrictions placed on NIs in § 441e are of a different character than other federal regulations of alienage that courts have considered under equal protection analysis. Unlike the provisions tested in *Mathews*, the prohibitions against foreign-national campaign contributions do not implicate the distribution of a public benefit. Nor do they set criteria for federal public-sector employment as in *Hampton v. Mow Sun Wong*,⁷⁶ another leading Supreme Court case in this area. At first blush, the alien ownership rules imposed by Congress and the FCC, which prevent foreign ownership of broadcast companies and which have survived strict scrutiny,⁷⁷ may seem analogous to the provisions of § 441e because both spring from anxieties over the political influence of foreign nationals in the policy arena.⁷⁸ But those measures are really more similar to laws that reserve any scarce public resource for U.S. citizens. To be sure, the Court in *Mathews* was keenly aware that the statute under scrutiny regulated a welfare program:

Neither the overnight visitor, the unfriendly agent of a hostile foreign power, the resident diplomat, nor the illegal entrant, can advance even a colorable constitutional claim to a share in the bounty that a conscientious sovereign makes available to its own citizens and some of its guests. The decision to share that bounty with our guests may take into account the character of the relationship between the alien and this country: Congress may decide that as the alien's ties grow stronger, so does the strength of his claim to an equal share of the munificence.⁷⁹

The *Mathews* Court, however, went on to note that "no impairment of the freedom of association of either citizens or aliens" was at issue in the Medicare case.⁸⁰ The campaign finance controls on foreign nationals, on the other hand, do involve restrictions on basic expressive liberties. But this fact is more useful under a First Amendment analysis.⁸¹ In terms of equal protection, the distinction is unlikely to elevate the classification in § 441e from mere limited

76. 426 U.S. 88 (1976).

77. See *Moving Phones Partnership L.P. v. F.C.C.*, 998 F.2d 1051 (D.C. Cir. 1993); *Campos v. F.C.C.*, 650 F.2d 890 (7th Cir. 1981). The FCC has also rejected equal protection arguments. See *In re Continental Cellular*, 6 F.C.C. Rcd. 6834, 6836 (1991); *In re Seven Hills Television Company*, 2 F.C.C. Rcd. 6867, (1987). In *Continental Cellular*, the FCC noted that it was one of "several federal agencies which Congress has mandated to regulate foreign ownership." *Id.* at 6840 n.26. A First Amendment challenge in *Seven Hills* was dismissed with the comment that "[n]o one has a First Amendment right to a license." *Id.* at 6876 (quoting *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 388 (1969)).

78. See *supra* note 34 and accompanying text. The ownership rules are derived from 47 U.S.C. § 310(b). Regulations enacted pursuant to this statutory command include 47 C.F.R. §§ 5.4, 20.5, 24.404, 24.804, and 80.15.

79. *Mathews*, 426 U.S. at 80.

80. *Id.* at 87.

81. The availability of First Amendment review makes striving for strict scrutiny through the fundamental rights prong of equal protection analysis unnecessary. See *Harper v. Virginia Board of Elections*, 383 U.S. 663, 670 (1966) ("We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.").

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scrutiny. Under that test, the government would first contend that it has a legitimate national-security interest in eliminating contributions from aliens in its political campaigns. It could then maintain that the different treatment of NIs and LPRs is rationally related to the goal of keeping out two sources of foreign influence—contributions from overseas that are channeled through NIs, as well the gifts of the NIs themselves, who only have a temporary connection with (and thus limited loyalty to) the United States.

This argument would almost surely suffice. It's true that in the wake of the DNC scandal, some anecdotal information is now available showing wealthy foreign interests channeling money through LPRs. One might try to marshal this material to suggest that Congress was not acting rationally in deciding that NIs were more of a risk for serving as conduits than were LPRs. But this recent evidence regarding resident aliens says nothing about the likely conduct of NIs were they permitted to give. The question will still come down to the rationality of Congress's 1974 determination, and a court is likely to defer to the lawmakers' judgment. (If anything, the experience of the 1996 election would tend to buttress the reasonableness of any new line-drawing between LPRs and citizens, as proposed by the McCain/Feingold bill.) The exclusion of NIs and other aliens from the campaign finance regime might be answered in the same fashion as the Court answered the complaints of the plaintiffs deemed ineligible for supplemental Medicare in *Mathews*:

[I]t remains true that some line is essential, that any line must produce some harsh and apparently arbitrary consequences, and, of greatest importance, that those who qualify under the test Congress has chosen may reasonably be presumed to have a greater affinity with the United States than those who do not. In short, citizens and those who are most like citizens qualify. Those who are less like citizens do not.⁸²

82. *Mathews*, 426 U.S. at 83. As noted in the previous section, the FEC's 1989 rulemaking significantly broadened the scope of the campaign finance controls on foreign nationals. These regulations thus extended into the expenditure area the same classifications that Congress enacted on the contribution side—LPRs can make expenditures, all other aliens cannot. An equal protection challenge against the foreign-national campaign finance restrictions would most likely choose § 441e as its target, because Congress, not the FEC, was the source of the disparate treatment. But plaintiffs bringing a Fifth Amendment challenge to the entire system as it impacts aliens could build an argument from *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976), where the Supreme Court declined to apply mere rational basis scrutiny to a U.S. Civil Service Commission rule which made non-citizens ineligible for employment in the competitive federal civil service. In striking down the regulation, the Court reasoned that since aliens are admitted to the United States by virtue of policy choices made by Congress and the President, "due process requires that the decision to impose [a] deprivation of an important liberty be made either at a comparable level of government or, if it is to be permitted to be made by the Civil Service Commission, that is be justified by reasons which are properly the concern of that agency." *Id.* at 116. A party challenging the foreign-national campaign finance controls under the Fifth Amendment could maintain that even if a court tests § 441e against the rational-basis standard, 11 C.F.R. § 110.4 should receive heightened scrutiny because the FEC has neither the stature in the governmental hierarchy nor the expertise in matters of immigration or foreign affairs to be making decisions regarding which aliens should be permitted to make expenditures in American elections or participate in the expenditure-related activities of PACs.

But is § 441e properly viewed as a control on “immigration” or “naturalization”? The statute does not regulate the admission or deportation of aliens, the one dimension of immigration law that undoubtedly evokes the political sovereignty rationale that the judiciary has traditionally cited when yielding to congressional judgment in this area.⁸³ Yet neither did the Medicare subsidies at issue in *Mathews*. Indeed, courts have read Congress’s plenary power to extend far beyond control over the border and the naturalization process, reaching the conditions of alienage as well.⁸⁴ So embedded in the constitutional framework is this doctrine that a challenge to § 441e on the grounds that it is not legitimately within the purview of federal immigration policy is unlikely to prevail.⁸⁵

If the constraints of § 441e seem unique among congressional alienage classifications in terms of their burden on political and expressive activities,⁸⁶ the explanation goes to the nature of federalism. While guarantees of political rights have been extended to U.S. citizens by constitutional and federal statutory mandate, they have been affirmatively denied to non-citizens in few circumstances in these foundational texts.⁸⁷ Voting privileges, like other issues pertaining to the inclusion of foreign nationals in American political life—such

83. See *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (“This Court has repeatedly emphasized that ‘over no conceivable subject is the legislative power of Congress more complete than it is over’ the admission of aliens. Our cases ‘have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.’”) (citations omitted).

84. Some scholars have argued that this line of cases should be reconsidered.

[T]he courts have wrongly assumed that every federal regulation based on alienage is necessarily sustainable as an exercise of the immigration power. It should be apparent that some statutes burdening aliens are based on considerations other than a policy judgment regarding the number and classes of aliens who may enter or remain in the United States. Rather than invoking “the immigration power” as a barrier to constitutional analysis, courts ought to examine the justifications offered on behalf of federal regulations based on alienage to see if they meet traditional constitutional standards of permissibility.

T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT’L L. 862, 869-70 (1989). For a discussion of the exclusion of aliens from federal civil service, see *Mow Sun Wong*, 426 U.S. at 88.

85. Perhaps in the wake of *United States v. Lopez*, 115 S. Ct. 1624 (1995), in which the Supreme Court showed a willingness to cut back on Congress’s nearly unbridled Commerce Clause authority, an argument is waiting to be made that in § 441e lawmakers have either exceeded their power to legislate in the immigration area or that their actions deserve a higher degree of review to ensure that they have identified a substantial nexus between the conduct they want to control and federal immigration policy. See *id.* at 1630 (holding that activity Congress wishes to regulate must “substantially affect[]” interstate commerce). But based on past case law, the national security/foreign affairs rationale is nearly certain to be sufficient if a challenge to § 441e is analyzed under rational basis scrutiny. The D.C. Circuit accepted this justification virtually without question in *Moving Phones Partnership L.P. v. F.C.C.*, 998 F.2d 1051, 1056 (D.C. Cir. 1993).

86. Exclusion and deportation measures affecting alien speech rights have pervaded federal law in the past, but these will be considered in Part III.

87. U.S. CONST. art. I, §§ 2, 3 set citizenship requirements for House and Senate members, respectively. U.S. CONST. art. II, § 1 establishes a natural-born citizenship requirement for the presidency. Recent scholarly attention to alien suffrage, for example, shows that it is neither required by, nor prevented by, the Fourteenth Amendment. See Raskin, *supra* note 4, at 1418-20.

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as their ability to serve as jurors or to run for state and local office—have been left to legislators in each jurisdiction to determine.⁸⁸

A different equal protection test applies to state laws that classify aliens. Under *Graham v. Richardson*, these statutes are generally subject to strict scrutiny.⁸⁹ But in *Sugarman v. Dougall*, the Supreme Court carved out, in the area of political functions, a zone in which states can exclude alien participation with a mere rational basis.⁹⁰

The *Sugarman* political function exception has been employed to uphold state laws using citizenship as a requirement for employment as a police officer,⁹¹ public school teacher,⁹² and peace officer.⁹³ Current Supreme Court doctrine thus suggests that aliens are only considered a suspect class for state legislation that harms their economic interests⁹⁴ or which “strike[s] at the non-citizens’ ability to exist in the community.”⁹⁵ Were a state version of § 441e to exist, it would not seem to fall into one of these two categories of heightened equal protection scrutiny. Such a law would likely find a place within the rationale for permissible political-function classifications:

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 representa-

88. While the Supreme Court has not squarely faced the question of whether a state may deny aliens the right to vote under the Fourteenth Amendment, it has said that “implicit in many of [its] voting rights decisions is the notion that citizenship is a permissible criterion for limiting such rights.” *Sugarman v. Dougall*, 413 U.S. 643, 649 (1973).

89. See *Graham v. Richardson*, 403 U.S. 365 (1971).

90. Recognizing “the State’s broad power to define its political community” as well as its “interest in establishing its own form of government . . . and in limiting participation in that government to those who are within ‘the basic conception of a political community,’” *Sugarman*, 413 U.S. at 643, the Court announced: “[O]ur scrutiny will not be so demanding where we deal with matters resting firmly within a State’s constitutional prerogatives. This is no more than a recognition of a State’s historical power to exclude aliens from participation in its democratic political institutions” *Id.* at 648. The Court has fleshed out the parameters of this “historical power” by casting a tolerant eye on state practices that bar aliens from enjoying the basic activities of democratic life: “[I]t is clear that a State may deny aliens the right to vote, or to run for elective office, for these lie at the heart of our political institutions. Similar considerations support a legislative determination to exclude aliens from jury service.” *Foley v. Connelie*, 435 U.S. 291, 296 (1978). A host of state cases reveal the various political disabilities imposed on aliens. For decisions rejecting equal protection challenges to state voting laws that bar alien franchise, see *Skafte v. Rorex*, 191 Colo. 399 (1976), *app. dismissed*, 430 U.S. 961 (1977); *Padilla v. Allison*, 38 Cal. App. 3d 784 (Cal. Ct. App. 1974); and *Park v. State of Alaska*, 528 P.2d 785 (Alaska 1974). For cases upholding the exclusion of aliens from jury service, see *Perkins v. Smith*, 370 F. Supp. 134 (D. Md. 1974), *aff’d*, 426 U.S. 913 (1976), and *Connecticut v. Thigpen*, 397 A.2d 912 (Conn. Super. Ct. 1978). For authority on a state’s prerogative to deny aliens the right to run for elective office, see *Boyd v. Thayer*, 143 U.S. 135, 161 (1892) (“Each State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen”).

91. See *Foley*, 435 U.S. at 291.

92. See *Ambach v. Norwick*, 441 U.S. 68 (1979).

93. See *Cabell v. Chavez-Salido*, 454 U.S. 432 (1981).

94. See *Cabell*, 454 U.S. at 439.

95. See *Foley*, 435 U.S. at 295. The Supreme Court has applied an intermediate standard of review to a Texas law denying education to the children of undocumented aliens. See *Plyler v. Doe*, 457 U.S. 202 (1982).

tives, begins by defining the scope of the community of the governed and thus of the governors as well: Aliens are by definition those outside of this community.⁹⁶

When enacting § 441e, Congress was of course legislating in a vacuum: No states regulated political contributions by aliens in 1974, and none do so now.⁹⁷ But while it is interesting to ask to what extent states could, under the shadow of § 441e and federal immigration authority, pass controls on campaign spending by aliens, the query only begs the question of whether Congress had the prerogative in the first place to set rules governing foreign-national contributions for all U.S. elections. Congressional plenary power over immigration, though expansive enough to hold back an equal protection challenge to the classifications in § 441e, must be tested against the states' control over their own political machinery.

B. *The Federal Government May Regulate Campaign Spending by Aliens in Non-Federal Elections*

Congressional authority to regulate federal elections is clear: It is constitutionally derived⁹⁸ and well-settled in Supreme Court jurisprudence.⁹⁹

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

97. If a state passed a campaign finance law setting conditions for alien participation, it would face preemption challenges both through FECA, 2 U.S.C. § 453 (1994), and as a matter of federal immigration policy. Suppose that this hypothetical statute declared that any foreign national, irrespective of her legal status, could contribute to any election—state or federal—within the state. In this instance, Congress has clearly expressed its intention in § 441e, so its law would control; the state's decision to enfranchise all foreign nationals for the purposes of making campaign contributions would be preempted. If, however, the state attempted to prevent LPRs from making contributions or expenditures connected to its own electoral contests, it is arguable that no FECA preemption would exist—in § 441e, Congress did not mandate that LPRs be permitted to donate campaign cash, only that federal law would not erect such a bar. One could also imagine a state legislature passing a law forbidding all aliens, LPRs and NIs alike, from spending funds in support of or against any ballot initiatives. Because referendums are outside of FECA's purview, federal campaign finance law would again not preempt. In both of these cases, however, federal immigration policy might be implicated, meriting scrutiny under *Graham's* preemption prong. Under such an analysis, it is hard to see how these hypothetical laws would frustrate or encroach upon Congress's plenary power. They would not "discourage entry into or continued residency in the State." *Graham v. Richardson*, 403 U.S. 365, 379 (1971). As the Colorado Supreme Court remarked in upholding the state's prerogative not to enfranchise non-citizens: "The statutes prohibiting aliens from voting do not affect [entry or residency conditions] and 'even if such local regulation has some purely speculative and indirect impact on immigration, it does not thereby become a constitutionally proscribed regulation of immigration . . .'" *Skaft v. Rorex*, 191 Colo. 399, 405 (1976) (quoting *De Canas v. Bica*, 424 U.S. 351, 355-56 (1976)). Preemption would succeed only if "complete ouster of state power—including state power to promulgate laws not in conflict with federal laws—was the 'clear and manifest purpose of Congress.'" *De Canas*, 424 U.S. at 357 (quoting *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 146 (1963)). The legislative history of § 441e does not suggest that Congress sought to eviscerate all state authority in this area.

98. See U.S. CONST., art. I, § 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators"). The Constitution also gives Congress authority to regulate the voting of presidential electors. U.S. CONST. art. II, § 1 ("The Congress may determine the Time of chusing Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States"). Congressional power over presidential elections has been interpreted as being coextensive with its authority to regulate

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In the Tillman Act of 1907, this power was directed for the first time at monetary contributions in electoral campaigns. That legislation put in place controls on spending by corporations and entities chartered by Congress.¹⁰⁰ In 1916, a federal district court provided a forceful justification for campaign finance regulation when upholding those portions of the Tillman Act that applied to federal elections:

[W]hen we reflect that Congress is here dealing with elections at which Representatives in Congress are being voted for; that an election is intended to be the free and untrammelled choice of the electors . . . ; that the concerted use of money is one of the many dangerous agencies in corrupting the elector and debauching the election; that any law the purpose of which is to enable a free and intelligent choice, and an untrammelled expression of that choice in the ballot box, is a regulation of the manner of holding the election—the power of Congress to prohibit corporations of the state from making money contributions in connection with any such election appears to follow as a natural and necessary consequence.¹⁰¹

Later incorporated into the Corrupt Practices Act of 1925,¹⁰² these measures were augmented by the Taft-Hartley Labor-Management Relations Act of 1947, which banned labor unions from contributing to campaigns for federal office.¹⁰³ Today, the restrictions on corporations and labor unions are embodied in more or less the same form in 2 U.S.C. § 441b. Federal courts have repeatedly affirmed that it is within Congress's authority to regulate the campaign spending of these organizations.¹⁰⁴ Indeed, when the FECA

elections for the House and Senate. See *Burroughs v. United States*, 290 U.S. 534 (1934).

99. For an historical examination of Congress's role in regulating federal elections, see *Buckley v. Valeo*, 424 U.S. 1, 13-14, 14 n.16 (1976); and *Oregon v. Mitchell*, 400 U.S. 112, 119-24 (1970).

100. The Act provided:

That it shall be unlawful for any corporation organized by authority of any laws of Congress, to make a money contribution in connection with any election to any political office. It shall be unlawful for any corporation whatever to make a money contribution in connection with any election at which Presidential and Vice-Presidential electors or a Representative in Congress is to be voted for or any election by any State legislature of a United States Senator.

Act of Jan. 26, 1907, ch. 420, 34 Stat. 864-65 (1907).

101. *United States v. United States Brewers' Ass'n*, 239 F. 163, 168-69 (W.D. Pa. 1916).

102. Corrupt Practices Act of 1925, ch. 368, tit. III, §§ 301-317, 43 Stat. 1070-74 (1925).

103. See Labor-Management Relations Act of 1947, Pub. L. No. 80-81, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-187 (1994)).

104. In *Burroughs v. United States*, 290 U.S. 534 (1933), the Supreme Court spoke of the particular importance of the Corrupt Practices Act in relation to Presidential elections: "To say that Congress is without power to pass appropriate legislation to safeguard such an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self-protection. Congress, undoubtedly, possesses that power" *Id.* at 545. The constitutionality of the Corrupt Practices Act as it applied to labor unions was affirmed in *United States v. Painters Local Union No. 481*, 79 F. Supp. 516 (D. Conn. 1948), *rev'd on other grounds*, 172 F.2d 854 (2d Cir. 1949). The district court referred to Congress's power under Art. I, § 4 and the Necessary and Proper Clause, and concluded, "Under these broad grants Congress has long assumed to surround the entire federal election process with such rules and regulations as it deemed necessary and advisable to preserve the basic elective system contemplated by the Constitution." *Id.* at 521; see also *United States v. UAW-CIO*, 352 U.S. 567 (1957).

amendments of 1974 were reviewed in *Buckley v. Valeo*, the Supreme Court wrote, "The constitutional power of Congress to regulate federal elections is well established and is not questioned by any of the parties in this case. Thus, the critical constitutional questions presented here [do not go to] the basic power of Congress to legislate in this area" ¹⁰⁵ Those sections of § 441e and 11 C.F.R. § 110.4 that govern federal elections, then, are clearly within Congress's authority.

But congressional power to regulate elections for federal office is balanced by the power reserved to the states to establish rules governing the elections of their own officers. ¹⁰⁶ In the Voting Rights Act of 1965 and its subsequent amendments, these two powers collided as the federal government intervened in certain state election processes. In *Oregon v. Mitchell*, ¹⁰⁷ the Supreme Court considered the constitutionality of several provisions of the 1970 amendments. Most of Congress's actions received a green light — it could enfranchise for federal elections all persons who have reached 18 years of age, establish uniform guidelines for absentee voting in presidential contests, bar states from enacting residency requirements for presidential elections, and forbid the use of literacy tests in any federal or state election. But the states did not walk away totally empty-handed; the Court also ruled that Congress could not pass legislation mandating the eighteen-year-old rule for voting in non-federal elections.

In evaluating those elements of the challenged law that made incursions into the regulation of state elections, the Court noted that the literacy test ban was an appropriate use of the enforcement power of the Fourteenth and Fifteenth Amendments. ¹⁰⁸ But the establishment of a standard minimum voting age for state and local elections could not be squeezed into the purview of these clauses. ¹⁰⁹ According to Justice Hugo Black's opinion announcing the judgments of the Court, preserving the historic balance between the states and the national government in this crucial area requires limiting federal interven-

105. *Buckley v. Valeo*, 424 U.S. 1, 13-14 (1976).

106. While leaving to the states the authority to set the qualifications for their own electors, the Constitution does mandate that the requirements established shall be the same for both federal elections and elections for the most numerous branch of the state legislature. See U.S. CONST. art. I, § 2; U.S. CONST. amend. XVII.

107. 400 U.S. 112 (1970).

108. The Court explained:

[W]e have upheld congressional legislation under the Enforcement Clauses in some cases where Congress has interfered with state regulation of the local election process. In *Katzbach v. Morgan*, the Court upheld a statute which outlawed New York's requirement of literacy in English as a prerequisite to voting as this requirement was applied to Puerto Ricans with certain educational qualifications. . . . And in *South Carolina v. Katzenbach*, the Court upheld the literacy test ban of the Voting Rights Act of 1965.

Mitchell, 400 U.S. at 129 (citations omitted).

109. See *id.* at 130. After the decision in *Mitchell*, Congress passed, and the states ratified, the Twenty-Sixth Amendment, which establishes eighteen as the voting age in both federal and state elections.

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tions into state election processes to the commands of the Fourteenth, Fifteenth, Nineteenth, and Twenty-Fourth Amendments:

[T]he Framers of the Constitution intended the States to keep for themselves, as provided by the Tenth Amendment, the power to regulate elections. . . . I agree as to the States' power to regulate the elections of their own officials No function is more essential to the separation and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices and the nature of their own machinery for filling local public offices.¹¹⁰

In light of this traditional role of the states in regulating their own elections, the all-inclusive prohibition against campaign spending by foreign nationals may not look like a valid federal action. But challenges mounted against other federal campaign finance laws that reach state and local elections have failed in the past. The provision in § 441b that prohibits national banks from making contributions, for example, was upheld on the reasoning that "the congress has the undoubted right . . . to restrict and regulate corporations of its own creation."¹¹¹ And a similar rationale was used to reject a suit against the early Tillman Act restrictions as they applied to state and local elections: "That Congress may control those corporations which the federal government has created goes for the saying."¹¹²

These cases do not provide a perfect analogy. While it is true that aliens in the U.S., like national banks and federally chartered corporations, owe their status to the grace of Congress, it does not follow that Congress's regulatory powers should be equal in the two areas. Additionally, even though the enforcement clauses of the Fourteenth¹¹³ and Fifteenth¹¹⁴ Amendments have been held sufficient for some kinds of federal intrusion into state and local election machinery, that does not mean that Congress's plenary power over immigration is expansive enough to sustain those elements of § 441e and 11 C.F.R. § 110.4 that cover non-federal elections.¹¹⁵ The enforcement authority

110. *Id.* at 124-25. More recently, the tension between federal and state roles in the election process was reignited by the National Voter Registration Act of 1993, 42 U.S.C. § 1973gg-1 to -10 (1994). The law, which among other things requires states to make their driving license applications capable of doubling as voter registrations for federal elections, has been challenged unsuccessfully on constitutional grounds by several state governments. *See, e.g.,* Voting Rights Coalition v. Wilson, 60 F.3d 1411 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 815 (1996); ACORN v. Edgar, 56 F.3d 791 (7th Cir. 1995). On a related note, some states recently made an effort to assert their sovereignty with regard to in-state federal elections by erecting term limits on their representatives to the U.S. House and Senate. These laws were invalidated by the Supreme Court, however, in *U.S. Term Limits v. Thornton*, 115 S. Ct. 1842 (1995).

111. *United States v. Clifford*, 409 F. Supp. 1070, 1073 (E.D.N.Y. 1976).

112. *United States Brewers' Ass'n v. Altoona Brewing Co.*, 239 F. 163, 168 (W.D. Penn. 1916).

113. *See Katzenbach v. Morgan*, 384 U.S. 641 (1966).

114. *See South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

115. This issue is not an insubstantial one in those parts of the country with large populations of foreign nationals who are not permanent resident aliens. *See Donna M. Ballman, Political Contributions*

of the Civil War Amendments has a clear textual basis in the Constitution; the plenary power does not.

But until the Supreme Court indicates that it is ready to entertain a narrowing of Congress's plenary authority over immigration,¹¹⁶ a state or foreign national who challenges § 441e on the theory that the federal government has overreached its bounds would presumably fail.¹¹⁷ The plenary power doctrine has grown so expansive in modern constitutional law that a court would likely perceive restrictions on campaign spending by aliens in non-federal elections as a sustainable intrusion into state sovereignty. As Professor Gerald Neuman comments in a different, but related, context:

It is probably true . . . that modern constitutional law would uphold an explicit congressional prohibition on alien voting. Although the infringement of state sovereignty would have troubled earlier generations, the states have shrunk sufficiently to enable the Supreme Court to view the prohibition as within the "plenary" federal power to set the conditions on which aliens will be admitted to U.S. territory. The entering wedge for the prohibition might well be the need to restrict the political activities of enemy aliens in time of war, and the usual deferential review of federal alien policy for "foreign relations" reasons would accomplish the rest.¹¹⁸

One might be tempted to conclude that as goes the franchise, so goes the checkbook. But campaign finance controls on aliens, whether derived from the federal power to regulate elections or from the plenary authority over immigration, raise First Amendment issues as well, and must pass scrutiny in this arena in order to be valid.

III. ALIEN POLITICAL SPENDING AND THE FIRST AMENDMENT

As the previous Part demonstrates, the Constitution does not prevent the government from barring aliens from democratic processes in the United States. Although non-citizens stand on the sidelines while others line up for the

by *Foreign Nationals in Florida Elections*, 65 FLA. B.J. 31 (Mar. 1991). The state and local restrictions have also created some administrative difficulties in enforcement, leading the FEC to ask Congress at one point whether § 441e should continue to cover non-federal elections. See Durbin, *supra* note 68, at 12-13 ("[T]he Commission noted that it is difficult to enforce this section with respect to state and local elections since only federal office candidates and committees participating in federal elections file reports with the FEC.").

116. See discussion of *Lopez*, *supra* note 85 and accompanying text.

117. Plaintiffs might find some success, however, arguing that the deference accorded to congressional action taken under the immigration plenary power should not extend to the FEC's 1989 rulemaking that barred foreign nationals from expenditure-related activities in state and local elections. See *supra* note 97 extrapolating from *Hampton v. Mow Sun Wong* to equal protection analysis of 11 C.F.R. § 110.4 (1996).

118. Gerald Neuman, "We are the People": *Alien Suffrage in German and American Perspective*, 13 MICH. J. INT'L L. 259, 324 (1992).

ballot-box, it does not follow that they can be restrained from speaking out, leafleting, demonstrating, and taking to the airwaves, all in the name of influencing the very elections in which they cannot vote. Their lack of formal participatory freedoms does not translate into diminished associational and expressive liberties, such as the right to fund political contests.¹¹⁹

A. *Does Buckley Apply?*

There is no doubt that laws limiting campaign contributions and expenditures by individuals implicate rights under the First Amendment.¹²⁰ While courts sustained controls on campaign spending for corporations and labor unions when they were first enacted,¹²¹ when FECA placed such restrictions

119. While the courts should invalidate the foreign-national campaign finance controls on First Amendment grounds, a major element of the restrictions was put in place by FEC rulemaking and thus is subject to scrutiny under the standard established in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Under *Chevron*'s two-step analysis, the FEC appears to have exceeded its grant of statutory authority under FECA. According to this approach, a court reviewing the FEC's actions would first evaluate whether FECA "directly [speaks] to the precise question at issue." *Id.* at 842. Finding that it does not, the next inquiry would be whether the 1989 regulation is "a permissible construction of the statute." *Natural Resources Defense Council v. EPA*, 822 F.2d 104, 117 (D.C. Cir. 1987). Not finding any supporting authority in the legislative history, a court would turn to the public policy rationale behind FECA to see if the agency's 1989 rulemaking was a reasonable interpretation of the statute. It would find that the commission justified its actions on the grounds that the resulting scheme would harmonize with other sections of the law in which prohibitions on contributions have been paired with restrictions on expenditures. *See Restrictions on Foreign Nationals Extended*, reprinted in 4 Fed. Election Campaign Fin. Guide (CCH) ¶ 9276 (Nov. 17, 1989). The agency cites 2 U.S.C. § 441b, but this reference does not by any means seal its case. That section, which establishes the controls on labor unions, national banks, and corporations, explicitly states that it is unlawful for these organizations "to make a contribution or expenditure in connection with any election to any political office . . ." 2 U.S.C. § 441b (emphasis added). While that language may show that in one instance Congress banned expenditures by certain entities when it restricted their contributions, it also proves that in drafting the statute, lawmakers were fully cognizant of the distinction between the two different terms. For the purposes of evaluating the FEC's reasonableness in interpreting the statute, Congress's silence about "expenditures" in § 441e speaks as loudly as the word's inclusion in § 441b. When an agency interprets a statute in a way that raises constitutional questions, a court should not defer to its construction under *Chevron*. *See Chamber of Commerce v. Federal Election Comm'n*, 69 F.3d 600, 605 (D.C. Cir. 1995), *clarified on reh'g*, 76 F.3d 1234 (1996), *reh'g en banc denied*, 1996 U.S. App. LEXIS 3954 (D.C. Cir. Mar. 1, 1996). As prohibiting all expenditure-related activities by foreign-nationals is an interpretation of FECA that raises serious First Amendment concerns, the FEC's decision was not a reasonable interpretation of its statutory mandate. By forbidding foreign nationals from making independent expenditures and becoming involved in the independent-expenditure decisions of PACs and other organizations, the FEC fundamentally exceeded the statutory scheme passed by Congress. While this Part argues that these elements of the 1989 rulemaking violate the First Amendment, a court wishing to avoid making a constitutional ruling alternatively could invalidate these provisions under the *Chevron* doctrine.

120. Regulations of pure speech in connection with the election process routinely have been invalidated. *See, e.g., Mills v. Alabama*, 384 U.S. 214 (1966) (striking down an Alabama law criminalizing newspaper editorial endorsements that appear on election day as violative of First Amendment).

121. *See United States v. United States Brewers' Ass'n*, 239 F. Supp. 163, 169 (W.D. Pa. 1916); *United States v. Painters Local Union No. 481*, 79 F. Supp. 516, 523 (D. Conn. 1948), *rev'd on other grounds*, 172 F.2d 854 (2d Cir. 1949) ("[A]n aggregation may properly be subjected to more stringent regulation in the exercise of its freedoms than an individual."); *United States v. Boyle*, 482 F.2d 755, 763-64 (D.C. Cir. 1973).

on persons, the full force of the First Amendment came into play. In the landmark decision in *Buckley v. Valeo*,¹²² the Supreme Court equated the use of money in politics with associational activities and speech freedoms. Under First Amendment review, the *Buckley* Court upheld restraints on contributions by individuals and political action committees, but rejected those provisions that capped individual, candidate, and campaign expenditures. The Court dismissed the argument that because election spending contains some elements of conduct, it is less deserving of careful scrutiny:

We cannot share the view that the present Act's contribution and expenditure limitations are comparable to the restrictions on conduct upheld in [*United States v.*] *O'Brien*.¹²³ The expenditure of money simply cannot be equated with such conduct as destruction of a draft card. Some forms of communication made possible by the giving and spending of money involve speech alone, some involve conduct alone, some involve conduct primarily, and some involve a combination of the two. Yet this Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment. . . . [V]irtually every means of communicating ideas in today's mass society requires the expenditure of money.¹²⁴

While it is well-settled that restrictions on an individual's political contributions and expenditures implicate "fundamental First Amendment interests"¹²⁵ under *Buckley*, analysis of the alien campaign finance restrictions presents two curious tensions. First, although the protection of political communication and commentary about public affairs has long been held to lie at the core of the free speech principle¹²⁶—indeed to be its "central mean-

122. 424 U.S. 1 (1976).

123. 391 U.S. 367 (1968) (holding that First Amendment does not bar prosecution for burning of draft card because governmental interest in regulating nonspeech element of act was unrelated to suppression of free expression).

124. *Buckley*, 424 U.S. at 16, 19. For a view questioning the Court's equation of money with speech, see J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001 (1976).

125. *Buckley*, 424 U.S. at 23.

126. See *Monitor Patriot v. Roy*, 401 U.S. 265, 272 (1971) ("[I]t can hardly be doubted that the constitutional guarantee [of the First Amendment] has its fullest and most urgent application precisely to the conduct of campaigns for public office."); *Mills v. Alabama*, 384 U.S. 214, 218 (1966) ("[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs, . . . of course includ[ing] discussions of candidates . . ."); *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964) ("[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . ."); *Thornhill v. Alabama*, 310 U.S. 88, 101 (1940) ("The freedom of speech and of the press guaranteed by the Constitution embraces at the very least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment."). The First Amendment's associational freedoms are also heightened in the political realm. See *Buckley*, 424 U.S. at 15 ("[T]he First and Fourteenth Amendments guarantee 'freedom to associate with others for the common advancement of political beliefs and ideas,' a freedom that encompasses '[t]he right to associate with the political party of one's choice.'" (citations omitted). For an argument that political speech exists as a "first tier" within the First Amendment, see CASS SUNSTEIN,

ing”¹²⁷—in the context of self-government, the rights of non-citizens are at their nadir. For example, as we have seen, aliens are denied the ballot and other privileges of political membership, such as serving on juries.¹²⁸ Second, though one line of Supreme Court precedent suggests that in some crucial circumstances the First Amendment liberties of aliens can be curtailed with minimal scrutiny, other case law shows that in their daily lives aliens are clothed with complete protection for their speech activities. The remainder of this section demonstrates that these tensions should be resolved in favor of applying full First Amendment scrutiny to the restrictions contained in § 441e and 11 C.F.R. § 110.4.

The first of the two paradoxes outlined above is less perplexing upon realizing that within the constitutional framework an individual’s speech rights are not derived from nor rigidly linked to formal political rights—in truth, they are broader. Whether the government can keep someone off the voting roll, for example, does not establish a prerogative to silence that person’s expression about electoral contests or other public policy matters. This principle is evident from the history of the women’s suffrage movement. While attempts to suppress speech sometimes accompanied efforts to keep women disenfranchised,¹²⁹ the exercise of First Amendment freedoms by women continued despite the lack of female voting power.¹³⁰ Vigorous expressive activity ultimately helped women obtain the prize of the ballot.

For a contemporary demonstration of this principle, consider the rights of children under the First Amendment. While minors lack the vote, they are invested with speech freedoms. The breadth of these liberties is not perfectly co-extensive with the rights of adults. To be sure, under the auspices of protecting children, states are free to keep certain kinds of potentially harmful material from them.¹³¹ But other cases protect the right of minors to engage in political speech without their lack of franchise entering the legal calculation. In *Tinker v. Des Moines Independent Community School District*,¹³² for example, the Supreme Court invalidated a school order that prohibited students from wearing anti-war armbands. The First Amendment freedoms of children

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127. *New York Times*, 376 U.S. at 273.

128. See *supra* note 90 and accompanying text.

129. See JoEllen Lind, *Dominance and Democracy: The Legacy of Woman Suffrage for the Voting Right*, 5 UCLA WOMEN’S L.J. 103, 136-37 (1994). Finding case law regarding women and the First Amendment in this period, however, is quite difficult. See Michael T. Gibson, *The Supreme Court and Freedom of Expression from 1791 to 1917*, 55 FORDHAM L. REV. 263, 270 n.22 (1986).

130. See Lind, *supra* note 129, at 148-49; see also Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1279 (1992).

131. See *Federal Communications Comm’n v. Pacifica Found.*, 438 U.S. 726 (1978) (upholding FCC regulations on broadcasting of indecent language); *Ginsberg v. New York*, 390 U.S. 629 (1968) (upholding New York statute prohibiting sale of nudity-depicting literature to minors).

132. 393 U.S. 503 (1969).

strike close to the topic at hand; current FEC rules permit minors to make contributions to political campaigns, provided that they use their own funds.¹³³

Finally, a recent case from Oregon clearly illustrates the lack of parallelism between speech and participatory rights relating to elections. In November 1994, Oregon voters passed Measure 6, an amendment to the state's constitution designed to virtually extinguish contributions from out-of-district and out-of-state donors to campaigns for local and state offices.¹³⁴ The provision forbids candidates from accepting money from individuals who do not reside in their electoral districts; it polices this rule by punishing those contestants who raise more than 10% of their total campaign funding in violation of the policy. A consortium of candidates and donors sued in federal court to invalidate the law.¹³⁵

133. See 11 C.F.R. § 110.1(i)(2) (1996); see also *Contributions by Minors* (informational letter), reprinted in 2 Fed. Election Campaign Fin. Guide (CCH) 6904 (July 30, 1976).

134. ORE. CONST. art. 2, § 22 (1995). The amendment reads:

SECTION 1. For purposes of campaigning for an elected public office, a candidate may use or direct only contributions which originate from individuals who at the time of their donation were residents of the electoral district of the public office sought by the candidate, unless the contribution consists of volunteer time, information provided to the candidate, or funding provided by the federal, state, or local government for purposes of campaigning for an elected public office.

SECTION 2. Where more than ten percent (10%) of a candidate's total campaign funding is in violation of Section (1), and the candidate is subsequently elected, the elected official shall forfeit the office and shall not hold subsequent elected public office for a period equal to twice the tenure of the office sought. Where more than ten percent (10%) of a candidate's total campaign funding is in violation of Section (1) and the candidate is not elected, the unelected candidate shall not hold a subsequent elected public office for a period equal to twice the tenure of the office sought.

SECTION 3. A qualified donor (or an individual who is a resident within the electoral district of the office sought by the candidate) shall not contribute to a candidate's campaign any restricted contributions of Section (1) received from an unqualified donor for the purpose of contributing to a candidate's campaign for elected public office. An unqualified donor (an entity which is not an individual and who is not a resident of the electoral district of the office sought by the candidate) shall not give any restricted contributions of Section (1) to a qualified donor for the purpose of contributing to a candidate's campaign for elected public office.

SECTION 4. A violation of Section (3) shall be an unclassified felony.

The measure apparently only applies to non-federal elections, although this is not clear on its face. See *Pol. Fin. & Lobby Rep.*, Sept. 27, 1995. The amendment, which left out-of-district individuals free to make unlimited independent expenditures, does not specify who qualifies as a "resident" for purposes of contributions. Discussion of the case suggests that the term should be equated with the legal residence that must be established for the purpose of voting in state elections.

135. See *Vannatta v. Keisling*, 899 F. Supp. 488 (D. Or. 1995). On a related note, a third-party candidate in Alaska recently filed an action seeking an injunction to prohibit out-of-state contributions in congressional campaigns. The Ninth Circuit deemed the claim frivolous, as no statute or precedent supported the argument. While not actually reaching a constitutional question, the court said that the injunction sought

would abridge people's constitutionally protected liberty to contribute to the candidates of their choice. Plaintiffs argue that the weight of in-state opinions should be enhanced, and that of out-of-state opinions reduced, by managing the flow of money. Such management of the system of political expression may violate the rights of the out-of-state contributors.

Whitmore v. Federal Election Comm'n, 68 F.3d 1212, 1216 (9th Cir. 1996).

The district court judge granted summary judgment for the challengers. The court did not even pose as a threshold matter whether out-of-district donors—persons who have no right to go to the polls in any of the elections covered by the provision—were protected by the First Amendment in this situation. It assumed that they were and went straight to application of strict scrutiny.¹³⁶ The restriction thus was treated first and foremost as a control on expression subject to First Amendment review, rather than as a limitation of a political right to which equal protection principles would attach.¹³⁷ *Vannatta* exemplifies a principle that Congress recognized over twenty years ago: Speaking and voting are distinct elements of democratic decisionmaking.

When enacting the Bentsen amendment in 1974, lawmakers were well aware that they were advancing a vision of representative government in which the right to make campaign contributions was not derived from the right to take part in the formal political process. “So even though [resident aliens] do not have the right to vote,” remarked Sen. Robert Griffin (R-Mich.) on the Senate floor, “[T]hey would have the right to make financial contributions.”¹³⁸ This conceptual point presents a way to harmonize the first paradox presented by § 441e—the tension between the lack of alien political freedoms and the heightened protection for political communication in the First Amendment marketplace. But the second puzzle—the conflicting precedent regarding the

136. See *Vannatta*, 899 F. Supp. at 496 (“[C]ampaign contributions are political speech protected by the First Amendment. Measure 6 substantially limits contributors from donating money to out-of-district candidates. Laws which directly burden First Amendment rights are subject to strict scrutiny . . .”).

137. An equal protection argument was advanced by the plaintiffs, but the court did not reach it. See *id.* at 497. The case is now on review in the U.S. Court of Appeals for the Ninth Circuit, where amicus curiae in support of Oregon cite to § 441e in arguing that Measure 6 falls within the state’s sovereign interest in reserving democratic participation for members. As one amicus contended:

This powerful prohibition on campaign contributions by non-U.S. citizens in American campaigns reflects our political system’s clear understanding that the right to finance campaigns belongs to members of the electoral community itself. Indeed, from Oregon’s constitutional perspective, a citizen of Florida, Texas or Vermont has no more of an interest or stake in voting or making campaign contributions in Oregon than does a citizen of Montreal or Mexico City. Again, viewed through the proper lens of American federalism, all persons who are not legal residents in Oregon are non-citizens and have no state-based political rights in state elections.

Brief of National Voting Rights Institute at 17-18, *Miller v. Vannatta*, Nos. 95-35998, 95-35999 (9th Cir.) (Jan. 2, 1996).

138. 93 CONG. REC. S4716 (statement of Sen. Griffin) (daily ed. Mar. 28, 1974). Other campaign finance rules envision a lack of absolute parallelism between political membership and the right to make contributions and expenditures. Permanent resident aliens are not the only class of unenfranchised persons who are entitled to make political contributions. Rules established by the FEC permit donations by minors under specified conditions, leaving any further regulation to state law. See *supra* note 133. Fourteen states disenfranchise nonincarcerated felons for life. See Andrew L. Shapiro, Note, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 YALE L.J. 537, 539 (1993). Yet in each of these jurisdictions ex-offenders are as entitled as any other person to express their political preferences through campaign contributions. The McCain/Feingold proposal would also bar these two groups from donating money. See *supra* note 22.

scope of speech freedoms for aliens in the United States—remains to be reconciled.

The vast majority of case law and scholarly literature addressing the First Amendment liberties of aliens is concentrated around exclusion, deportation, and naturalization. In these contexts, the United States has in the past systematically used ideological and content-based criteria—those that are the most offensive to the core First Amendment value of government neutrality¹³⁹—to exclude and expel aliens with beliefs deemed undesirable for the American community.

In *Harisiades v. Shaughnessy*, for example, the Supreme Court held that the First Amendment did not bar the deportation of LPRs due to their membership in the Communist Party.¹⁴⁰ A pacifist was rejected for citizenship in *United States v. Schwimmer*,¹⁴¹ leading a dissenting Justice Oliver Wendell Holmes Jr. to issue one of his spirited defenses of free speech.¹⁴² In *Turner v. Williams*, a British national was turned away from the U.S. border for being an anarchist.¹⁴³ And in a twist on the more typical challenges to the exclusion power, the Court in *Kleindienst v. Mandel* let stand a denial of a nonimmigrant visa to a foreign professor on the basis of his adherence to Marxism, declining to weigh the First Amendment interests of the American scholars and students who invited him against Congress's authority to set criteria for entrance.¹⁴⁴ Thus a jurisprudence exists that suggests that speech restraints on foreign nationals might not be accorded the strict scrutiny that would apply were such restrictions imposed on U.S. citizens. At least in certain circumstances, it appears that aliens, like children¹⁴⁵ and military personnel,¹⁴⁶ possess a lesser First Amendment.

139. See SUNSTEIN, *supra* note 126, at 11-13 (contrasting content-neutral restrictions, viewpoint-based restrictions, and content-based restrictions, and noting that latter two are more likely to be held unconstitutional).

140. 342 U.S. 580 (1952). For another foundational deportation case, see *Galvan v. Press*, 347 U.S. 522 (1954).

141. 279 U.S. 644 (1929).

142. See *id.* at 654-55 (Holmes, J., dissenting) ("[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom of thought for the thought that we hate."); see also *United States v. Macintosh*, 283 U.S. 605 (1931) (upholding denial of citizenship on grounds of applicant's refusal to "promise to bear arms in defense of the United States unless he believed the war to be morally justified"). On the congressional power to denaturalize, see *Schneiderman v. United States*, 320 U.S. 118 (1943).

143. 194 U.S. 279 (1904). Professor Harry Kalven says that "[i]t is not clear whether the Court is treating the case as one of exclusion or of deportation," because the British subject had been in the U.S. for only a few days when he was removed. HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 437-38 (1988). Turner put up a serious First Amendment defense, but the Court upheld the statute in question—which barred "anarchists or persons who believe in or advocate the overthrow by force or violence of the Government of the United States or of all forms of government or of all forms of law"—by a unanimous vote. *Id.*

144. 408 U.S. 753 (1972).

145. See *Ginsberg v. New York*, 390 U.S. 629 (1968).

146. See *Parker v. Levy*, 417 U.S. 733 (1974).

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The infamous McCarran-Walter Act (formally known as the Immigration and Nationality Act of 1952¹⁴⁷) catalogued the forbidden viewpoints and affiliations that could trigger an alien's rejection at the front door or removal once in the country.¹⁴⁸ Professor Harry Kalven's survey of this chapter in American law finds little evidence of any First Amendment protection at all:

The deportation precedents form a tidy, if disheartening, universe of their own. The profile of the rules governing deportation is clear. There is *plenary* power to deport aliens. And this remains true against First Amendment inhibitions. . . . [Deportation] may be applied to resident aliens even when any sanction against citizens for comparable degrees of association would be grossly unconstitutional. . . .

. . . .
. . . [T]he entrant alien stopped at the border, the resident alien faced with a deportation order, and even the naturalized citizen threatened with denaturalization, though they may stand on American soil, are excluded from the domain of the First Amendment.¹⁴⁹

For the purposes of a challenge to the foreign-national campaign finance rules, the deportation cases are probably the most serious hurdles in this line of precedent because they involve, as do § 441e and 11 C.F.R. § 110.4, the application of speech restraints on aliens lawfully situated in the United States. To be sure, § 441e and 11 C.F.R. § 110.4 also restrict contributions and expenditures originating from abroad, but the foreign national who cuts a check from overseas can claim no constitutional protection. Like the academic denied a visa in *Kleindienst*, this person cannot invoke the First Amendment from offshore.¹⁵⁰

In contrast, a second strain of constitutional doctrine shows the rights of aliens in a different light—one in which in the conduct of their everyday lives they enjoy full First Amendment privileges. In *Bridges v. California*,¹⁵¹ the Supreme Court vacated a conviction for contempt of court against Harry Bridges, a West coast labor leader, for statements he made about an ongoing judicial matter. Bridges had sent a telegram to the Secretary of Labor, parts of

147. Pub. L. No. 82-414, 66 Stat. 163 (1952).

148. The Act, for example, provided for the deportation of "aliens who advocate or teach . . . opposition to all organized government"; "who are members of . . . the Communist Party of the United States"; and "who knowingly circulate . . . or display[] any written or printed matter . . . teaching . . . the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship." 8 U.S.C.A. § 1251(a)(6)(B), (C), (G) (West 1995). Similar language governed exclusion criteria. *See id.* § 1182(a)(28).

149. KALVEN, *supra* note 143, at 421.

150. *See Kleindienst v. Mandel*, 408 U.S. 753, 762-64 (1972). The citizen-plaintiffs in *Kleindienst* unsuccessfully argued that their First Amendment right to "receive ideas" was compromised by the denial of Mandel's visa, building their position from the Court's pronouncements in *Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1969). This precedent suggests that citizens running for public office would not be successful in claiming that the application of § 441e and 11 C.F.R. § 110.4 to nonimmigrants in the U.S., as well as to potential overseas foreign-national contributors, infringes on their First Amendment rights as candidates.

151. 314 U.S. 252 (1941).

which were later published in newspapers, threatening that enforcement of an "outrageous" decree against his union would result in a strike that would "tie up port of Los Angeles and involve entire Pacific Coast."¹⁵² The Court determined that this expression was protected commentary on public affairs:

The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions.¹⁵³

The fact that Bridges was Australian had no bearing on the Court's 1941 decision. However the legal significance of his alienage did come to light four years later, when the United States tried to expel him for past membership in a proscribed socialist organization. In *Bridges v. Wixon*,¹⁵⁴ Justice William O. Douglas, writing for the Court, reversed a deportation order against Bridges. Though his opinion saves Bridges through statutory construction, Justice Douglas alludes to the earlier *Bridges* case for the important principle that "[f]reedom of speech and of the press is accorded aliens residing in this country. So far as this record shows the literature published by Harry Bridges, the utterances made by him were entitled to that protection."¹⁵⁵

This pronouncement does not appear to square with those cases upholding the government's prerogative to deport aliens on the basis of their speech or associational activities. Justice Francis W. Murphy, concurring in the judgment, highlighted this inconsistency, stating that he would have struck down the entire statutory scheme. While not contesting Congress's power to exclude aliens on speech grounds, he states that "once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and the Fifth Amendments" ¹⁵⁶ Agreeing with the majority that Bridges "possesses the right to free speech and free press," ¹⁵⁷ Murphy reasoned that the exercise of this freedom is so eviscerated by a regime that permits deportation for ideological expression that it makes a sham of the alien's ability to comment vigorously on public matters:

Thus the government would be precluded from enjoining or imprisoning an alien for exercising his freedom of speech. But the government at the same time would be free, from a constitutional standpoint, to deport him for exercising that very freedom. The alien would be fully clothed with his constitutional rights when

152. *Id.* at 277 n.20.

153. *Id.* at 270.

154. 326 U.S. 135 (1945).

155. *Id.* at 148.

156. *Id.* at 161 (Murphy, J., concurring).

157. *Id.*

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defending himself in a court of law, but he would be stripped of those rights when deportation officials encircle him.¹⁵⁸

This conundrum has resulted in cases in which aliens speak out as freely as citizens, but then face consequences for the exercise of these freedoms at a later date. In *Massignani v. INS*,¹⁵⁹ for example, a nonimmigrant alien who had been in the U.S. for seven years was denied permanent resident status by the INS because she had joined a newspaper ad condoning the destruction of draft records. The Seventh Circuit had occasion to address only the plaintiff's request for a preliminary injunction, and it affirmed a lower court ruling denying relief. The panel envisioned that removal proceedings against the plaintiff were a possibility down the road, but it also said that "we do not intend to infer any disagreement with the proposition that aliens fully enjoy our primary rights of free speech guaranteed by the First Amendment."¹⁶⁰ Thus the machinery of deportation exists side by side with the system of free speech.¹⁶¹

The legal consequences of the puzzling precedent emerging from *Wixon* have attracted much scholarly criticism,¹⁶² and it stands out as a strange embarrassment in Kalven's worthy tradition.

The two *Bridges* cases thus dramatize a deep paradox in the legal framework. Bridges as an alien residing in the United States is entitled to the full speech privileges of the citizen. . . . But were the law to provide that he could be deported for an utterance such as the telegram, or even one much milder in tone, there would be no constitutional scrutiny of the imposition of so grave a penalty.¹⁶³

158. *Id.* at 162.

159. 438 F.2d 1276 (7th Cir. 1971).

160. *Id.* at 1278.

161. Language affirming that the First Amendment covers aliens is pervasive in the case law. Supreme Court majorities have cited favorably to Murphy's concurrence in *Wixon*. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) (citing *Wixon* to show that "resident aliens have First Amendment rights"); *Kwong Hai Chew v. Kolding*, 344 U.S. 590, 596 n.5 (1953); see also *Parcham v. INS*, 769 F.2d 1001, 1004 (4th Cir. 1985) (alien denied voluntary departure because of felony charges for violent demonstration is entitled to same "right to peaceful expression of views" as is any citizen); *In re Weitzman*, 426 F.2d 439, 449 (8th Cir. 1970) ("The Supreme Court has stated clearly that resident aliens are to be accorded the First Amendment guarantees of free speech and free press."); *Narenji v. Civiletti*, 481 F. Supp. 1132, 1139 n.5 (D.D.C. 1979), *rev'd on other grounds*, 617 F.2d 745 (D.C. Cir. 1979) ("The first amendment protections of speech, press, religion, assembly, and association also apply to aliens here in this country . . ."); *Schneider v. State*, 308 U.S. 147, 160 (1939) ("The freedom of speech and of the press secured by the First Amendment against abridgment by the United States is similarly secured to all persons by the Fourteenth against abridgment by a state."). The *Schneider* Court noted that in the cases at bar, which concerned the public distribution of leaflets, there was "no averment of proof . . . that the appellants or petitioners are citizens of the United States" *Id.* at 160 n.8.

162. See Philip Monrad, *Ideological Exclusion, Plenary Power, and the PLO*, 77 CAL. L. REV. 831 (1989); John Scanlon, *Aliens in the Marketplace of Ideas: The Government, the Academy, and the McCarran-Walter Act*, 66 TEX. L. REV. 1481 (1988); Katherine Pringle, Note, *Silencing the Speech of Strangers: Constitutional Values and the First Amendment Rights of Resident Aliens*, 81 GEO. L.J. 2073 (1993).

163. KALVEN, *supra* note 143, at 405-06.

In the time since Professor Kalven wrote, however, the picture has shifted somewhat. On a statutory level, Congress repealed McCarran-Walter in 1990.¹⁶⁴ (Though it did take a step back toward that regime in 1996 when it stipulated that aliens can be excluded or removed on the basis of membership in a terrorist organization.)¹⁶⁵ In addition, in recent years judges applying a modern understanding of the First Amendment have attacked the legacy of Justice Murphy's lament. In *Rafeedie v. INS*,¹⁶⁶ for example, a federal district court in Washington, D.C. struck down a number of exclusion provisions in McCarran-Walter. (The case was decided after the passage of the 1990 immigration law, but the judge determined that the changes to the code did not affect the claim presented.)¹⁶⁷ Stating that "[p]laintiff is entitled to the same First Amendment protections as United States citizens,"¹⁶⁸ the court held the exclusion rules unconstitutional because they were vague and overbroad. The government did not appeal the court's ruling.

Before the 1990 law was passed, a district judge in California invalidated deportation sections of the McCarran-Walter Act, also on First Amendment grounds, in *American-Arab Anti-Discrimination Committee v. Meese*.¹⁶⁹ The case arose out of the government's ongoing efforts to deport eight aliens, two of them permanent residents, who were supporters of the Popular Front for the Liberation of Palestine.¹⁷⁰ When it initially considered the issue in 1989, the district court first looked to precedent showing that outside of the deportation/exclusion setting citizens and non-citizens alike possess the same First Amendment freedoms.¹⁷¹ From here, the judge came to the same conclusion

164. See Immigration Act of 1990, Pub. L. No. 101-649.

165. See The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, §§ 401, 411 (Apr. 24, 1996).

166. 795 F. Supp. 13 (D.D.C. 1992).

167. See *id.* at 15 n.2.

168. *Id.* at 22. The sections at issue provided for the exclusion of

[a]liens who the consular officer or the Attorney General knows or has reason to believe seek to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States; and [a]liens who advocate or teach or who are members of or affiliated with any organization that advocates or teaches . . . (ii) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized government, because of his or their official character; or (iii) the unlawful damage, injury, or destruction of property; or (iv) sabotage.

8 U.S.C. §§ 1182(a)(27), (a)(28)(F). In judging whether these two sections infringed on protected expression, the court used the standard laid out in *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), the test applicable for U.S. citizens.

169. 714 F. Supp. 1060 (C.D. Cal. 1989). The case addressed the removal provisions at issue in 8 U.S.C.A. §§ 1251(a)(6)(D), (F)(iii), (G)(v), and (H).

170. See Anthony Lewis, *Enough is Enough*, N.Y. TIMES, Feb. 17, 1997, at A25; Anthony Lewis, *Free Speech, Except—*, N.Y. TIMES, Aug. 19, 1994, at A27. The INS recently granted resident alien status to two of the other six plaintiffs. See Todd S. Purdum, *2 Members of Palestinian Group Get U.S. Legal Resident Status*, N.Y. TIMES, Apr. 11, 1997, at A24.

171. See *American-Arab*, 714 F. Supp. at 1074.

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as did Justice Murphy in *Bridges v. Wixon*—that unless the aliens had full speech protection at deportation, their First Amendment rights apart from that context would be greatly impoverished:

[I]t is impossible to adopt for aliens a lower degree of First Amendment protection solely in the deportation setting without seriously affecting their First Amendment rights outside that setting. . . . Since aliens enjoy full First Amendment protection outside the deportation setting, we decline to adopt a lesser First Amendment test for use within that setting.¹⁷²

The district court struck down the deportation provisions on overbreadth grounds.¹⁷³ In the course of its opinion, the court buttressed its reasoning by positing that in the seminal deportation case of *Harisiades v. Shaughnessy*,¹⁷⁴ the Supreme Court “applied the same First Amendment standard to aliens’ claims that then applied to United States citizens’ First Amendment challenges.”¹⁷⁵

The Ninth Circuit vacated the *American-Arab* holding, deciding that the constitutional challenge was not yet ripe.¹⁷⁶ But in a later stage of the case, in which the appellate court was reviewing a preliminary injunction entered to prevent further deportation proceedings against the six nonimmigrant plaintiffs, the court issued what is surely the strongest language from any federal court validating the speech freedoms of non-citizens in the United States:

[T]he values underlying the First Amendment require the full applicability of First Amendment rights to the deportation setting. . . . Because we are a nation founded by immigrants, this underlying principle is especially relevant to our attitude toward current immigrants who are a part of our community. . . . Aliens, who often have different cultures and languages, have been subjected to intolerant and harassing conduct in our past, particularly in times of crisis. . . . It is thus especially appropriate that the First Amendment principle of tolerance for different voices restrain our decisions to expel a participant in that community from our midst. . . .

. . . .
. . . If aliens do not have First Amendment rights at deportation, then their First Amendment rights in other contexts are a nullity, because the omnipresent threat of deportation would permanently chill their expressive and associational activities.¹⁷⁷

172. *Id.*

173. *See id.*

174. 342 U.S. 580 (1952).

175. *American-Arab*, 714 F. Supp. at 1077; *see also* *Price v. INS*, 962 F.2d 836, 843 n.7 (9th Cir. 1992) (presenting similar reading of *Price v. INS*). This interpretation has been praised by Aleinikoff, *supra* note 84, at 869 n.42. *But see* Pringle, *supra* note 162, at 2088-89 (“Saturated as it is by language emphasizing the need for deference to the government in matters of immigration policy, it is difficult to imagine that *Harisiades* was intended to . . . accord aliens as much scrutiny as citizens in First Amendment challenges.”).

176. *See American-Arab*, 940 F.2d at 453.

177. *American-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1064-66 (9th Cir. 1995) (citations omitted). The court rejected a number of government arguments to the effect that aliens facing

The panel affirmed the injunctive relief, finding that sufficient evidence existed to show that the INS was selectively enforcing the immigration code in retaliation for the exercise of constitutionally protected rights.¹⁷⁸

The government's traditionally unquestioned power to penalize aliens on the basis of their speech is thus beginning to look less invincible. However, even conceding that *Rafeedie* and the Ninth Circuit's *American-Arab* decision are innovative and untested at the highest level¹⁷⁹—the Supreme Court was not presented with the opportunity to review either matter—the most adverse precedent in this area does not present a case such as the alien campaign finance prohibitions. At issue in § 441e and the 1989 FEC rule is not the right to believe in or speak up for a particular ideology, but the right to speak itself. This kind of outright silencing of a segment of society cannot be justified by reference to a lesser “alien’s” First Amendment. Even if that concept is viable, it is confined to contexts such as exclusion and naturalization in which the government is making decisions that are “fundamental to the identity of the nation,”¹⁸⁰ such as who it will accept for membership.

Imagine that when the Bentsen amendment was passed in 1974 it had only provided that a deportation proceeding may be instituted against a foreign national in the United States who contributes money or makes independent expenditures to benefit a political party or candidate with certain ideological positions. Such a viewpoint-based regulation may be offensive—and using campaign spending as a proxy for political affiliation may be problematic—but it would have been legally consistent with other controls on alien speech in place at the time and embodied in McCarran-Walter. Or Congress might have followed the FARA model, and only established labeling and reporting requirements for foreign-national contributions and expenditures. (Curiously, aliens who violate FARA are subject to deportation,¹⁸¹ while those who are

deportation lack First Amendment rights. First, it ruled that efforts to transplant the discretion afforded in *Kleindienst* were misplaced, stating that the First Amendment interest of aliens is different in the deportation setting than in the exclusion setting; it is in the former context that non-citizens must receive full First Amendment protection. *See id.* at 1064. Second, the court asserted that Congress' plenary power in the immigration area is insufficient to justify granting only limited First Amendment review to deportation proceedings. *See id.* at 1065. Third, government efforts to analogize to special First Amendment considerations involving children and the military were rejected. *See id.* at 1066. Additionally, the court offered a reading of *Harisiades* similar to the one made by the district court below, saying that deportation processes must be judged by the same standard used for other laws that burden First Amendment rights. *See id.* at 1064. The editorial page of the *Washington Post* praised the court's decision: “[T]he bottom line from the appellate court is this: Aliens present in the United States have the same right to political speech and association as citizens. Aliens cannot be singled out for deportation because they exercise those rights. . . . These clear and principled determinations are on firm constitutional ground . . .” Editorial, *Aliens and Speech*, WASH. POST, Nov. 13, 1995, at A20.

178. *See American-Arab*, 70 F.3d at 1066.

179. The Ninth Circuit has also recently ruled that the more deferential *Kleindienst* standard is appropriate for a First Amendment challenge to a denial of naturalization. *Price v. INS*, 962 F.2d 836, 842 (9th Cir. 1992).

180. *Id.* at 843 n.7.

181. *See* 22 U.S.C.A. § 618(c) (West 1990).

found guilty of FECA infractions are not.¹⁸²) Section 441e, however, has a different statutory architecture. It creates, *ex ante*, a blanket prohibition, and is thus unlike other federal laws that have impaired the expressive freedoms of non-citizens. The measure is aimed not at ideology, but at participation itself. Both types of restraints evoke strong First Amendment objections, but while the former has some precedent behind it, the latter is unknown in immigration and free speech law, even going back to the notorious Alien and Sedition Acts of 1798.¹⁸³

However, before concluding that full First Amendment scrutiny is appropriate for § 441e and 11 C.F.R. § 110.4, another potential objection must be met: Should NIs and other aliens affected by the campaign finance controls receive the same speech protection as permanent residents? To be sure, in *Bridges v. Wixon*, the landmark case in this area, the Supreme Court said that “[f]reedom of speech and of the press is accorded aliens *residing* in this country,”¹⁸⁴ and the concurring opinion spoke of equal treatment of “citizens and *resident* aliens.”¹⁸⁵ Playing off that language, some courts considering the applicability of the First Amendment to aliens have emphasized the permanent residence status of those whose rights they were adjudicating.¹⁸⁶ These decisions did not, however, attempt to draw any kind of rationalized distinction between the two broad classes of lawfully admitted aliens, nor did *Wixon*, which suggests that its use of the terms “residing” and “resident” should not be dispositive.

The Ninth Circuit in *Arab-American*, on the other hand, did offer a reasoned explanation as to why the two groups of aliens should receive the same free speech protection. The court strongly rebuffed the government’s suggestion that, building from *Mathews v. Diaz*,¹⁸⁷ a sliding-scale of immigrants’ rights should be applied in the First Amendment area. “We reject the government’s contention that we apply graduations of First Amendment protection parallel to the rational distinctions that are permissible pursuant to

182. See 2 U.S.C.A. § 437(g)(d).

183. Act of July 14, 1798, ch. 74, 1 Stat. 596 (1798); Act of July 1798, ch. 66, 1 Stat. 577 (1798); Act of June 25, 1798, ch. 58, 1 Stat. 570 (1798); Act of June 18, 1798, ch. 54, 1 Stat. 566 (1798).

184. *Bridges v. Wixon*, 326 U.S. 135, 148 (1945) (emphasis added).

185. *Id.* at 161 (Murphy, J., concurring) (emphasis added).

186. See *In re Weitzman*, 426 F.2d 439, 449 (8th Cir. 1970) (“The Supreme Court has stated clearly that resident aliens are to be accorded the first amendment guarantees of free speech and free press.”); *Rafeedie v. INS*, 795 F. Supp. 13, 22 (D.D.C. 1992).

187. 426 U.S. 67, 78-79 (1976) (“[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 the other; and the class of aliens is itself a heterogeneous multitude of persons with a wide-ranging variety of ties to this country.”). The Court also has held that an alien is “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 to those of full citizenship upon naturalization.” *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950).

the Equal Protection Clause in determining which citizens and aliens may receive particular government benefits," the panel wrote.¹⁸⁸ The court elaborated on why it rejected this move: "Ordinary equal protection analysis requires only that the government bestow benefits in accord with classifications that rationally satisfy the stated government objective. In contrast, to deny citizens or aliens some measure of their admitted rights to First Amendment associational freedom would be to nullify the right in its entirety."¹⁸⁹

Other courts have explicitly equated or made no distinctions regarding the First Amendment interests of LPRs and NIs.¹⁹⁰ Once admitted to the United States, both permanent residents and nonimmigrants have a legal entitlement to speak and freely associate, and, in the case of campaign finance, to see that any regulation of their contributions and expenditures is consistent with the First Amendment.

B. *The Application of Buckley*

The sweep of prohibited campaign spending on the part of foreign nationals must be considered against the nuanced backdrop of *Buckley v. Valeo*, in which the Supreme Court established that the First Amendment test for evaluating restrictions on contributions is different from the standard used to judge limitations on expenditures. The Court considered three types of contribution caps (on an individual to a single candidate, on a political committee to a single candidate, and on an individual during any calendar year)¹⁹¹ and three kinds of expenditure ceilings (independent expenditures by individuals, candidate expenditures from personal funds, and overall spending per campaign).¹⁹²

188. *American-Arab Anti-Discrimination Comm'n v. Reno*, 70 F.3d 1045, 1066 (1995).

189. *Id.*

190. See *Parcham v. INS*, 769 F.2d 1001, 1004 (4th Cir. 1985) (holding that "aliens residing in this country" enjoy protection of First Amendment in suit brought by plaintiff on a nonimmigrant student visa); *Massignani v. INS*, 438 F.2d 1276, 1278 (1971) (stipulating that "aliens fully enjoy our primary rights of free speech guaranteed by the First Amendment" in case where plaintiff was not LPR); *American-Arab Anti-Discrimination Comm. v. Meese*, 714 F. Supp. 1060, 1075, n.11 (C.D. Cal. 1989), *aff'd in part, rev'd in part, vacated and remanded*, 970 F.2d 501 (9th Cir. 1991) ("We simply draw no distinctions between immigrant and nonimmigrant aliens for First Amendment purposes.").

191. The law limited contributions from an individual to a candidate in an election to \$1,000, and from a political committee to candidate in an election to \$5000; individuals were permitted to donate no more than \$25,000 to candidates in a single year. See 2 U.S.C.A. §§ 441(a)(1)(A), 441(a)(2)(A), 441(a)(3) (West 1990).

192. See 18 U.S.C.A. § 608, *repealed by* Act of May 11, 1976, Pub. L. No. 94-283, § 201(a), 90 Stat. 496 (1976). The law mandated that "[n]o person may make any expenditure . . . relative to a clearly identified candidate during a calendar year which, when added to all other expenditures made by such person during the year advocating the election or defeat of such candidate, exceeds \$1,000." *Id.* at § 608(a)(1). The Act also restricted expenditures by a candidate "from his personal funds, or the personal funds of his immediate family, in connection with his campaigns during any calendar year." *Id.* These caps varied from \$50,000 for Presidential or Vice Presidential candidates to \$35,000 for senatorial candidates, and \$25,000 for most candidates for the House of Representatives. Section 608(c)

On the contribution side, the Court found that the restrictions involved only a “marginal” restraint “upon the contributor’s ability to engage in free communication” because they permit “the symbolic expression of support evidenced by a contribution but [do] not in any way infringe the contributor’s freedom to discuss candidates and issues.”¹⁹³ Capping the amount of money individuals can donate to campaigns was more of an associational restraint in the Court’s understanding, but it found that while the regulations “limit one important means of associating with a candidate or committee,” they “leave the contributor free to become a member of any political association and to assist personally in the association’s efforts on behalf of all candidates.”¹⁹⁴ On the basis of this analysis, the *Buckley* Court determined that the contribution limitations merited “the closest scrutiny.”¹⁹⁵

Controls on expenditures, on the other hand, “represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech.”¹⁹⁶ The cap on independent expenditures would prevent all persons and institutions except “candidates, political parties, and the institutional press from any significant use of the most effective modes of communication.”¹⁹⁷ The infringement on associational freedom was also perceived as more acute on the expenditure side. The ceiling on independent expenditures by individuals, for example, “precludes most associations from effectively amplifying the voice of their adherents, the original basis for the recognition of First Amendment protection of the freedom of association.”¹⁹⁸ The Court tested the expenditure cap using “the exacting scrutiny applicable to limitations on core First Amendment rights of political expression.”¹⁹⁹

The government offered three justifications in support of the restraints challenged in *Buckley*: (1) to prevent “corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates’ positions and on their actions if elected to office;” (2) to “mute the voices of affluent persons and groups in the election process and thereby equalize the relative ability of all citizens to affect the outcome of elections;” and (3) to “brake . . . the skyrocketing cost of political campaigns and thereby serve to open the political system more widely to candidates without access to sources of large amounts of money.”²⁰⁰

put ceilings on overall campaign expenditures by candidates seeking nomination and election to the presidency and senate and house seats.

193. *Buckley v. Valeo*, 424 U.S. 1, 20-21 (1976).

194. *Id.* at 22.

195. *Id.* at 24-25.

196. *Id.* at 19.

197. *Id.* at 19-20 (footnote omitted).

198. *Id.* at 22.

199. *See id.* at 44-45.

200. *Id.* at 25-26.

The Supreme Court, using an intermediate standard of review, decided that the first reason—eliminating corruption—was sufficient to sustain the contribution limitations: “To the extent that large contributions are given to secure a political *quid pro quo* from current and potential officeholders, the integrity of our system of representative democracy is undermined.”²⁰¹ The Court also noted that contribution controls operating in an overall scheme that precluded expenditure restrictions would leave “persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources.”²⁰²

If the government were called upon to defend the prohibitions against foreign-national contributions in § 441e, it would have to come armed with a stronger version of the corruption formula accepted in *Buckley*, which concerned only a limitation on campaign donations, not a ban on them altogether. The argument might be that the particular corruptive element that § 441e seeks to eradicate—the possibility of *quid pro quo* arrangements between foreign citizens and American politicians that would impair U.S. national security or foreign policy—requires stronger prophylactics than other parts of FECA.

While this justification is almost certain to clear the “important state interest” hurdle, the restrictions still must be closely drawn in order to survive constitutional review. The ban on contributions in § 441e fails this second criteria because it is overbroad for the purposes that it alleges to serve. First, it can easily be argued that the total prohibition on campaign-giving by foreign nationals living in the United States is too draconian. The law scoops up into one disadvantaged class—all non-LPRs—many disparate alien groups, from refugees/asylees to international students to intra-company transferees. The legislative history of the Bentsen amendment suggests that Congress was most concerned about eliminating the participation of foreign principals such as governments and corporations, as well as wealthy foreign individuals living overseas and truly temporary visitors, such as tourists. However as drafted, § 441e also prohibits campaign contributions from persons who could be living in the United States for a period of years.

In addition, the restrictions suffer from overbreadth in that the important governmental need of safeguarding the integrity of the foreign-policy process is not advanced by barring NIs from contributing to state and local elections. One commentary on non-citizen voting, for example, suggests that granting the franchise to aliens in non-federal elections is not likely to invoke national

201. *Id.* at 26-27.

202. *Id.* at 28.

security concerns.²⁰³ A final overbreadth flaw is that the law prevents non-corrupting foreign nationals—those who want to promote domestic well-being—from associating with the candidates of their choice.²⁰⁴

Section 441e is also vulnerable to attack for being underinclusive: The law permits foreign citizens who are permanent residents to fund campaign-related activities despite the fact that they have not definitively transferred their national loyalty to the United States. By the same token, the provision fails to address the possibility that U.S. citizens might themselves make contributions to advance the cause of overseas interests. The law thus fails to eliminate the potential for corruption from these two sources.²⁰⁵

Somewhere along the line, then, § 441e is likely to founder under intermediate scrutiny.²⁰⁶ It is true that the foreign affairs/national security interest is at its zenith here, inviting judicial deference. Another crucial consideration should be, as it was for the Supreme Court in *Buckley*, the availability of other outlets for expressive and associational freedoms. If restrictions on independent expenditures were loosened, nonimmigrant aliens would have other avenues for exercising their political preferences and viewpoints. But a court looking at § 441e on its own, while sure to find a sufficiently important governmental interest behind the law, should reject the measure's tailoring. Obviously, Congress could impose some contribution limits on foreign nationals that would be consistent with the First Amendment but § 441e is not that statute.

On the expenditure side, which merits strict scrutiny because such restrictions "heavily burden[] core First Amendment expression,"²⁰⁷ the *Buckley* Court did not accept as compelling the governmental interest in checking corruption by capping independent expenditures. For one, the Court

203. See Raskin, *supra* note 4, at 1467-68. Professor Raskin explains: [D]espite intense globalizing trends in economics, the ideological hold of nationalism has not loosened significantly, and the political interests of nation-states are still essentially organized counter to one another. The idea of having foreign citizens vote in American national elections is thus inherently more troubling than having them vote in local elections. At the local level, each resident's interests in good schools, public services, and transportation are very similar. If these interests diverge at all, it will be according to differences in neighborhood, income, or homeownership—not nationality or citizenship. At the national level, however, American, Mexican, and Canadian citizens arguably have numerous divergent interests as citizens of their respective states. *Id.* at 1468.

204. In *Vannatta*, the district court made a similar conclusion about the effect of Oregon's Measure 6 on "non-corrupt, out-of-district contributors." 899 F. Supp. 488, 497 (D. Or. 1995).

205. A similar flaw existed in Oregon's Measure 6. One reason the district court rejected the tailoring of the law is because it failed to prevent any in-district corruption. See *id.*

206. If the McCain/Feingold bill were to become law, this tailoring analysis would clearly change, but other problems would still remain.

207. *Buckley*, 424 U.S. at 48; see also *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 251 (1986) (holding that §441(b)'s prohibition on independent expenditures is unconstitutional as applied to non-profit corporation and that "[i]ndependent expenditures constitute expression 'at the core of our electoral process and of the First Amendment freedom'" (quoting *Williams v. Rhodes*, 393 U.S. 23, 32 (1968))).

noted that such a measure was not needed to prevent individuals from skirting the contribution ceilings because any coordinated expenditure would be treated as an in-kind contribution.²⁰⁸ But more importantly, as in later cases addressing restraints on ballot proposition spending,²⁰⁹ the Court did not see any "dangers of real or apparent corruption comparable to those identified with large campaign contributions."²¹⁰ The fear of *quid pro quo* arrangements, strong enough on its own to sustain the contribution ceiling, does no comparable work in the independent expenditure context. Far from being a *quid pro quo*, an independent expenditure can, the Court comments, hobble the candidate it is designed to help.²¹¹

Turning then to the equalization rationale, the Court delivered a strong rebuke to governmental efforts to level the political playing field: "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."²¹² To reinforce the notion that independent expenditures constitute the highest First Amendment value, the Court then cited two of its cases striking down laws that infringed on the speech rights of newspapers during elections, *Mills v. Alabama* and *Miami Herald v. Tornillo*.²¹³ The Court did not reach the issue of independent expenditures because it found no compelling governmental interests at stake.

Called to defend the constitutionality of expenditure provisions of 11 C.F.R. § 110.4, the government would be hard-pressed under the *Buckley* framework to produce a winning argument. Merely mouthing "quid pro quo" is unlikely to provide a compelling state interest. Since *Buckley* was decided, the Supreme Court has shown no signs of retreating from its strong protection for independent expenditures. *Colorado Republican Federal Campaign Committee v. Federal Election Commission* reinforced *Buckley* on this point, holding that "restrictions on independent expenditures significantly impair the ability of individuals and groups to engage in direct political advocacy and 'represent substantial . . . restraints on the quantity and diversity of political speech.'"²¹⁴

The government might try to advance a variation on the equalization rationale, arguing that a policy that precludes all campaign spending by foreign

208. See *Buckley*, 424 U.S. at 46.

209. See *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 299 (1981); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978).

210. *Buckley*, 424 U.S. at 46.

211. See *id.* at 47.

212. *Id.* at 48-49.

213. *Id.* at 51.

214. *Colorado Republican Fed. Campaign Comm. v. FEC*, 116 S. Ct. 2309, 2315 (quoting *Buckley*, 424 U.S. at 19) (striking down the applicability of 2 U.S.C.A. § 441(a)(d)(3) to independent expenditures made by a state party committee); see also *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480 (1985).

nationals, including independent expenditures, enhances the relative ability of the country's formal political members to influence electoral outcomes.²¹⁵ Creating greater equality between citizens through control of wealth advantages is not what would be advanced here, but rather the notion that according to citizens exclusive access to the campaign finance system prevents their voices from dilution by the dollars of nonvoting aliens.²¹⁶ Taking a cue from *Austin v. Michigan Chamber of Commerce*,²¹⁷ where the Supreme Court upheld a state version of a campaign finance law modeled on § 441b, the government could maintain that participation by non-citizens inherently distorts the political process.

But such a theory would seem to depend on some transplantation of equal protection principles into the First Amendment, an approach that the Supreme Court firmly rejected in *Buckley*. Indeed, contrary to the teachings of *Buckley*, the ban “restrict[s] the speech of some elements of our society,” in this case nonimmigrants, “in order to enhance the relative voice of others,” in this case citizens.²¹⁸ And even if any of these purported governmental interests were accepted as compelling, the tailoring of 11 C.F.R. § 110.4—which has to be even more precise than § 441e—suffers from the same flaws as the statute. Overbreadth challenges to the unqualified nature of the limitation, to the expansive class of aliens affected, and to the range of elections covered, would all come into play. The same underinclusive deficiencies are apparent here as well; even if the government were to succeed on some variation of the equalization/dilution model, the tailoring would still be skewed by the fact that the law already permits a large class of nonvoting non-citizens—permanent resident aliens—to make independent expenditures.²¹⁹

215. The *Buckley* Court, whether consciously or not, refers frequently in the opinion to the interests of “citizens” in the campaign finance system. See *Buckley*, 424 U.S. at 19, 26, 28, 57–58.

216. Only in *Austin* has the Court even come close to accepting a governmental interest predicated more on correcting distortions in the political marketplace than on eliminating corruption.

Regardless of whether this danger of ‘financial quid pro quo corruption . . . may be sufficient to justify a restriction on [corporate] independent expenditures [from treasury funds], Michigan’s regulation aims at a different type of corruption in the political arena: 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. . . . Corporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions.

Id. at 659–60.

217. 494 U.S. 652 (1990).

218. *Buckley*, 424 U.S. at 48–49.

219. If the McCain/Feingold bill were to become law, and if a court were to accept an equalization rationale as compelling, the scheme would not suffer from this underinclusive problem.

IV. CONCLUSION

In some respects, the controversy over the role of money in the 1996 elections has centered on an old point: that the current campaign finance system permits disproportionate influence by affluent persons and powerful special interests. This wealth advantage has been the focus of agitation for years.²²⁰ However, the debate over contributions to U.S. political campaigns by nonimmigrant and resident aliens presents a different theoretical question: Is representative government perverted when those who are not formal members of society are permitted to use their money to attempt to influence electoral outcomes?

Sen. Russell Feingold (D-Wis.) stressed this purported threat when introducing legislation to bar LPRs from contributing to U.S. campaigns: "Simply put, if our laws and Constitution do not allow an individual to participate in the political process with their ballot, there is no reason the same individual should be permitted to participate with their checkbook."²²¹ Stating the objection in other terms, the amicus party defending Oregon's Measure 6 argued that allowing such participation would harm the functioning of democratic institutions:

The people of Oregon's specific sovereignty interests in banning non-resident money contributions in elections parallel their sovereignty interests in banning non-resident voting and candidacy. . . . [N]on-citizen campaign contributors' intervention in state legislative races changes the definition of the political community and distorts the character of the campaign process. Non-citizen campaign contributors' special interests can dramatically change the nature of campaign appeals. Their intervention potentially changes the outcome of elections and damages the relationship of loyalty that ought to exist between residents and their officials.²²²

Permitting non-citizen campaign spending raises the possibility that individuals who stand outside the formal American political community may effect the composition, and thus ultimately the public policy, of the U.S. government. Indeed, anyone who believes in the "rational voter" problem—that there is a significant motivational impediment that discourages individuals from casting a ballot knowing that its determinative value is close to nil—might well conclude that for a single individual the ability to make political contributions

220. See Jamin Raskin & John Bonifaz, *Equal Protection and the Wealth Primary*, 11 YALE L. & POL'Y REV. 273 (1993); Fred Wertheimer & Susan Weiss Manas, *Campaign Finance Reform: A Key to Restoring the Health to Our Democracy* 94 COLUM. L. REV. 1126 (1994).

221. 143 CONG. REC. S386 (statement of Sen. Feingold) (daily ed. Jan. 21, 1997).

222. Brief of National Voting Rights Institute, at 19-20 (January 2, 1996) (on file with author).

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and expenditures is a more formidable tool in a democracy than the franchise itself.²²³

Even though recent research shows how difficult it is to draw precise correlations between campaign spending and electoral outcomes,²²⁴ the possibility that contributions and expenditures by non-citizens may tip a race one way or the other might present a scenario that could convince the Supreme Court to reconsider the *Buckley* framework and begin to treat campaign spending as something other than a pure First Amendment activity.²²⁵ The Court would be wise, however, to stay with its original formula. “[V]irtually every means of communicating ideas in today’s mass society requires the expenditure of money,” the Court said over 20 years ago. Those words ring just as true in the contemporary speech marketplace.²²⁶ As the Court elaborated, “The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. . . . [and the] electorate’s increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.”²²⁷ Although the money-equals-speech equation has drawn its share of criticism throughout the years, it has served to update for the modern era the promise embodied in the First Amendment of energetic public debate surrounding elections.

The public policy underlying *Buckley* should compel Congress to permit all non-citizens in the United States to participate fully in the campaign finance system. Their speech is valuable to our national discourse; they (and we) have a vital interest in making sure that the political system treats them fairly. As a matter of social justice, persons denied the franchise but living under the laws of the community should have some ability to project their voices into the governmental arena.²²⁸ As many key policy decisions affect aliens, they should be able to enrich the citizenry’s understanding of these issues by expressing their own viewpoints and preferences through campaign dollars. This interest is even more acute at a time in which the legal status of aliens has

223. A foundational discussion of the rational voter dilemma can be found in ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 260-76 (1957).

224. See Raskin & Bonifaz, *supra* note 220.

225. A group of law professors has begun a campaign to persuade the Court to revisit *Buckley*. See Leslie Wayne, *After the Election: Campaign Finance Scholars Ask Court to Backtrack, Shutting Floodgates on Political Spending*, N.Y. TIMES, Nov. 10, 1996, at A30.

226. See *Buckley*, 424 U.S. at 19.

227. *Id.*

228. Seen in this light, LPRs may have a stronger claim to engage in campaign spending than NIs because their roots in the country are deeper. Legal residents aliens are in many ways treated like citizens. They must register for the Selective Service System, for example, and they are taxed virtually the same as citizens.

come under increasing assault, as illustrated by the 1996 welfare bill that booted LPRs out of important safety net programs.²²⁹

While First Amendment theorists have not paid much attention to aliens, Professor Thomas Emerson has argued that the speech of non-citizens does have a place in the American community:

The basic theory of freedom of expression would seem clearly to preclude any special restriction upon freedom of expression by aliens. The right of expression extends to all individuals as members of a society, regardless of whether they are born into it, formally accepted as members, or are members by virtue of residence alone. Realization of the social values of free expression requires also that all members of the society have and exercise the right.²³⁰

Emerson values the speech of aliens both because it promotes individual autonomy and because of its instrumental benefits for society as a whole. On the former point, one can certainly argue that the modern, expansive contours of the First Amendment emerged only after years of sometimes painful struggle with voices deemed “foreign” to American values—anarchists, labor leaders, fascists, civil rights activists, and war protesters, among others. Including the voices of the most alien of speakers among us would be a further sign of the First Amendment living up to its mission of “secur[ing] ‘the widest possible dissemination of information from diverse and antagonistic sources.’”²³¹

As for the second justification, full speech privileges for non-citizens harmonize nicely with Professor Alexander Meiklejohn’s proposition that we must protect freedom of expression in order to strengthen our democratic institutions. Meiklejohn wants the pulling of a voting lever to be an informed act: “[The First Amendment’s function] is to give to every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal.”²³² Even in a regime that prohibits voting by aliens, their expression during political campaigns is valuable to the members of the society who do make electoral decisions. It creates a more robust speech marketplace, with more benefits than risks:

The premise of our system is that there is no such thing as too much speech—that the people are not foolish but intelligent, and will separate the wheat

229. In 1996, Congress also passed the Illegal Immigration Reform and Immigrant Responsibility Act, which limits federal court review over a broad range of INS actions. Pub. L. No. 104-208, 110 Stat. 3009; see also Stanley Mailman, *Cutting Back on Hearings*, *Judicial Review*, N.Y.L.J., Oct. 28, 1996, at 3; Editorial, *Hard Times for Immigrants*, N.Y. TIMES, Apr. 4, 1997, at A34; *supra* note 74.

230. THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 101 (1963).

231. *New York Times v. Sullivan*, 376 U.S. 254, 266 (1964) (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

232. ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM 75 (1948); see also CASS SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993).

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from the chaff. As conceded in Lincoln's aphorism about fooling 'all of the people all of the time,' that premise will not invariably accord with reality; but it will assuredly do so much more frequently than the premise . . . that a healthy democratic system can survive the legislative power to prescribe how much political speech is too much, who may speak, and who may not.²³³

Finally, permitting aliens in the United States to fund campaigns is desirable public policy for another reason. It provides the political system with an additional source of funding at a time when the need for private money shows no signs of relenting. This demand will not taper off unless Congress decides to provide for free television spots and public financing that is fair to challengers. But taxpayer subsidies for politics have not been popular. Only 13% of U.S. income tax filers check the box on their returns providing funds for presidential contests, even though the action costs them nothing.²³⁴ Moreover, lawmakers cannot be trusted to set up a public financing regime for congressional races that does not favor incumbents, who are now reelected about 95% of the time. Federal contribution caps, for example, have not been raised in 23 years, making it harder for challengers to amass the money they need to be a credible threat. More money, not less, should be pumped into the campaign finance system for the democratically vital function of communicating to voters. If Congress now moves to ban contributions and expenditures by LPRs, it would create a double windfall for itself—lawmakers would diminish political competition and at the same time proclaim themselves as reformers in the wake of the DNC's Lippo controversy.

Lippo, in fact, could end up teaching several lessons. The first is that restrictions on foreign money probably always will easily be circumvented; a U.S. citizen can just as easily front for overseas governments and corporations as a non-citizen. Second, winning access is not the same as dictating policy. The alleged Lippo money has thus far bought only the appearance of influence, though this could change. Third, public disclosure is the best regulator of abuse in the campaign finance system. After all, it is the political reaction to the Lippo revelations that has fueled the current debate. Given today's point-and-click technology, the release of records can be immediate and in an easily accessible format.²³⁵

233. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 695 (1990) (Scalia, J., dissenting).

234. See Johanna Hoadley, *Election Fund Support Lowest Ever*, CHICAGO SUN-TIMES, Aug. 14, 1996, at 29.

235. If Congress feels that it must take some action in response to the DNC/Lippo affair, it could establish tighter controls on the disclosure front. The prohibitions against non-citizen campaign spending, which grew out of the Foreign Agents Registration Act, could return to these origins. Consistent with the regimes created by FARA and FECA, and the cases interpreting them, Congress could mandate the labeling and reporting of all LPR and NI campaign spending, contributions and expenditures alike. Disclosure of non-citizen campaign spending would not violate the First Amendment. See *Buckley*, 424 U.S. at 60-84 (upholding FECA's reporting and disclosure requirements); see also *Viereck v. United States*, 318 U.S. 236, 251 (1943) (Black, J., dissenting) (arguing that FARA enhances

Is pushing a First Amendment-based argument for the participation of non-citizens in the campaign finance system really just a backdoor way of trying to win the franchise for them, particularly if the use of money in elections can be more influential than the vote itself? The answer is no—good reasons exist for limiting suffrage to the actual members of a society. No matter how much cash goes into funding a campaign, the numbers that matter at the end of the day come out of the voting booth. Ballots, not dollars, ultimately determine outcomes; and they should only be cast by citizens. Withholding the franchise from aliens also has the positive effect of encouraging those who can to become citizens so that they may partake in the formal privileges of democracy. Aliens in the United States should not have the right to govern. They should have the right to express their political preferences through campaign spending.