CONTEXTUALIZING CORRUPTION: FOREIGN FINANCING BANS AND CAMPAIGN FINANCE LAW

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INTRODUCTION

The ease of moving information and money across borders has raised alarm about the growing risk of foreign interference in domestic elections. This issue burst into the spotlight in the United States in the aftermath of the 2016 presidential election, but subsequent events have demonstrated that the phenomenon is far from abating. In March 2021, the National Intelligence Council released an unclassified version of a report finding that both Russia and Iran engaged in extensive efforts to influence the 2020 presidential election, mainly by spreading misleading and false allegations about Joe Biden.[1] Russian actors also were deeply involved in pushing inflammatory narratives after the election, including amplifying material about election fraud and promoting "stop the steal" hashtags on social media.[2] Iranian actors went even further, funding the creation of a website promoting death threats against U.S. election officials.[3] The Department of Homeland Security warned of similar activities in connection with the fall 2022 midterm elections.[4]

1 NAT'L INTEL. COUNCIL, INTELLIGENCE COMMUNITY ASSESSMENT: FOREIGN THREATS TO THE 2020 US FEDERAL ELECTIONS (2021), https://www.dni.gov/files/ODNI/documents/assessments/ICA-declass-16MAR21.pdf [https://perma.cc/323G-JB6J].

2 *Id.* at 4–5.

3 *Id.* at 5–6.

4 NAT'L TERRORISM ADVISORY SYS., DEP'T OF HOMELAND SEC., SUMMARY OF THE TERRORISM THREAT TO THE UNITED STATES (2022), https://www.dhs.gov/sites/default/files/ntas/alerts/22_0607_S1_NTAS-Bulletin_508.pdf [https://perma.cc/RBF8-9LBQ] ("As the U.S. 2022 mid-term

The reach of activities like these is extraordinary. According to one report, foreign disinformation campaigns on Facebook reached almost half of all Americans in the run-up to the 2020 election.[5] But efforts to effectively regulate them raise a host of practical and legal issues. As a practical matter, policing the spread of disinformation on social media is extraordinarily difficult, even for the technology companies hosting the most popular platforms. This is especially true when false narratives are adopted and spread by regular Americans unaware of or indifferent to the fact that they are disseminating foreign-funded propaganda. As a legal matter, the First Amendment puts formidable barriers in the path of governmental efforts to contain the distribution of political information or to limit the perspectives to which American voters are exposed.[6]

But there are some things that can, and should, be done. This Article addresses one: the prohibition on independent expenditures funded by foreign nationals. Current federal law prohibits foreign nationals (excluding permanent residents) from funding independent express expenditures.[7] *Bluman v. FEC*, a decision of the U.S. District Court for the District of Columbia, authored by then-Judge Brett Kavanaugh, upheld this prohibition by relying on cases excluding foreign nationals from participating in acts of democratic self-governance.[8] The Supreme Court summarily affirmed *Bluman*.[9] The decision, however, sits on shaky foundations. It relies on a series of "political community" cases, which are themselves remnants of an earlier, more xenophobic age.[10] As many commentators have noted, *Bluman* also is in significant tension with the sweeping condemnation of speaker-based distinctions announced by the Supreme Court in *Citizens United v. FEC*.[11] Finally, the decision runs seriously afoul of the current Court's general refusal to accept as legitimate (much less compelling) any state interest in regulating

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elections approach, malign foreign actors could bolster their messaging to sow discord and influence U.S. audiences in keeping with practices during previous election cycles.").

5 Karen Hao, *Troll Farms Reached 140 Million Americans a Month on Facebook Before 2020 Election, Internal Report Shows*, MIT TECH. REV. (Sept. 16, 2021), https://www.technologyreview.com/2021/09/16/1035851/facebook-troll-farms-report-us-2020-election [https://perma.cc/CX9J-WGEY].

6 *See generally* FEC v. Ted Cruz for Senate, 142 S. Ct. 1638 (2022).

7 52 U.S.C. § 30121; 11 C.F.R. § 110.20 (2022).

8 800 F. Supp. 2d 281 (D.D.C. 2011), *aff'd*, 565 U.S. 1104 (2012).

9 *Bluman*, 565 U.S. 1104.

10 *Bluman*, 800 F. Supp. 2d at 286.

11 558 U.S. 310 (2010); *see also* Michael W. McConnell, *Reconsidering* Citizens United *as a Press Clause Case*, 123 YALE L.J. 412, 448 (2013) (detailing multiple instances in which First Amendment doctrines make distinctions based on the identity of the speaker); Asaf Wiener, *A Speaker-Based Approach to Speech Moderation and First Amendment Analysis*, 31 STAN. L. & POL'Y REV. 187 (2020).

campaign speech on the basis of its effect on voters rather than on candidates.

Despite these weaknesses, I argue in this Article that *Bluman* was correctly decided, albeit for reasons different than those relied on by the district court. The reason foreign nationals can be prohibited from engaging in independent express advocacy is not that non-nationals cannot ever be part of the U.S. political community or generally lack First Amendment protection for their speech, or because of fears that the speech of non-nationals will somehow inappropriately influence the votes of American citizens. Instead, the compelling state interest supporting the prohibition is the same candidate-based corruption rationale underlying all campaign finance regulations upheld by the current Court: independent expenditures by foreign nationals can be limited because they pose a risk of corrupting public officeholders. They do so by creating incentives to pressure and reward foreign actors who spend on a candidate's behalf in a context—foreign and international affairs—which is uniquely difficult for courts, Congress, and the public to otherwise police. Unlike other independent expenditures, which the Court has said pose little risk of quid pro quo corruption or the appearance thereof,[12] independent expenditures by foreign actors pose exactly that risk. Bans on foreign-funded expenditures are a sufficiently tailored way—and may well be the only way—to tackle the particular problem they present.

This conclusion is well supported by current First Amendment doctrine. For more than 100 years, the Supreme Court has upheld restrictions on the ability of certain categories of people to engage in various types of political activity on the grounds that their engagement creates an unacceptably high risk of political corruption or the appearance thereof. This rationale, which rests firmly on the traditional grounds of preventing conduct that corrupts public officials rather than voters, was accepted by the Supreme Court as early as 1882 in *Ex parte Curtis*[13] as a constitutionally sufficient reason to uphold prohibitions on the political activity of federal employees. It was reiterated by the Court in 1947 in *United Public Workers of America v. Mitchell*[14] and again in 1973 in *United States Civil Service Commission v. National Ass'n of Letter Carriers*.[15] More recently, the Supreme Court used similar reasoning to

[12] *See* Buckley v. Valeo, 424 U.S. 1, 45 (1976) ("We find that the governmental interest in preventing corruption and the appearance of corruption is inadequate to justify § 608(e)(1)'s ceiling on independent expenditures.").

[13] 106 U.S. 371 (1882).

[14] 330 U.S. 75 (1947) (upholding the Hatch Act).

[15] 413 U.S. 548 (1973) (upholding the Hatch Act against challenges of overbreadth and vagueness).

impose a constitutional requirement on judges to recuse themselves in cases involving entities engaged in large spending campaigns on their behalf.[16]

In these and other cases, the Court has plainly grasped the pertinent point: the risk of constitutionally salient corruption is contextually situated—it depends on the specific institutional relationship between the public official and the political speaker whose activity is being constrained. When this contextual situationality is recognized and taken into account, we can see clearly how the weight of the government's compelling interest in preventing corruption differs, depending on the contextual relationship between the public official and the restricted class of speakers. When that relationship poses a risk of corrupting the public officeholders' use of public power, the government has a well-established compelling interest in preventing that risk by imposing restrictions based on the identity of the speaker.

With this framework firmly in place, we are able to see the government's interest in preventing foreign financing of political activities more clearly. The Court has never held that independent expenditures do not *in fact* generate feelings of indebtedness and gratitude on the part of officeholders. Indeed, the current Court has leaned into that fact, arguing that the responsiveness of elected officials to donors is a healthy part of democratic self-governance.[17] But there is no theory of democratic self-governance suggesting that elected officials should be similarly responsive to the wishes of foreign financiers. Thus, the current prohibition on the limitation of independent expenditures by domestic entities is readily distinguished from the type of foreign funding ban at issue in *Bluman*.[18] Additionally, executive privilege, judicial deference to the political branches in areas of foreign affairs, the sensitivity of foreign relations, the difficulty of untangling the underlying relationships between foreign nationals and their governments, and the scope of potential harm in getting it wrong all justify a broadly prophylactic approach.

This Article proceeds in three Parts. Part I explains the history of foreign financing bans and their uncomfortable fit with the rest of U.S.

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16 Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009).

17 *See infra* Section II.A.2.

18 *Bluman* did not engage in this argument, having assumed the government interest was exclusively that of foreign influence over elections. Bluman v. FEC, 800 F. Supp. 2d 281, 288 n.3 (D.D.C. 2011) ("We note that plaintiffs have not attempted to argue as a backup that they may have a right to make expenditures even if they do not have a right to make contributions. We think that a wise approach. The constitutional distinction between contributions and expenditures is based on the government's anti-corruption interest. But that is not the governmental interest at stake in this case. Here, the government's interest is in preventing foreign influence over U.S. elections." (citation omitted)).

campaign finance law. Part II contextualizes the Court's understanding of corruption by deconstructing current doctrine and looking more closely at how the Court has, in fact, understood corruption in context, both in the past and in current law, and then applying a similarly contextualized approach to foreign funding bans. Part III demonstrates the close connection between the corruption risk posed by foreign financing of election activities and issues of national security, illustrating why judicial deference to congressional judgment is appropriate here. The Article concludes by summarizing the current Court's acceptance of contextually situated corruption and the importance of taking such an approach when evaluating the constitutionality of foreign financing bans.

Preventing foreign nationals from funding independent express expenditures will not solve all of the woes facing the U.S. electoral system. It is nonetheless an important prohibition to defend. Our founders were deeply concerned about foreign influence over U.S. lawmakers and went to extensive lengths to prevent it from taking root. Statutes like that at issue in *Bluman* are the current incarnation of these long-standing efforts and should continue to be upheld against First Amendment challenges.

I. The Apparent Unconstitutionality of Foreign Financing Bans

Current foreign financing bans have their origins in three federal laws: the Foreign Agents Registration Act (FARA), Federal Election Campaign Act (FECA), and Bipartisan Campaign Reform Act (BCRA). Each of these laws was enacted by Congress in the wake of scandals involving elected officials' entanglements with foreign actors. This Part sets out that history and explains how these three statutes continue to structure our current prohibitions on foreign financing of domestic elections. It then outlines the current state of campaign finance law and explains the uneasy fit between that law and the district court's opinion in *Bluman*.

A. *The Origins of Foreign Financing Bans*

1. Foreign Agents Registration Act

Restrictions on foreign involvement in domestic elections have been part of U.S. law since 1938, when Congress enacted FARA.[19] As originally enacted, FARA was not primarily a campaign finance law. Rather, it required agents of foreign principals who engaged in "political activities" within the United States to register with the Attorney General and "disclose their connections with foreign governments, foreign political parties and other foreign principals."[20] "Agent" is defined in the statute as "any person who acts . . . under the direction or control of a foreign principal, either directly or indirectly."[21] The term "political activities" is defined as any

> activity which the person [(i.e., agent)] engaging therein believes will, or which he intends to, prevail upon, indoctrinate, convert, induce, persuade, or in any other way influence any agency or official of the Government of the United States or any section of the public within the United States with reference to formulating, adopting, or changing the domestic or foreign policies of the United States or with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party.[22]

Since 1942, a registered agent distributing "political propaganda" must also disclose that activity and label the distributed material as such.[23]

The 1938 law came about amid concerns regarding Nazi agents operating in the United States prior to America's entry into World War II.[24] The congressional committee considering the legislation reported that its investigation had turned up "extensive evidence of Nazi . . . efforts to influence American public opinion . . . . 'to foster un-American activities, and to influence the external and internal policies of this

[19] AM. L. DIV., CONG. RSCH. SERV., RL91-915, THE FOREIGN AGENTS REGISTRATION ACT 3 (1977); *see also* WAYNE S. COLE, ROOSEVELT & THE ISOLATIONISTS: 1932–45 (1983).

[20] AM. L. DIV., *supra* note 19, at 5–6.

[21] *Id.* at 6.

[22] *Id.* at 37.

[23] *Id.* at 9–10.

[24] *See Activities of Nondiplomatic Representatives of Foreign Principals in the United States: Hearings on S. Res. 362 and S. Res. 26 Before the S. Comm. on Foreign Rels.*, 88th Cong. 3–4 (1963) [hereinafter *Activities of Nondiplomatic Representatives*]; *see also* Act of June 8, 1938, Pub. L. No. 75-583, 52 Stat. 631; Zephyr Teachout, *Extraterritorial Electioneering and the Globalization of American Elections*, 27 BERKELEY J. INT'L L. 162, 171 (2009).

country.'"[25] The purpose of the Act, according to the Congressional Research Service, was to

> protect the national defense, internal security, and foreign relations of the United States by requiring public disclosure by persons engaging in propaganda activities and other activities for or on behalf of foreign governments, foreign political parties, and other foreign principals so that the Government and the people of the United States may be informed of the identity of such persons and may appraise their statements and actions in the light of their associations and activities.[26]

As originally enacted, then, FARA was concerned about the effect of foreign campaign spending on American voters.

That changed when the law was amended in 1966, this time specifically in response to concerns about foreign interference in domestic elections. The issue in 1966 was not propaganda pitched to voters, but contributions made to candidates. An investigation by the U.S. Senate Foreign Relations Committee revealed that campaign contributions had been channeled to congressional candidates by Philippine sugar industry magnates and other foreign interests.[27] Senator J.W. Fulbright, chair of the committee, expressed concern that agents of foreign principals had shifted their efforts to influence U.S. policy away from subversive activities to lobbying and financing election campaigns.[28] The 1966 amendments addressed this concern in two ways. First, in an effort to destigmatize registration by bona fide foreign lobbying interests, the amendments made it easier to register and enhanced transparency of lobbying efforts.[29] Second, and more pertinently for our purposes, the amended law for the first time codified the prohibition on giving or receiving political contributions from foreign financiers.[30] Specifically, the new law prohibited an agent of a foreign principal from directly, or through or on behalf of another person, making a contribution of money or any other "thing of value" in connection with an election to political office.[31] The amendments likewise made it a criminal offense to "knowingly solicit, accept, or receive any such a contribution."[32]

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25 AM. L. DIV., *supra* note 19, at 5 (quoting H.R. REP. NO. 75-1381, at 2 (1937)).

26 *Id.* at 6 (quoting 22 U.S.C. § 611 note).

27 *See Activities of Nondiplomatic Representatives*, *supra* note 24, at 201–03; Lori Fisler Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence Over Domestic Affairs*, 83 AM. J. INT'L L. 1, 22 (1989).

28 AM. L. DIV., *supra* note 19, at 12–13.

29 *Id.* at 13.

30 *See id.* at 89–90.

31 Act of July 4, 1966, Pub. L. No. 89-486, 80 Stat. 244, 248.

32 AM. L. DIV., *supra* note 19, at 130.

2. Federal Elections Campaign Act

The next significant restrictions on foreign financing of U.S. election activity came in the wake of the Watergate scandal. The Watergate scandal is known today primarily for the break-in at the Democratic National Committee (DNC) headquarters, housed in the Watergate Hotel in Washington, D.C., which triggered the series of events leading to the resignation of President Richard M. Nixon.[33] But Watergate was also a campaign financing scandal. The men arrested in the break-in were carrying thousands of dollars in cash, which was quickly tied to a "slush fund" held by Nixon's campaign committee (the Committee to Re-elect the President). The slush fund appeared to have been financed through undisclosed campaign contributions and laundered through a Mexican bank. These revelations triggered concerns about the origin of the contributions, calling for a deeper investigation into the finances of the Nixon campaign.[34]

In response, the Senate unanimously voted to form a bipartisan Select Committee on Presidential Campaign Activities (Watergate Committee) to investigate the accusations.[35] At the time, federal law required candidates for federal office to disclose most campaign contributions.[36] But an awkward interaction between the applicability of an older law (the Federal Corrupt Practices Act)[37] and the more recently enacted 1971 version of FECA allowed Nixon's fundraisers to plausibly tell donors that contributions received between February and April of 1972 would not be disclosed publicly, if at all.[38] Nixon's committee had taken full advantage of this, raising but not disclosing more than eleven million dollars during those months.[39] Most of these donations were very large, and many were tied to foreign nationals.[40] The origin of others was unclear, in part because they were routed through intermediaries.[41]

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33 ROBERT E. MUTCH, CAMPAIGN FINANCE: WHAT EVERYONE NEEDS TO KNOW 10–13 (2016); *see also* Ciara Torres-Spelliscy, *How Much Is an Ambassadorship? And the Tale of How Watergate Led to a Strong Foreign Corrupt Practices Act and a Weak Federal Election Campaign Act*, 16 CHAP. L. REV. 71 (2012).

34 *See also* Torres-Spelliscy, *supra* note 33, at 92–99.

35 *See* FRED EMERY, WATERGATE: THE CORRUPTION OF AMERICAN POLITICS AND THE FALL OF RICHARD NIXON 241 (1995).

36 *See id.* at 108–09.

37 Federal Corrupt Practices Act, 43 Stat. 1070 (1925) (codified at 2 U.S.C. §§ 241–48) (repealed 1972).

38 *See* EMERY, *supra* note 35, at 109–10.

39 *See* Anthony J. Gaughan, *The Forty-Year War on Money in Politics: Watergate, FECA, and the Future of Campaign Finance Reform*, 77 OHIO ST. L.J. 791, 799 (2016).

40 *See* Torres-Spelliscy, *supra* note 33, at 90–91.

41 *Id.*

These revelations, with others, led Congress to substantially amend FECA, creating the version of the statute that continues to structure campaign finance law today.[42] As amended, FECA now prohibits foreign nationals from making any contribution or expenditure, directly or through another person, "in connection with" an election to state or federal office.[43] It also prohibits candidates from soliciting or accepting such contributions[44] and clarifies that the prohibition applies not just to agents of foreign principals (through FARA) but also to the foreign principals themselves. Finally, the amended law prohibits all foreign spending in relation to election campaigns, not just that over $1,000 as the original legislation had done.[45]

3. Bipartisan Campaign Reform Act

The prohibition against foreign financing of domestic election activity was strengthened again through the enactment of BCRA in 2002. Once again, a major motivation for the law was concern that elected officials were accepting inappropriate campaign assistance from foreign financiers. This time, the scandal involved President Bill Clinton's 1996 re-election campaign. Like Nixon two decades earlier, Clinton's re-election team took advantage of a perceived loophole in then-existing campaign finance laws to solicit and accept large amounts of so-called "soft-money," including from foreign nationals—most notably, individuals connected with China.[46]

Soft money was an unintentional creation of the Supreme Court. As enacted, FECA regulated the spending of all political actors: political parties, candidates for federal office, and nonparty/noncandidates (third parties) were all regulated under the law.[47] The regulation of third-party spenders was particularly strict. FECA prohibited such entities from spending more than $1,000 on expenditures "relative to a clearly identified candidate."[48] The point of this was to prevent third-party expenditures from becoming a vehicle to circumvent the spending and

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42 *See id.* at 87–90.

43 *See* 52 U.S.C. § 30121(a).

44 *Id.*

45 Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 324, 90 Stat. 475, 493.

46 H.R. REP. NO. 105-829, pt. 1, at 61 (1998). "Soft money" is money used to engage in party building activities and is regulated separately under FECA.

47 *See generally* Buckley v. Valeo, 424 U.S. 1 (1976).

48 *Id.* at 13 (quoting Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, tit. I, § 101(e)(1), 88 Stat. 1263, 1265 (repealed 1976)).

contribution limits imposed on candidates and parties.[49] Allowing third parties to spend unlimited funds on political advertising would, Congress believed, have the same corrupting effect on candidates as permitting large contributions made directly to candidates, even if the third-party spending was done independently.[50] The effect of this Act, however, was to prohibit entities not affiliated with parties or candidates from engaging in virtually any campaign spending at all.[51]

As discussed below, expenditure caps, including those imposed on third-party spenders, were invalidated by the Supreme Court in *Buckley v. Valeo*.[52] But FECA also imposed broad disclosure requirements, including on third-party spenders.[53] So, the *Buckley* Court had to address the constitutionality of these requirements. The Court's concern was that the disclosure provision was too sweeping. Much of the speech captured by the statutory definition, the Court worried, would be pure "issue advocacy"—the discussion of issues of public policy that must be robust and uninhibited in a democracy.[54] To solve this perceived problem, the Court imposed a limiting construction on the provision. The speech of third-party spenders—everyone other than parties, candidates, and political action committees—could only be regulated when it constituted what came to be known as "express advocacy."[55] Express advocacy was defined (in a footnote) as messages including terms "such as 'vote for,' 'elect,' 'support,' . . . 'vote against,' 'defeat,' [and] 'reject.'"[56] This newly defined category of express advocacy was subject to disclosure, but independent third-party spending that was not such advocacy (issue advocacy) was not.

It is this distinction that spawned the soft money "loophole" weaponized by Clinton. Working with the DNC, the Clinton campaign decided that money spent on issue advocacy, as opposed to express advocacy, was not subject to contribution caps and could be raised and

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[49] *Id.* at 46–47.

[50] *Id.* at 45–51.

[51] *Id.* at 46–47.

[52] *Id.* at 58–59.

[53] *See id.* at 60–82.

[54] *See id.* at 44 ("We agree that in order to preserve the provision against invalidation on vagueness grounds, § 608(e)(1) must be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office.").

[55] *Id.* at 44–45.

[56] *Id.* at 44 n.52. This distinction spurred decades of so-called "issue ads" in which disclosure requirements were circumvented by producing political advertising that avoided the so-called "magic words" set out in *Buckley* but was otherwise indistinguishable from other campaign advertisements. *See* McConnell v. FEC, 540 U.S. 93, 126 (2003), *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010).

spent in unlimited amounts, which is exactly what the campaign did.[57] BCRA was enacted in part to close this gap. It had two major provisions. Title I prohibited candidates and political parties from soliciting or accepting soft money from anyone, including foreign nationals. Title II amended FECA and FARA to extend the prohibitions on foreign financing already in those statutes to more election activities.[58] Specifically, it prohibited foreign nationals from making any "expenditure, independent expenditure, or disbursement for an electioneering communication."[59] "Electioneering communications" was defined in BCRA as those involving a clearly identified candidate and broadcast in the relevant media market within certain limited time frames preceding primary or general elections.[60] BCRA then subjected those communications to the same regulations previously applied to express advocacy, including prohibiting foreign financing of such communications.[61] BCRA also included a sentencing enhancement for campaign finance violations involving foreign contributions specifically from or directed by foreign governments.[62]

The upshot of these laws is this: in regard to contributions, candidates and political parties are categorically prohibited from soliciting, accepting, or receiving donations from foreign nationals.[63] It is likewise illegal for a foreign national to directly or indirectly contribute money or other "thing[s] of value" to a candidate in connection with any

57 In his testimony before the Thompson Committee, Clinton confidant Harold Ickes denied that the President had put him in charge of the DNC, while also noting that "*from a very technical point of view*, the party is a separate entity [from the President's campaign committee] and we all recognize that." S. REP. NO. 105-167, pt. 1, at 113 (1998). Clinton's campaign team had also decided, with DNC lawyers, that as long as the DNC limited itself to raising soft money to fund issue (rather than express) advocacy, the organization could legally coordinate advertising strategy with the Clinton campaign committee through shared advisors and media consultants. *Id.* at 59, 114, 121–23.

58 *See* JOSEPH E. CANTOR & L. PAIGE WHITAKER, CONG. RSCH. SERV., RL31402, BIPARTISAN CAMPAIGN REFORM ACT OF 2002: SUMMARY AND COMPARISON WITH PREVIOUS LAW (2004); *McConnell*, 540 U.S. at 132.

59 Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, §§ 303(2), 319(a)(1)(C), 116 Stat. 81, 96.

60 52 U.S.C. § 30104(f)(3).

61 The effect of this new definition was that paid political broadcasts identified as "issue advocacy" under *Buckley* were now regulated in the same way as "express advocacy" when such broadcasts occurred within the statutorily prohibited time period. *See* CANTOR & WHITAKER, *supra* note 58; *McConnell*, 540 U.S. at 95. BCRA arguably also prohibits foreign financing of true issue advocacy, although the *Bluman* court opted to interpret the statute more narrowly. Bluman v. FEC, 800 F. Supp. 2d 281, 284–85 (D.D.C. 2011), *aff'd*, 565 U.S. 1104 (2012).

62 *See* Bipartisan Campaign Reform Act § 314; *see also* 52 U.S.C. § 30121; 11 C.F.R. § 110.20(b) (2022). This provision of BCRA was upheld by the Supreme Court in 2003 in *McConnell*, 540 U.S. 93, then limited four years later in *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 476 (2007).

63 52 U.S.C. § 30121; 11 C.F.R. § 110.20(b) (2022).

federal, state, or local election, or to make any sort of expenditure on express advocacy or electioneering communications.[64] The cumulative effect of these laws is that foreign nationals are prohibited from financing a large array of domestic election activity.

B. *Foundations, Corruption, and Incoherence*

These restrictions on foreign financing sit somewhat uneasily with the rest of U.S. campaign finance law. This Section introduces the development of current U.S. campaign finance law and explains the significant tension between the law and the "political community" rationale relied on in *Bluman v. FEC* to uphold current law's prohibition on the foreign financing of independent expenditures.[65]

1. Foundations: *Buckley v. Valeo*

Buckley v. Valeo is the 1976 Supreme Court decision evaluating the constitutionality of FECA. Its parameters have been tweaked over the years, but the core dichotomies drawn by the Court in the case continue to define the constitutional limits of campaign finance law. In essence, the *Buckley* Court created a two-track system for evaluating efforts to regulate the flow of money in politics. It drew a constitutional line between campaign contributions and campaign expenditures. According to the Court, caps on campaign contributions—money given to candidates or political parties to enable them to engage in campaign activities—only indirectly affected speech and therefore were less constitutionally suspect and subject to something less than strict scrutiny review.[66] Campaign expenditures, on the other hand, were, in the Court's view, direct

[64] 52 U.S.C. § 30121.

[65] *Bluman*, 800 F. Supp. 2d at 286.

[66] Buckley v. Valeo, 424 U.S. 1, 16–23, 25, 44–45 (1976) (discussing that expenditure limitations "impose significantly more severe restrictions on protected freedoms of political expression and association than" do contribution limitations). In *Buckley*, the Court described this as requiring the law to be "closely drawn" to advance a "sufficiently important" state interest. *Id.* More recently, a three-member plurality of the Court applied "exacting" scrutiny to a mandatory disclosure case involving donations made to charitable nonprofit groups. Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2383 (2021). In that case, the Court said that exacting scrutiny was appropriate because mandatory disclosure can chill political association. To be "exacting," according to Chief Justice Roberts, a law must be substantially related to an important government interest and narrowly tailored to advance that interest, but it need not be the least restrictive means possible. *See id.*; *see also* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 386 (2000) ("Precision about the relative rigor of the standard to review contribution limits was not a pretense of the *Buckley per curiam* opinion.").

restrictions on speech and, therefore, subject to the most rigorous standard of review.[67] This has meant in practice that contribution limits have almost always been upheld against First Amendment challenges,[68] while expenditure limits have been uniformly struck down.[69]

The *Buckley* Court also drew a constitutional line on the state-interest side of the scale. In enacting FECA, Congress defended contribution and expenditure limits as necessary not only to prevent the risk or appearance of corruption but also to promote political equality.[70] The *Buckley* Court accepted that preventing corruption or the appearance of corruption could be a compelling government interest sufficient to support regulation but flatly rejected the equality rationale. Limiting the speech of some in order to enhance that of others, the Court said, was "wholly foreign" to the First Amendment.[71] Applying this to the FECA provisions challenged in *Buckley*, the Court upheld the statute's contribution limits as sufficiently tailored to advance the government's anti-corruption interest but struck down all of the law's expenditure limits as insufficiently related to any constitutionally cognizable anti-corruption interest.[72] As long as political parties and candidates were spending money they had raised in compliance with the contribution limits, the Court held, expenditure limits served no additional anti-corruption purpose.[73] Third-party spending likewise posed no risk of quid pro quo corruption, according to the Court, as long as it was done independently of candidates and parties.[74]

These two dichotomies—the constitutional distinctions drawn by the Court in *Buckley* between contributions and expenditures on the one hand, and preventing corruption and promoting equality on the other—continue to shape campaign finance law today, including in the Court's seminal 2010 case, *Citizens United v. FEC*.[75]

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67 *Buckley*, 424 U.S. at 44–45.

68 To date, the Supreme Court has issued only two decisions deviating from this pattern. In *Randall v. Sorrell*, 548 U.S. 230, 242 (2006), the Court found that Vermont's contribution limits of $200–$400 for state political campaigns were unconstitutionally low. In *McCutcheon v. FEC*, 572 U.S. 185, 227 (2014), the Court struck down an aggregate contribution limit, as discussed below.

69 *See, e.g.*, *Buckley*, 424 U.S. at 58–59.

70 See Daniel P. Tokaji, *The Obliteration of Equality in American Campaign Finance Law: A Trans-Border Comparison*, 5 J. PARLIAMENTARY & POL. L. 381 (2011), for a comparative treatment of the concept of equality in U.S. campaign finance law.

71 *Buckley*, 424 U.S. at 48–49.

72 *Id.* at 28–30, 57–59.

73 *Id.* at 58–59.

74 Tokaji, *supra* note 70, at 384.

75 558 U.S. 310 (2010).

2. Corruption: *Citizens United v. FEC*

In the years after *Buckley*, the Court waffled about exactly what constitutes constitutionally salient "corruption." *Buckley* had rejected the protection of political equality as a constitutionally compelling reason to limit political speech but that still left room for creative interpretations of the Court-approved anti-corruption interest. The Court initially was receptive to a fairly expansive view of that interest. Most notably, in *Austin v. Michigan Chamber of Commerce*, the Court accepted that preventing the corruption of the political process that occurs, in that Court's view, when corporate entities parlay their market power into political power was a sufficiently compelling reason to prohibit corporations from using general corporate revenue funds to finance campaign contributions and expenditures.[76] The Court also accepted this type of rationale in *FEC v. Massachusetts Citizens for Life, Inc.*[77] and *First National Bank of Boston v. Bellotti*,[78] even while limiting its reach.[79] But in 2010, in *Citizens United*, the Court changed course and overturned *Austin*.[80] In doing so, it provided the clearest statement to date that the only form of political corruption the state has an interest in preventing through campaign financing laws is the actuality or appearance of quid pro quo corruption.[81]

Citizens United involved one of the provisions enacted in BCRA. As explained above, BCRA prohibited foreign nationals from financing independent expenditures or making soft money contributions to political parties.[82] BCRA also imposed an identical restriction on corporations, prohibiting corporations from using general corporate revenue to finance political activities. Specifically, under BCRA, both

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[76] 494 U.S. 652 (1990), *overruled by Citizens United*, 558 U.S. 310.

[77] 479 U.S. 238 (1986).

[78] 435 U.S. 765 (1978).

[79] In *Massachusetts Citizens for Life, Inc.*, the Court refused to extend *Austin* to so-called "ideological corporations" on the basis that funds available to these corporations, unlike regular corporations, did not present the same corruption of political discourse that concerned the Court in *Austin*, because the ideological corporation's ability to raise money was not distinct from public support for its ideas in the same way. *Mass. Citizens for Life, Inc.*, 479 U.S. at 259. In *Bellotti*, the Court declined to apply a similar distortion type of rationale to a noncandidate referendum on the basis that there was no candidate in referendum campaigns to corrupt, and therefore, no possibility that corporate general revenue spending in such campaigns could generate the reality or appearance of quid pro quo corruption. *Bellotti*, 435 U.S. at 789–92.

[80] *Citizens United*, 558 U.S. 310.

[81] *Id.* at 361.

[82] S. REP. NO. 105-167 (1998); *see also Citizens United*, 558 U.S. at 439–40 (Stevens, J., concurring in part and dissenting in part) (explaining how *Buckley*'s "magic words" test paved the way for the "sham" issue ads Congress was attempting to reach in defining electioneering communications in BCRA).

foreign nationals and corporations are prohibited from making an "expenditure, independent expenditure, or disbursement for an electioneering communication."[83]

It was the corporate financing provision of this prohibition that was at issue in *Citizens United*. Prior to *Citizens United*, U.S. law permitted corporations to use general corporate revenue funds to purchase issue ads, but they were prohibited from using such funds to purchase independent express advocacy (under FECA as modified by *Buckley*) or electioneering communications (under BCRA). Citizens United, a nonprofit corporation, wanted to broadcast and advertise *Hillary: The Movie*, an unflattering portrayal of Hillary Clinton.[84] The movie, as well as the advertisements promoting it, would be broadcast in the lead-up to the 2008 Democratic presidential primary, in which Clinton was a candidate.[85] Under BCRA, both the movie and the advertisements for it constituted electioneering communications, therefore barring Citizens United from using corporate general revenue funds to pay for them even when done independently of a candidate or political party.[86]

Citizens United sued, claiming that this funding prohibition violated the First Amendment. The Supreme Court agreed.[87] In doing so, it overturned *Austin* and replaced its expansive understanding of "corruption in the electoral process" with one much more tightly focused on the risk of candidate-based quid pro quo. Citing *Buckley*'s invalidation of independent expenditure limits, the *Citizens United* Court first reiterated that case's determination that "the independent expenditure ceiling . . . fails to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process."[88] As long as the expenditures were independent, the Court held, they posed no risk of quid pro quo corruption.[89] The *Citizens United* Court then considered whether independent expenditures could

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83 Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, §§ 303(2), 319(a)(1)(C), 116 Stat. 81, 96.

84 *Citizens United*, 558 U.S. at 319–20. Justice Kennedy's majority opinion in *Citizens United* insisted that the constitutionally protected speaker was the corporation itself, not its shareholders or directors. Consequently, the unique voice of the corporation was, in the Court's view, completely censored by the funding prohibition. *Id.* at 342–66. Somewhat inconsistently, Justice Kennedy also argued that the corporate shareholders were being "discriminated against" merely because they chose to organize themselves using the corporate form. This duality is a recurring feature of the evolving law recognizing corporations as bearers of constitutional rights, and has yet to be fully resolved, or even addressed, by the Supreme Court. *See* ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS (2018).

85 *Citizens United*, 558 U.S. at 319–20.

86 *Id.* at 321.

87 *Id.* at 372.

88 *Id.* at 345 (alteration in original) (quoting Buckley v. Valeo, 424 U.S. 1, 47–48 (1976)).

89 *See id.* at 360–61.

nonetheless be prohibited based on the corporate "identity" of the speaker.[90] Its answer was a resounding no. "Speech restrictions based on the identity of the speaker," the Court said, "deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration."[91] Without *Austin*'s more expansive definition of corruption as the corruption of the political process, the *Citizens United* majority saw no reason to distinguish expenditures financed by corporate general revenue funds from expenditures financed by other spenders and struck down the prohibition.

Citizens United's narrow definition of corruption, combined with its apparently unqualified rejection of speaker-based restrictions, had implications well beyond its corporate context. First, the *Citizen United* Court's limitation of the state's anti-corruption interest to the prevention or appearance of quid pro quo cast doubt on the constitutionality of the aggregate contribution limits that had been part of federal law since FECA was originally enacted.[92] As noted above, FECA imposed contribution caps limiting the amount of money an individual or entity could give to a candidate for federal office. This limitation is within even the constrained definition of corruption adopted in *Citizens United*: large individual donations to candidates create the opportunity for quid pro quo, or at least the appearance thereof. Aggregate limits are different. They limit the overall amount of money an entity can contribute across candidates and other campaign spenders.[93] Because no candidates in this scenario are themselves receiving more than the federally capped amount from any single individual, the only anti-corruption interest apparent in aggregate caps is the type of disproportionate influence on the political process embraced in *Austin* but rejected in *Citizens United* as constitutionally insufficient. When invited in *McCutcheon v. FEC* to invalidate the aggregate limits on exactly these grounds, the Court readily did so.[94]

Secondly, the tightened definition of the anti-corruption interest embraced in *Citizens United* paved the way for what we now know as "Super PACs." Under *Buckley*, political action committees (PACs) were classified with candidates and political parties as entities that could be

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[90] *See id.* at 364.

[91] *Id.* at 340–41.

[92] Daniel Hays Lowenstein, *A Patternless Mosaic: Campaign Finance and the First Amendment After* Austin, 21 CAP. U. L. REV. 381, 384 (1992) ("[A]ggregate limits . . . . fall[] between some of the cracks in the Court's doctrinal mosaic in a manner that further illustrates the mosaic's lack of a pattern, and because aggregate limits, unless carefully crafted, may easily fail to achieve their potential for accomplishing reform objectives." (footnote omitted)).

[93] 52 U.S.C. § 30116.

[94] 572 U.S. 185, 193 (2014).

more extensively regulated than independent third-party spenders.[95] Among the regulations FECA imposed on these groups (candidates, political parties, and PACs) were contribution caps on the amount of money they could receive from donors. The anti-corruption rationale justifying contribution caps on donations to candidates and (to a somewhat lesser extent) political parties sits neatly within the quid pro quo concerns articulated in *Buckley*, and those caps have been routinely upheld by subsequent courts.[96] But the anti-corruption justification for caps on contributions made to PACs is less clear and was not directly discussed in *Buckley*. After all, if the only constitutionally compelling justification for restricting campaign speech is to prevent the actuality or appearance of quid pro quo corruption, then what is the constitutional justification for limiting contributions to PACs, who are not candidates or political parties, and who therefore will never be in a position to return a *quo* for a *quid*?

This was the challenge brought forward in the D.C. Circuit Court of Appeals in a 2010 case, *SpeechNow.org v. FEC*.[97] SpeechNow.org was a political committee formed to engage in express advocacy and, therefore, subject under FECA to regular disclosure requirements and contribution caps.[98] But it was an "expenditure only" group, meaning that it would not make contributions to candidates or political parties.[99] Consequently, SpeechNow.org argued that its activities posed no risk of quid pro quo corruption as defined in *Citizens United* and that, thus, there was no constitutionally acceptable reason to cap its incoming contributions.[100] The D.C. Circuit Court agreed. "[C]ontributions to groups that make only independent expenditures," the court said, "cannot corrupt or create

95 *See* Buckley v. Valeo, 424 U.S. 1, 62–64, 74–75 (1976) (upholding reporting requirements on political committees, candidate committees, and party committees, as distinguished from other groups).

96 *See generally* FEC v. Ted Cruz for Senate, 142 S. Ct. 1638 (2022) (continuing to support the constitutionality of contribution caps).

97 599 F.3d 686 (D.C. Cir. 2010).

98 *Id.* at 689–92.

99 This meant it could not be used as a "pass-through" group to circumvent the contribution caps applicable to those entities. This matters because *Buckley* held that there is a compelling interest in enforcing contribution limits imposed on donations made to candidates and political parties by preventing other groups from being used to circumvent those limits. For example, under *Buckley*, Donor A can be prohibited from making more than a $1,000 contribution directly to Candidate X (because contributions pose a risk of quid pro quo corruption or the appearance thereof and, therefore, can be limited). But if Donor A can make an uncapped contribution to Organization B, and then Organization B can make a donation to Candidate X that exceeds the individual contribution cap imposed on Donor A directly, then Organization B is a "pass-through" entity that allows Donor A to make a larger contribution to Candidate X than he or she is legally entitled to do directly.

100 *Id.* at 689–92.

the appearance of corruption" because "there is no corrupting 'quid' for which a candidate might in exchange offer a corrupt 'quo.'"[101] The Supreme Court declined to review the case, and Super PACs—expenditure-only groups that do not make contributions to candidates or political parties and therefore can accept unlimited donations—were born.[102]

As cases like *McCutcheon* and *Speechnow.org* make clear, *Citizens United* did much more than simply change the rules about the use of corporate general revenue funds to finance election-related speech. It cast constitutional doubt on all source-based independent expenditure restrictions, including the foreign-financing bans found in both FECA and BCRA.[103] So it was not surprising when the federal district court for the District of Columbia was asked just a year after *Citizens United* was decided to consider whether those bans also were unconstitutional.

3. Incoherence: *Bluman v. FEC*

Bluman involved two foreign nationals living in the United States.[104] Both were legally present in the United States, but neither were permanent residents.[105] Both of them wanted to make independent expenditures supporting candidates for federal office, but under BCRA's foreign expenditure ban, they were prohibited from doing so.[106] Drawing on *Citizens United*, the *Bluman* challengers argued that as long as their expenditures were made independently of any candidate or political party, they posed no risk of quid pro quo corruption and, therefore, could not be constitutionally restricted.[107] They further argued that *Citizens*

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101 *Id.* at 694–95.

102 Keating v. FEC, 562 U.S. 1003 (2010), *denying cert. to SpeechNow.org*, 599 F.3d 686.

103 The Justices were aware of this. Justice Stevens, writing partly in dissent, wrote:

> If taken seriously, our colleagues' assumption that the identity of a speaker has *no* relevance to the Government's ability to regulate political speech would lead to some remarkable conclusions. Such an assumption would have accorded the propaganda broadcasts to our troops by 'Tokyo Rose' during World War II the same protection as speech by Allied commanders. More pertinently, it would appear to afford the same protection to multinational corporations controlled by foreigners as to individual Americans . . . .

Citizens United v. FEC, 558 U.S. 310, 424 (2010) (Stevens, J., concurring in part and dissenting in part). In response, the majority opinion said only "[w]e need not reach the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation's political process." *Id.* at 362 (majority opinion).

104 Bluman v. FEC, 800 F. Supp. 2d 281 (D.D.C. 2011).

105 *Id.* at 282.

106 *Id.* at 284, 292.

107 *Id.* at 288 n.3.

United had held it was presumptively unconstitutional under the First Amendment to "discriminate" based on the identity of the speaker.[108]

Writing for the majority, then-Judge Kavanaugh upheld the prohibition, at least in regard to express independent expenditures.[109] Judge Kavanaugh's opinion does not grapple deeply with *Citizens United*.[110] Instead, he relied on a separate line of cases holding that foreign nationals can be constitutionally excluded from activities that are part of democratic self-government, even when done in ways that would be unconstitutional if applied to U.S. citizens.[111] These cases, which date back several decades, stand for the proposition that foreign nationals can be excluded from activities "intimately related" to the process of self-government.[112] Activities that the courts have defined as within this category include such things as serving on juries,[113] being employed as probation officers[114] and police officers,[115] and working as public school teachers.[116]

What these areas have in common, Judge Kavanaugh wrote, is that they all involve the right of a country to define and preserve itself as a distinct political community.[117] A nation's ability to exclude outsiders from participation in democratic processes, the court had said in these cases, is "part of the sovereign's obligation to preserve the basic conception of a political community."[118] It is core to the very idea of citizenship. The *Bluman* court saw the prohibition on foreign financing

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108 *Id.* at 289.

109 *Id.* at 284–85 (concluding that *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007), and *Emily's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009), required the statutory expenditure prohibition to be read to include only express advocacy and not issue advocacy).

110 *See id.* at 289 ("To be sure, the other five Justices did not have occasion to expressly address this issue in *Citizens United*, but the majority's analysis in *Citizens United* certainly was not in conflict with Justice Stevens's conclusion on this particular question about foreign influence. Indeed, in our view, the majority opinion in *Citizens United* is entirely consistent with a ban on foreign contributions and expenditures.").

111 *See id.* at 290. The Supreme Court has held that both lawful and unlawful resident aliens enjoy some constitutional protections, avoiding bright-line rules in this area, and instead has developed different standards depending on the status of the alien, the constitutional right at issue, and the government's asserted interest. *Compare* Plyler v. Doe, 457 U.S. 202 (1982) (holding that undocumented children cannot constitutionally be excluded from attending public schools), *with* Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471 (1999) (holding that an alien unlawfully present in the United States has no constitutional right to assert a selective enforcement defense against deportation).

112 Bernal v. Fainter, 467 U.S. 216, 220 (1984).

113 Perkins v. Smith, 370 F. Supp. 134 (D. Md. 1974), *aff'd*, 426 U.S. 913 (1976).

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

115 *See* Foley v. Connelie, 435 U.S. 291 (1978).

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

117 *See* Bluman v. FEC, 800 F. Supp. 2d 281, 287–88 (D.D.C. 2011).

118 *Id.* at 287 (quoting *Foley*, 435 U.S. at 295–96 (citation omitted)).

of political advocacy as implicating the same governmental interest.[119] Spending money to influence voters, Judge Kavanaugh wrote, is an "integral aspect of the process" of our elections, and as essential to our national self-governance as seating juries and hiring teachers and police officers.[120] While speaking about an election is distinct from voting in one, the court acknowledged, expressive acts targeted at influencing elections are both speech and political participation.[121] Protecting the state's ability to preserve such acts to members of the nation's political community, the court therefore held, constitutes a distinct and sufficiently compelling reason to uphold the foreign financing ban.[122]

It is notable that the *Bluman* decision anchored its reasoning in the potentially corrupting influence foreign speech might have on American voters, rather than its effect on elected officials.[123] Judge Kavanaugh presumably made this choice because of the broad language in *Citizens United* implying that independent expenditures do not, as a matter of law, pose a constitutionally sufficient risk of quid pro quo corruption to warrant regulation of political spending. As discussed in the following Part, however, this choice unnecessarily left the *Bluman* decision resting on a rationale—the potentially persuasive effect of foreign speech on voters—of which the current Supreme Court has shown significant skepticism.

II. CONTEXTUALIZING CORRUPTION

The Supreme Court summarily affirmed *Bluman*.[124] But there is considerable tension between it and *Citizens United*. Justice Kennedy's majority opinion in *Citizens United* is a love letter to the rational voter. In *Citizens United*, the Court stated that "voters must be free to obtain information from diverse sources" when deciding how to cast their votes, and the state may not "deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration."[125] In *Bluman*, the court noted that sovereign states have the power, if not the duty, to protect Americans from foreign efforts to influence U.S. elections, even, apparently, when that influence occurs

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119 *Id.* at 284.

120 *Id.* at 288.

121 *Id.* at 289.

122 *Id.* at 287–88. The *Bluman* court declined to articulate a specific standard of review. *Id.* at 285.

123 *Id.* at 288 (citing *Foley*, 435 U.S. at 295–96).

124 Bluman v. FEC, 565 U.S. 1104 (2012).

125 Citizens United v. FEC, 558 U.S. 310, 341 (2010).

because an American voter is persuaded by the political advocacy of a foreign speaker to vote for one candidate rather than another.[126] This tension has drawn considerable scholarly attention;[127] resolving it requires taking a closer look at current law.

This Part does that by reviewing two areas of the current Court's campaign finance cases. First, it examines the Court's differential treatment of anti-corruption rationales that purport to prevent corruption of voters versus those that are aimed at preventing the corruption of public officials. Second, it looks more closely at what the Court has actually said about the effect of independent expenditures on public officials. The Part then uses this deepened understanding to explore the willingness of the Court to continue to uphold restrictions in two areas of law which, *Citizens United* notwithstanding, plainly make distinctions on the basis of the identity of the speaker. These cases—regarding the speech of public employees and spending in judicial elections—at first appear, like foreign financing bans, difficult to reconcile with the rest of the Court's campaign finance jurisprudence. But as this Part shows, they readily can be harmonized by recognizing that what the Court is doing in all of these cases is *contextualizing corruption* by considering the institutional role of the public official at risk of being corrupted and the relationship of that role to the speaker being restricted. The Part then concludes by contextualizing foreign financing bans in this same way by revealing the specific anti-corruption concerns undergirding them.

A. *Deconstructing Doctrine*

1. Corrupting Voters Versus Corrupting Public Officials

The Supreme Court, especially in recent years, has been deeply hostile to campaign finance regulations that rest on concerns about things that influence voters rather than things that influence elected officials. *Buckley* rejected as not compelling, and probably not even legitimate, any governmental interest in using campaign finance law to equalize the voices voters hear in political campaigns, but the contemporary Court has gone even further and appears poised to reject all restrictions based on concerns about the "corruption" of voters.[128] *McCutcheon* struck down

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[126] *Bluman*, 800 F. Supp. 2d at 290–91.

[127] Toni M. Massaro, *Foreign Nationals, Electoral Spending, and the First Amendment*, 34 HARV. J.L. & PUB. POL'Y 663 (2011); *see also* Richard L. Hasen, *Cheap Speech and What It Has Done (to American Democracy)*, 16 FIRST AMEND. L. REV. 200 (2017).

[128] Buckley v. Valeo, 424 U.S. 1, 26 (1976).

aggregate spending limits restricting how much total money any individual could contribute to political candidates, rejecting the idea that aggregate limits are necessary to ensure voters hear a variety of messages.[129] *Austin v. Michigan Chamber of Commerce* briefly recognized a state interest in limiting corporate spending in campaigns to ensure some proportionality between the messages voters hear in the political marketplace and support for those ideas among voters but was overruled by *Citizens United*.[130] And *Citizens United* itself bristles with hostility toward any hint that it is a legitimate role of government to restrict the messages voters hear.[131] Over and over again, then, the Court has resisted any governmental interest in regulating spending on the basis of the influence such spending has on the minds of the voters, rather than its possible effect on public officials.[132]

This hostility runs through all of the Court's recent cases, but it is most visible in cases involving financing of referendum campaigns.[133] Referendums do not involve candidates, so any efforts to regulate spending in such campaigns cannot rest on quid pro quo anti-corruption grounds. The Supreme Court emphasized this point in *Bellotti*.[134] *Bellotti* involved a Massachusetts law prohibiting corporations from using general corporate revenue funds to "mak[e] contributions or expenditures 'for the purpose of . . . influencing or affecting the vote on any question submitted to the voters.'"[135] The *Bellotti* Court saw this as a transparent effort to restrict speech because of the effect it had on voters: voters might find the corporate-funded speech persuasive and vote the way the corporation preferred in the referendum.[136]

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129 McCutcheon v. FEC, 572 U.S. 185 (2014).

130 Austin v. Mich. Chamber of Com., 494 U.S. 652 (1990), *overruled by Citizens United*, 558 U.S. at 350–51.

131 *Citizens United*, 558 U.S. at 341.

132 Professor Daniel Lowenstein discussed this difference in terms of different strategies spenders take to influence public policy. In an "electoral" strategy, a spender's strategy is to influence voters to elect candidates sympathetic to the spender's policy goals or to defeat candidates hostile to those goals. A spender using a "legislative" strategy, in contrast, uses campaign contributions to gain access or influence over elected officials. *See* Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of All Evil Is Deeply Rooted*, 18 HOFSTRA L. REV. 301, 308 (1989).

133 Professor Jacob Eisler has exhaustively detailed the different views of public corruption taken by Congress and the Supreme Court over time. Jacob Eisler, *The Unspoken Institutional Battle over Anticorruption:* Citizens United*, Honest Services, and the Legislative-Judicial Divide*, 9 FIRST AMEND. L. REV. 363 (2010).

134 First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765 (1978).

135 *Id.* at 768 (second alteration in original) (quoting MASS. GEN. LAWS ch. 55, § 8 (Supp. 1977)).

136 *Id.* at 789.

The Supreme Court struck down the law.[137] In doing so, it elaborated on what it saw as the constitutionally relevant distinction between candidate elections and referendum campaigns. In a referendum, the Court argued, there is no candidate who could be "corrupt[ed]" by corporate money, and therefore no risk of quid pro quo corruption justifying the restriction.[138] Far from being a threat to democracy, corporate-funded speech has a role in "affording the public access to discussion, debate, and the dissemination of information and ideas."[139] "In the realm of protected speech," the Court continued, "the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue."[140]

In defending its law, Massachusetts made the same argument the Court would later accept, in the candidate-election context, in *Austin*. It argued that the corporate expenditure prohibition was necessary to preserve the integrity of the electoral process.[141] The Court, looking to *Buckley* instead, granted that sustaining the "active, alert responsibility of the individual citizen in a democracy" is a governmental interest of the "highest importance"[142] but objected to Massachusetts's attempt to do so by preventing corporations from exercising "undue influence" on the choices made *by voters*.[143] An influence cannot be "undue," the *Bellotti* Court held, just because voters are receptive to it. Political messages mitigated through the minds of the voters are persuasive, not corrupting, and the fact that advertising may persuade voters simply cannot, according to the Court, be a reason to suppress it.[144]

Bluman's political community rationale is vulnerable to this same criticism. The *Bluman* court relied explicitly on the potentially corrupting influence of foreign-financed speech on voters rather than on public officials.[145] The Federal Election Commission (FEC) had to grapple with the implications of this almost immediately after *Bluman* was decided when it was presented with a complaint alleging that a foreign national

137 *Id.* at 795.

138 *Id.* at 790.

139 *Id.* at 783.

140 *Id.* at 784–85.

141 *Id.* at 788–89.

142 *Id.* (quoting United States v. Int'l Union United Auto., Aircraft & Agric. Implement Workers of Am., 352 U.S. 567, 575 (1957)).

143 *Id.* at 789.

144 *Id.* at 789–90.

145 Bluman v. FEC, 800 F. Supp. 2d 281, 289 (D.D.C. 2011) (noting that the challenged speech is "targeted at influencing the outcome of an election").

spent $327,000 opposing a California ballot referendum.[146] The FEC commissioners could not agree whether to act on the complaint. The foreign expenditures prohibition in BCRA extended to expenditures made "in connection with a Federal, state, or local *election*."[147] The statute defined an "election" as "a general, special, primary, or runoff election," and "a convention or caucus of a political party which has authority to nominate a candidate."[148] An FEC regulation further specified that "[e]lection means the process by which individuals, whether opposed or unopposed, seek nomination for election, or election, to [public] office."[149]

This would appear to exclude referendum campaigns. But the FEC complicated the issue in 1989 when it decided that a foreign national violated the provision by financing political communications about a ballot initiative when it was "inextricably linked" with a candidate for state office.[150] This decision, coupled with *Bluman*'s rationale, convinced some of the FEC commissioners that the foreign funding ban should indeed apply to referendum campaigns as well as candidate elections. These commissioners argued that *Bluman* recognized as compelling the government's interest in keeping foreign influences out of U.S. politics, and that this interest is no less compelling in referendum campaigns than in candidate campaigns.[151] The FEC commissioners in favor of dismissing the complaint, in contrast, argued that noncandidate ballot initiatives are a form of issue advocacy and that *Bluman*'s holding regarding protecting the political community was therefore not relevant.[152]

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146 FEC MUR 6678 (MindGeek USA, Inc.), Statement of Reasons of Comm'r Ellen L. Weintraub (Apr. 23, 2015), https://eqs.fec.gov/eqsdocsMUR/15044372958.pdf [https://perma.cc/LZ43-YQTZ].

147 FEC MUR 6678 (Mindgeek USA, Inc.), Statement of Reasons of Vice Chairman Matthew S. Peterson & Comm'rs Caroline C. Hunter & Lee E. Goodman at 1 (Apr. 30, 2015) [hereinafter Peterson, Hunter & Goodman Statement of Reasons] (emphasis added) (quoting 52 U.S.C. § 30121(a)), https://eqs.fec.gov/eqsdocsMUR/15044372963.pdf [https://perma.cc/H6UD-Z8BM].

148 52 U.S.C. § 30101(1).

149 11 C.F.R. § 100.2(a) (2022).

150 FEC Advisory Op. 1989-32, at 1, 6 (July 2, 1990), https://www.fec.gov/files/legal/aos/1989-32/1989-32.pdf [https://perma.cc/4E5R-9TWS]. The candidate for state office had organized and controlled a political committee that initiated the ballot measure drive, which was on the same ballot as the candidate, and was sponsored and promoted by the candidate. This Advisory Opinion was issued before BCRA was enacted, but the relevant prohibition on foreign-funded contributions to political committees had not changed. FEC MUR 7523 (Stop I-186 to Protect Mining and Jobs), MUR 7512 (Pembina Pipeline Corp.), Statement of Reasons of Chair Shana M. Broussard at 3 n.18 (Nov. 2, 2021) [hereinafter Broussard Statement of Reasons], https://www.fec.gov/files/legal/murs/7523/7523_28.pdf [https://perma.cc/B8XS-TV62].

151 Peterson, Hunter & Goodman Statement of Reasons, *supra* note 147, at 2.

152 *Id.*

A split vote resulted in the dismissal of the complaint with commissioners issuing four separate Statements of Reasons.[153] But in 2018, the issue arose again, this time in relation to a public referendum in Montana involving mining. A Canadian subsidiary, Sandfire Resources America, Inc., of an Australian corporation, Sandfire Resources NL, made donations to a political committee opposing the referendum.[154] There was no assertion in the complaint that the referendum issue was meaningfully linked to any candidate or to a candidate election. Instead, the complainant argued that BCRA's foreign financing ban covered all referendums, regardless of the extent to which the referendum issue was associated with candidates or political parties.[155] This time, the FEC was able to reach a decision. Citing *Bellotti*, it dismissed the complaint.[156] The commissioners addressed *Bluman* in a footnote which described *Bluman* as "closely" tying the foreign funding prohibition to "candidate advocacy."[157] It further highlighted *Bluman*'s observation that the foreign expenditure ban did not extend to issue advocacy or prevent foreign nationals from "speaking out about issues or spending money to advocate their views about issues."[158] Finally, the commissioners noted the longstanding distinction made by the FEC, Congress, and the courts between referendums and candidate elections.[159] To the commissioners, this distinction was determinative: whatever compelling interest the government has in preventing foreign influence in American self-governance, it does not extend beyond candidate elections.

But this is an unusual way to think about the governmental interest relied on in *Bluman*. The self-government cases cited by the district court in *Bluman* did not involve candidate elections. They involved things like who should be allowed to be schoolteachers and police officers—positions that shape public opinion and implement public policy.[160] Moreover, self-government is hardly just about electing candidates. It is also, perhaps even more directly so, about making policy choices through mechanisms like public referendums. So, if, as per *Bluman*, the reason for foreign funding bans is that foreign speech should have no role in influencing the choices of American voters, that rationale should be

153 *See* FEC MUR 7523 (Stop I-186 to Protect Mining and Jobs), Factual & Legal Analysis at 6 (Oct. 4, 2021), https://www.fec.gov/files/legal/murs/7523/7523_23.pdf [https://perma.cc/6RFQ-38XG].

154 *Id.* at 2–3.

155 *Id.* at 3.

156 *Id.* at 2, 5 n.15.

157 *Id.* at 5 n.15.

158 *Id.* (quoting Bluman v. FEC, 800 F. Supp. 2d 281, 290 (D.D.C. 2011)).

159 *Id.* at 5 n.15, 6 n.18.

160 *See* cases cited *supra* notes 115–16.

equally potent when foreign financers attempt to influence voter choices operationalized through referendums. If *Bluman* was correct to frame the anti-corruption interest in that case as preventing foreign influence on political discourse, then the FEC's decision in the Sandfire matter makes little sense.[161] The choices made by the commissioners and the *Bluman* court do make sense, however, if what foreign funding bans have been targeting all along is not the potentially corrupting effect of foreign financers on voters, but avoiding corruption of public officeholders.

2. Independent Expenditures, Ingratiation, and Indebtedness

The difficulty presented by foreign financing bans is now clear. If the only constitutionally acceptable reason to permit foreign bans is to prevent the appearance or actuality of corrupting officeholders rather than voters, and if independent expenditures do not pose a risk of such corruption as a matter of law, how can prohibitions on the foreign financing of independent expenditures be constitutional?

The answer is to understand how the Court has contextualized corruption. The Court has never held that independent expenditures do not, *in fact*, create feelings of ingratiation and indebtedness on the part of the public officials who benefit from them. Indeed, the Court has explicitly recognized that even truly independent expenditures can facilitate access and engender feelings of gratitude and indebtedness. The issue, according to the Court, is not that these things do not happen but that they are, in the cases presented, a normal part of the democratic process because elected officials *should* be responsive to the wishes of their constituencies, including their financial supporters.[162] Engendering such feelings, consequently, could not pose a constitutionally salient risk of corrupting the officeholder.[163]

161 A similar inconsistency is present in *Bluman* itself, in the rote limitation of the foreign funding ban to the financing of express advocacy. *See generally Bluman*, 800 F. Supp. 2d 281.

162 For a discussion of out-of-state contributions, the perception of corruption, and differences between out-of-state contributions and foreign financiers, see Eugene D. Mazo, *Our Campaign Finance Nationalism*, 46 PEPP. L. REV. 759 (2019); Richard Briffault, *Of Constituents and Contributors*, 2015 U. CHI. LEGAL F. 29 (2015).

163 *See* Douglas M. Spencer & Abby K. Wood, Citizens United*, States Divided: An Empirical Analysis of Independent Political Spending*, 89 IND. L.J. 315 (2014) (discussing empirical evidence demonstrating that independent expenditures can (and do) create feelings of indebtedness on the part of those who benefit from them). Prior to *Citizens United*, lower courts recognized this indebtedness and viewed it as a form of public corruption. *See, e.g.*, Andrew T. Newcomer, Comment, *The "Crabbed View of Corruption": How the U.S. Supreme Court Has Given Corporations the Green Light to Gain Influence over Politicians by Spending on Their Behalf [*Citizens United v. Federal Elections Commission*, 130 S. Ct. 876 (2010)]*, 50 WASHBURN L.J. 235, 270 n.273 (2010) (citation omitted) (discussing relevant cases).

This reasoning is on vivid display in the majority opinion in *Citizens United*. Corporations, Justice Kennedy wrote, are "associations of citizens" and often "the voices that best represent the most significant segments of the economy."[164] As such, there is simply nothing corrupt happening when elected officials listen and respond to those voices. Rather, democracy, as Justice Kennedy said, is premised on this type of responsiveness.[165] "It is in the nature of an elected representative," he wrote in *Citizens United*, "to favor certain policies, and, by necessary corollary, to favor the voters *and contributors* who support those policies."[166] Since the other state interests asserted in that case depended on the effect of political speech on voters rather than public officials—rationales the Court rejected in overturning *Austin*—the prohibition on corporate expenditures was struck down.[167]

This understanding of the likely effect on elected officials of independent expenditures was not new to *Citizens United*. Indeed, the actual likely effect of independent expenditures on elected officials has been recognized again and again by Supreme Court Justices across the ideological spectrum, writing in both dissenting and majority opinions. In *Buckley*, the Court acknowledged that a future court could find, in some circumstances, that independent expenditures could pose a risk of quid pro quo arrangements.[168] Chief Justice Roberts, in *FEC v. Wisconsin Right to Life, Inc.*, agreed, quoting *Buckley* to note that "in some circumstances, 'large independent expenditures pose the same dangers of actual or apparent *quid pro quo* arrangements as do large contributions.'"[169] Justice Stevens, writing for the majority in *McConnell v. FEC*, declared that contributions to a candidate's political party "threaten to create—no less than would a direct contribution to the candidate—a sense of obligation."[170] Justice Kennedy, dissenting in that same case, agreed, writing that "[f]avoritism and influence are not . . . avoidable in representative politics. . . . Democracy is premised on responsiveness."[171] "Access in itself," Justice Kennedy went on,

164 Citizens United v. FEC, 558 U.S. 310, 354 (2010) (quoting McConnell v. FEC, 540 U.S. 93, 257–58 (2003) (Scalia, J., concurring in part and dissenting in part)).

165 *Id.* at 359 (citing *McConnell*, 540 U.S. at 297 (Kennedy, J., concurring in part and dissenting in part)).

166 *Id.* (emphasis added) (quoting *McConnell*, 540 U.S. at 297 (Kennedy, J., concurring in part and dissenting in part)).

167 *Id.* at 360–61.

168 Buckley v. Valeo, 424 U.S. 1, 45 (1976).

169 FEC v. Wisconsin Right to Life, Inc., 551 U.S. 449, 478 (2007) (quoting *Buckley*, 424 U.S. at 45).

170 *McConnell*, 540 U.S. at 144 (upholding most provisions of BCRA).

171 *Id.* at 297 (Kennedy, J., concurring in part and dissenting in part).

> shows only that in a general sense an officeholder favors someone or that someone has influence on the officeholder. There is no basis, in law or in fact, to say favoritism or influence in general is the same as corrupt favoritism or influence in particular.[172]

The Court's most recent cases have, if anything, made this point even more plainly. In *McCutcheon*, the Court stated that influence and access "embody a central feature of democracy—that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns."[173] During the *McCutcheon* oral argument, Justice Scalia was quite explicit that there was little difference between contributions and independent expenditures in this regard, stating that

> it seems to me fanciful to think that the sense of gratitude that an individual Senator or Congressman is going to feel because of a substantial contribution to the Republican National Committee or Democratic National Committee is any greater than the sense of gratitude that that Senator or Congressman will feel to a PAC which is spending enormous amounts of money in his district or in his State for his election.[174]

The point is this: the Supreme Court's campaign finance cases have not rested on a naïve, indeed unsustainable, view that independent expenditures do not generate increased access, ingratiation, and feelings of indebtedness on the part of candidates and public officeholders. Quite to the contrary. Over and over again, the Justices have recognized the empirical thinness between the ingratiating effects of direct contributions and other types of financial support. While the absence of coordination indicative of truly independent expenditures may make them less valuable to candidates,[175] it does not erase the risk that their beneficiaries will feel a sense of ingratiation and indebtedness to the people who pay for them.[176] When the Court has rejected limitations on independent

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172 *Id.* at 296.

173 McCutcheon v. FEC, 572 U.S. 185, 192 (2014) (striking down aggregate contribution limits).

174 Oral Argument at 54:16, *McCutcheon*, 572 U.S. 185 (No. 12-536), https://www.oyez.org/cases/2013/12-536 [https://perma.cc/W2SQ-Y4J6].

175 Buckley v. Valeo, 424 U.S. 1, 47 (1976); *see also* Citizens United v. FEC, 558 U.S. 310, 345 (2010) ("The absence of prearrangement and coordination . . . *alleviates* the danger that expenditures will be given as a *quid pro quo* for improper commitments . . . . " (first emphasis added) (quoting *Buckley*, 427 U.S. at 47)).

176 *See generally* Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009). As the Court noted in *McConnell*:

> While the public may not have been fully informed about the sponsorship of so-called issue ads, the record indicates that candidates and officeholders often were. A former

expenditures, it has not been because these expenditures do not, *in fact*, have these effects but because of a vision of democratic representation that sees this type of responsiveness to financial supporters as contextually appropriate.[177] But this simply is not the case in regard to foreign financiers. No theory of democratic self-governance celebrates the indebtedness of elected officials to foreign financiers.[178] Consequently, when the risk of *contextually inappropriate* ingratiation and indebtedness is created by such expenditures, prohibiting them fits perfectly comfortably into the Court's current anti-corruption model of campaign finance regulation.

> Senator confirmed that candidates and officials knew who their friends were and "sometimes suggest[ed] that corporations or individuals make donations to interest groups that run 'issue ads.'"

McConnell, 540 U.S. at 128–29 (alteration in original) (quoting McConnell v. FEC, 251 F. Supp. 2d 176, 518 (D.D.C. 2003) (Kollar-Kotelly, J., mem.)); *see also* Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 638–39 (1996) (Thomas, J., concurring in part and dissenting in part) ("Even in the case of a direct expenditure, there is usually some go-between that facilitates the dissemination of the spender's message—for instance, an advertising agency or a television station.").

177 Scholars have disagreed with this vision of democratic representation. *See, e.g.*, Michael T. Morley, *Contingent Constitutionality, Legislative Facts, and Campaign Finance Law*, 43 FLA. ST. U. L. REV. 679 (2016) (arguing that independent expenditures give rise to the concerns recognized in *Buckley* as sufficient to restrict contributions). The public also appears to disagree with the Court on this point. *See, e.g.*, Mathew DeBell & Shanto Iyengar, *Campaign Contributions, Independent Expenditures, and the Appearance of Corruption: Public Opinion vs. the Supreme Court's Assumptions*, 20 ELECTION L.J. 286, 286 (2021) (using survey data to determine that the amount of money spent is the key component in public perceptions of the corrupting effect of campaign financing, and that "independent expenditures are more likely to elicit the appearance of corruption than direct contributions").

178 So, for example, various states have throughout our history at times opted to permit noncitizen immigrants to vote in state and local elections but are not required to do so. *See generally* RON HAYDUK, DEMOCRACY FOR ALL: RESTORING IMMIGRANT VOTING RIGHTS IN THE UNITED STATES (2006); Gerald L. Neuman, *"We Are the People": Alien Suffrage in German and American Perspective*, 13 MICH. J. INT'L L. 259, 311 (1992) ("Self-government, whether direct or through representatives, begins by defining the scope of the community of the governed and thus of the governors as well: Aliens are by definition those outside of this community." (quoting Cabell v. Chavez-Salido, 454 U.S. 432, 439–40 (1982))). Permanent resident non-nationals (undocumented immigrants) subject to the jurisdiction of the United States may pose a special case. For an argument that such individuals should be entitled to full protection of the First Amendment, see Michael Kagan, *When Immigrants Speak: The Precarious Status of Non-Citizen Speech Under the First Amendment*, 57 B.C. L. REV. 1237 (2016). For an argument that immigrants may be entitled to virtual representation as non-voting residents, see Joseph Fishkin, *Taking Virtual Representation Seriously*, 59 WM. & MARY L. REV. 1681, 1686 n.18, 1711 (2018) (noting also that few people "argue for enfranchising everyone in this country, regardless of immigration status, on the day they arrive here"). Finally, for an argument locating rights of undocumented immigrants in the Equal Protection Clause rather than the Fourteenth Amendment, see *Plyler v. Doe*, 457 U.S. 202 (1982), *Evenwel v. Abbott*, 578 U.S. 54 (2016), and Bertrall L. Ross II, *The Representative Equality Principle: Disaggregating the Equal Protection Intent Standard*, 81 FORDHAM L. REV. 175, 234 (2012).

B. *Contextualization in Action*

Contextualizing the current Court's view of constitutionally salient corruption and the regulation of political speech in this way also makes sense of several areas in First Amendment law where the Court has, *Citizens United* notwithstanding, permitted differential restriction of political speech on the basis of the identity of the speaker. As shown below, First Amendment doctrine has consistently recognized a constitutionally salient risk of corruption when the relationship between public officials and potential speakers poses a high risk of tempting the official to use their public power corruptly. The Supreme Court's willingness to contextualize corruption this way can be seen by examining two areas that, like foreign financing bans, appear to fit awkwardly within the Court's current body of campaign financing law: the Hatch Act cases involving the political activities of public employees and *Caperton v. A.T. Massey Coal Co.* involving financing of judicial election campaigns.

Neither of these cases involves the exact same corruption concerns as those at issue in *Bluman*, but each demonstrates how the Court has consistently been willing to contextualize corruption by examining the government's interest in reference to expectations about how public officials may use their public power in relation to the regulated speaker.[179] As seen in these cases, the Court has been perfectly able to recognize as constitutionally compelling the anti-corruption interest present when that relationship poses a risk that public officials will use their public power in contextually corrupt ways. This Section further shows that this type of contextualized corruption by public officeholders is precisely what Congress was targeting in enacting the current foreign financing prohibitions.

1. Public Employees and the Hatch Act Cases

The corrupting potential of permitting federal employees to engage in partisan activities was recognized early in our history,[180] but the need for a legislative prohibition did not arise until the expansion of the federal government in the 1820s. As Professor Anthony J. Gaughan put it, this expansion "created an opportunity for the major parties to turn government payrolls into a source of campaign funds."[181] President

179 *See infra* Sections II.B.1–II.B.2.

180 Anthony J. Gaughan, *Chester Arthur's Ghost: A Cautionary Tale of Campaign Finance Reform*, 71 MERCER L. REV. 779, 780 (2020).

181 *Id.* at 780–81.

Andrew Jackson, elected in 1828, was the first to take full advantage of this. Prior presidents had retained most of the non-policy level federal employees in place when they assumed office.[182] President Jackson, in contrast, wiped out virtually the entire federal bureaucracy, firing most executive branch employees and replacing them with loyalists who had worked for or supported his election campaign.[183] But these jobs were not free: partisan employees were expected to contribute a portion of their salary to the reigning political party or lose their positions.[184] These "assessments" were legal and used by President Jackson and his successors to fund the burgeoning costs of their election campaigns.[185] Government employees also were expected to volunteer for their political party, raise money for it, and make large campaign contributions to party candidates.[186]

By 1857, this "spoils system" served as a "crucial source of campaign funds" for both major American political parties.[187] The corrupting effects of this system were predictable, and spurred Congress to enact America's very first federal election financing law.[188] That law, the Appropriation Act of 1876, was designed to protect federal employees from demands that they support the reigning party or lose their jobs. In doing so, it also limited their ability to engage in some political activities, prohibiting most executive branch employees "from requesting, giving to, or receiving from, any other officer or employee of the Government, any money or property or other thing of value for political purposes."[189] The prohibition was immediately challenged by a federal employee who had been convicted under the law for receiving money for political purposes from a fellow federal employee.

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182 Even Thomas Jefferson kept almost half of federal branch employees in place after the acrimonious election of 1800. *Id.* at 780.

183 *Id.* at 781 (citing DANIEL P. CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862–1928, at 41 (2001)).

184 *Id.* at 781–83.

185 *Id.*

186 *Id.* at 783.

187 *Id.* at 781–83; *see also* Anthony J. Gaughan, *James Madison,* Citizens United*, and the Constitutional Problem of Corruption*, 69 AM. U. L. REV. 1485, 1508 (2020) (exploring how James Madison and Alexander Hamilton paid for publication of the Federalist Papers).

188 Gaughan, *supra* note 180, at 787–89 (quoting reformers about the effects of the spoils system). Senator Daniel Webster condemned the system as an abuse of official power and misuse of public services. *Id.* at 784. President Abraham Lincoln's Secretary of the Navy deemed it as "not in all respects right or proper." *Id.* at 785 (quoting JOHN C. WAUGH, REELECTING LINCOLN: THE BATTLE FOR THE 1864 PRESIDENCY 330 (De Capo Press ed., 2001)).

189 Act of Aug. 15, 1876, ch. 287, § 6, 19 Stat. 143, 169.

The resulting Supreme Court decision, *Ex parte Curtis*, upheld the law.[190] Modern First Amendment doctrine lay decades in the future, but the justices in *Curtis* recognized the question presented as whether the law unconstitutionally restricted Curtis's "political privileges" by interfering with his ability to engage in political speech and association.[191] In holding that it did not, the Court, in an 8-1 decision, validated the anti-corruption interest behind the prohibition. The purpose of the law, as the Court understood, was to prevent the corrupt use of public power likely to occur when public officials are permitted to extort federal employees for the officials' partisan political purposes. As such, the Court said, the law "rests on the same principle" as other laws prohibiting this type of misuse of public power for personal gain, including laws from 1867 making it illegal for federal employees to impose political assessments on navy-yard workmen and from 1870 prohibiting federal supervisory employers from soliciting or accepting "gifts" from other employees.[192]

In response to the dissent's objection that the law prohibited even voluntary contributions,[193] the majority again took full account of the contextual relationship of public officials to federal employees:

> If contributions from those in public employment may be solicited by others in official authority, it is easy to see that what begins as a request may end as a demand . . . . Contributions secured under such circumstances will quite as likely be made to avoid the consequences of the personal displeasure of a superior, as to promote the political views of the contributor . . . .[194]

The likely consequences of this were clear to the Court.

> If persons in public employ may be called on by those in authority to contribute from their personal income to the expenses of political campaigns, and a refusal may lead to putting good men out of the service, liberal payments may be made the ground for keeping poor ones in.[195]

The Court also recognized that these practices enabled political parties to corruptly convert public money for their partisan gain.

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190 *Ex parte* Curtis, 106 U.S. 371 (1882).

191 *Id.* at 371–72.

192 *Id.* at 372–73.

193 *See id.* at 376 (Bradley, J., dissenting).

194 *Id.* at 374 (majority opinion).

195 *Id.* at 375. Decades later, officials investigating the Watergate scandal would reach the exact same conclusion. *See* Gaughan, *supra* note 39, at 796 ("Watergate investigators learned that many corporations felt pressured by the Administration to make campaign contributions.").

> [I]f a part of the compensation received for public services must be contributed for political purposes, it is easy to see that an increase of compensation may be required to provide the means to make the contribution, and that in this way the government itself may be made to furnish indirectly the money to defray the expenses of keeping the political party in power that happens to have for the time being the control of the public patronage.[196]

In light of these strong anti-corruption interests, the Court readily held that Congress was acting well within its constitutional authority in limiting the political speech and association rights of public workers.

A more comprehensive law, the Hatch Act, was passed by Congress in 1939.[197] The Hatch Act broadly prohibits civil servants from engaging in most partisan political activities.[198] As originally enacted, it prohibited partisan activities, both on and off duty, of all "classified" employees.[199] The Hatch Act was seen as necessary in part because of concerns that President Franklin D. Roosevelt's political allies were diverting money from the massive, federally funded Works Progress Administration for partisan, political purposes.[200] Like its predecessor, it was immediately challenged in court, this time by a federal employee named George Poole, who was employed by the federal government as a skilled mechanic (a roller) in a federal mint. Poole admitted he violated the Hatch Act by working as a ward executive, poll watcher, and "paymaster" for a political party during a partisan election. He argued that the Hatch Act violated the First, Ninth, and Tenth Amendments.[201]

The Supreme Court again upheld the restrictions in its illuminating decision in *United Public Workers of America v. Mitchell*.[202] Poole had argued that the statute was overly broad as applied to him because he was an "industrial" worker whose job did not involve contact with the public (in contrast to "administrative" workers whose work did involve such contact).[203] The relevance of this distinction, to Poole, was that the government's interest was in promoting *politically neutral administration* of the law—in other words, to protect the public from the perception (and actuality) that governmental services might be provided in politically

196 *Curtis*, 106 U.S. at 375.

197 Hatch Act, Pub. L. No. 76-252, 53 Stat. 1147 (1939).

198 *See* U.S. Civ. Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 565 (1973).

199 For a history of the Hatch Act, see Scott J. Bloch, *The Judgment of History: Faction, Political Machines, and the Hatch Act*, 7 U. PA. J. LAB. & EMP. L. 225, 231 (2005). The law was amended in 1993 to apply the most comprehensive prohibitions only to certain more restricted employees, a topic addressed below. *Id.* at 234–35.

200 David Porter, *Senator Carl Hatch and the Hatch Act of 1939*, 48 N.M. HIST. REV. 151 (1973).

201 United Pub. Workers of Am. v. Mitchell, 330 U.S. 75, 94–95, 101 (1947).

202 *Id.* at 75.

203 *Id.* at 102.

biased ways.[204] Because Poole did not interact with the public in his official duties, this interest could not support restrictions on his partisan activities.[205] His political biases, he argued, should be considered a "matter of complete indifference to the effective performance" of his official duties.[206]

The majority opinion, written by Justice Reed, rejected this narrow view of the government's anti-corruption interest. Politically neutral administration of the laws was not the only, or perhaps even primary, state interest at stake, Justice Reed's opinion recognized. Instead, the threats being addressed by the statute included the risk that elected officials would corruptly use their public power over federal employees to build a party machine and entrench a one-party system.[207] The majority understood that, given the contextual relationship between elected officials and federal employees, permitting the political activity at issue risked enabling public officials to corruptly use their political power for partisan or personal gain. The law, in other words, restricted the partisan activities of a group of individuals based not on the effect of their activities on the public, but on the risk of corruption they posed on the part of elected officials. To declare that risk "beyond the power of Congress to redress," Justice Reed wrote for the majority, "would leave the nation impotent to deal with what many sincere men believe is a material threat to the democratic system."[208]

The significance of contextualizing the anti-corruption interest this way is even clearer when we consider Justice Black's dissent. Unlike the majority, Justice Black focused exclusively on Poole's limited view of the relevant corruption interest at issue. So, rather than considering whether the unrestrained ability to use federal employees to advance their own political campaigns posed a risk of corrupting *public officials*, Justice Black asked only whether *Poole*'s political activity risked corrupting the "political process": "It is argued that it is in the interest of clean politics to suppress political activities of federal and state employees. It would hardly seem to be imperative to muzzle millions of citizens because some of them, if left their constitutional freedoms, might corrupt the political process."[209]

Foreshadowing the current Court's skepticism about laws based on the corruption of voters rather than officeholders, Justice Black went on to fervently reject the idea that the public needed to be protected from the

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[204] *Id.* at 101.

[205] *Id.*

[206] *Id.*

[207] *Id.* at 98–100.

[208] *Id.* at 99.

[209] *Id.* at 112–13 (Black, J., dissenting).

speech of others. "Popular government," he said, "must permit and encourage much wider political activity by all the people. . . . 'Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truths.'"[210] "There is nothing," he concluded, about government employees that "justifies depriving them or society of the benefits of their participation in public affairs."[211] After framing the issue this way, as exclusively concerned with whether the political speech of public employees would "corrupt the political process," Justice Black had no difficulty striking down the restrictions as beyond the power of Congress.[212]

Even Justice Black, though, acknowledged that the risk the majority focused on—that public officials would corruptly use their public power for their partisan political benefit—could in a different case support restrictive legislation. "It may also be true," Justice Black wrote, that "some public officials . . . . may use their influence to have their own political supporters appointed or promoted."[213] They may "discharge some employees" and promote others "on a political rather than on a merit basis."[214] *That* misuse of public power would, Justice Black wrote, be "so great an evil as to require legislation."[215] But because Poole himself was not in a position to wield such corrupt power, Justice Black believed that his partisan activity could not be so constrained, even if others' could.[216]

What is notable about *Curtis* is the extent to which the disagreement between the majority and Justice Black depends on precisely the same issue in campaign finance cases today: whether the anti-corruption interest asserted by Congress is about preventing the corruption of voters or public officials. When framed as protecting the public from being "corrupted" by the partisan preferences of civil servants (as it was by Justice Black), the government's interest fades before the imperative that the power of the people to "discover and spread political and economic truth"[217] must not be hindered. But when framed as preventing the self-

210 *Id.* at 110–11 (footnote omitted) (quoting Thornhill v. Alabama, 310 U.S. 88, 95 (1940)).

211 *Id.* at 111.

212 *Id.* at 112–13.

213 *Id.* at 114.

214 *Id.*

215 *Id.*

216 *Id.* Justice Douglas also dissented, in part, on grounds similar to Justice Black's dissent. His separate opinion was more open than Justice Black's, however, to the possibility that even employees like Poole may need to be restricted if evidence in the future showed doing so would be necessary to prevent the corrupt use of public power by elected officials. *Id.* at 115–26 (Douglas, J., dissenting in part).

217 *Id.* at 110–11 (Black, J., dissenting) (quoting Thornhill v. Alabama, 310 U.S. 88, 95 (1940)).

interested abuse of public power by elected officials (as it was by Justice Reed), Congress's anti-corruption interest prevails. In fact, when contextualized the latter way, even the dissenting Justices agreed that Congress's interest would be constitutionally sufficient to restrict the partisan activity at issue; they disagreed only about what category of speaker could be so restricted.[218]

The Supreme Court's last major opinion addressing the Hatch Act's restrictions on the partisan activity of public employees came in 1973, in *United States Civil Service Commission v. National Ass'n of Letter Carriers*.[219] The specific provision of the Hatch Act at issue in *National Ass'n of Letter Carriers* was the prohibition against federal employees' active involvement in managing partisan political campaigns. The Court again upheld the Act, this time against a challenge that the statute was unconstitutionally vague and overbroad. In "unhesitatingly" reaffirming *Mitchell*, the *National Ass'n of Letter Carriers* Court was clear that the interest in preventing corruption of public officials was itself a sufficiently important (even if not exclusive) justification for the restrictions.[220] Anticipating later debates about the difference between referendums and candidate elections, the Court noted that the bar against political activity did not prohibit civil servants from actively participating in the management of non-partisan elections, referendums, municipal ordinances, or other issues not "specifically identified with any national or state political party."[221] The goal of the Act, as the Court saw it, was not to limit the potentially persuasive speech of federal employees, but rather to control the temptation of public officials to use their power over the federal bureaucracy to corruptly use its public power to "build a powerful, invincible, and perhaps corrupt political machine" at public expense, or hire and promote employees based on partisan loyalty rather than merit.[222] This risk—that public officials would corruptly misuse their public power for partisan gain—was, according to the *National Ass'n of Letter Carriers* Court, well within Congress's power to prevent.

The point here is not to defend the Hatch Act in all its incarnations. Congress has significantly reduced the scope of the Act over the years,

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218 *Id.* at 125–26 (Douglas, J., dissenting in part).

219 413 U.S. 548 (1973).

220 *Id.* at 556. The Court also considered the governmental interest in limiting the "political influence of federal employees on others and on the electoral process," but this appears to be primarily about the Act's prohibition on the use of official power to influence or interfere with elections. *Id.* at 557.

221 *Id.* at 562.

222 *Id.* at 565. Like Justice Black in *Curtis*, the three dissenting Justices in *National Ass'n of Letter Carriers* focused their attention on the effect of the prohibition on public debate about public issues. But they agreed with this point, stressing that the "political creed" of federal employees should be irrelevant to their ability to do their job. *Id.* at 597 (Douglas, J., dissenting).

and its most restrictive provisions now apply to a small group of federal employees engaged in particularly sensitive work only.[223] Rather, the point is to illustrate that the Supreme Court, in this trio of cases, has recognized that the government's anti-corruption interest in each of these contexts is firmly focused on the corrupt misuse of public power by elected officials rather than the persuasiveness of speech to voters, and has accepted this contextualized risk as constitutionally sufficient to support some restrictions on the political activities of certain speakers. In these cases, the Court's contextualized understanding of the corruption risk is key. When the corruption interest is not contextualized and is framed only as influencing voters and the "political process" (as done by Justice Black in his dissent in *Mitchell*),[224] the restrictions fail. But when recognized in context as preventing the corrupt use of public power unrelated to the persuasive power of the speech (as done by the majority in all three of these cases), they survive. These cases thus demonstrate that recognizing the contextual situation in which the risk of corruption occurs, including especially the relationship between public officials and proposed speakers, is essential to properly understanding the Court's jurisprudence in this area.

2. *Caperton v. A.T. Massey Coal Co.*

The careful attention to the context of corruption also is apparent in another, more recent Supreme Court case that is otherwise a puzzling fit with the Court's other campaign finance cases, *Caperton v. A.T. Massey Coal Co*.[225] *Caperton* involved independent and other expenditures made in a West Virginia state supreme court election campaign.[226] The expenditures were made by Don Blankenship, the Chairman, Chief Executive Officer, and President of A.T. Massey Coal Company (Massey Coal).[227] Massey Coal was involved in a high-profile, high-stakes civil

[223] Hatch Act Reform Amendments of 1993, Pub. L. No. 103-94, 107 Stat. 1001 (codified as amended at 5 U.S.C. §§ 7321–26); *see also* Daniel Pines, *The Extraordinary Restrictions on the Constitutional Rights of Central Intelligence Agency Employees: How National Security Concerns Legally Trump Individual Rights*, 21 J. TRANSNAT'L L. & POL'Y 105 (2011) (examining and defending as compelling the national security concerns underlying the severe restrictions on the political activity of Central Intelligence Agency (CIA) employees).

[224] United Pub. Workers of Am. v. Mitchell, 330 U.S. 75, 110–14 (1947) (Black, J., dissenting) (discussing and rejecting the influence of the prohibited activities on the political process, as opposed to framing the issue as involving the potential misuse of public power by public officials).

[225] 556 U.S. 868 (2009).

[226] *Id.* at 873. The court of last resort in West Virginia is known as the Supreme Court of Appeals of West Virginia.

[227] *Id.*

lawsuit in West Virginia.[228] A jury had found Massey Coal liable for "fraudulent misrepresentation, concealment, and tortious interference" with existing contractual relationships and had awarded the plaintiffs in the litigation "$50 million in compensatory and punitive damages."[229]

Knowing the case would be appealed to the state supreme court, Blankenship spent three million dollars in contributions and independent expenditures to replace a sitting state supreme court justice, Justice McGraw, with a new justice preferred by Blankenship, Brent Benjamin. Blankenship's spending in the race was extensive, constituting more than the total amount spent by the campaign committees of both candidates combined.[230] Benjamin, Blankenship's preferred candidate, ended up winning the election by a narrow margin. When the Massey Coal appeal arrived at the state supreme court, Justice Benjamin refused to recuse himself and cast the deciding vote, in a 3-2 decision, overturning the damages award.[231] Caperton, the lead plaintiff, sued.

Caperton's argument was that Justice Benjamin's refusal to recuse himself violated his federal constitutional due process rights.[232] The case, consequently, did not directly involve the First Amendment. The question presented was not whether Blankenship could engage in his political activity, but rather whether his advocacy created the actuality or appearance of unconstitutional bias in Justice Benjamin, thereby requiring Justice Benjamin's recusal. But as the litigants and the Court realized, the underlying *factual* claim about the effect of independent expenditures on the elected officials who benefit from them was the same as that posed in First Amendment challenges to campaign finance regulations: given the contextual relationship between Justice Benjamin's institutional role as a judge and Blankenship's spending on his behalf, would Justice Benjamin feel *inappropriately* indebted to Blankenship for the three million dollars Blankenship expended to promote Justice Benjamin's election?[233]

Lawyers following the litigation understood the significance the case posed to the Court's campaign finance jurisprudence. Writing an amicus curiae brief on behalf of the Center for Competitive Politics in support of the respondents, Bradley A. Smith—long-time campaign finance

[228] *Id.* at 872.

[229] *Id.*

[230] *Id.* at 873.

[231] *Id.* at 873–74. The litigation history of this dispute is complex. Two justices recused themselves for reasons connected to Blankenship's involvement in the judicial election campaign, which is why it was heard before only five of the seven justices normally sitting on the court. *Id.* at 874–75.

[232] *Id.* at 873–74.

[233] *Id.* at 882–84.

regulation-foe and former-FEC Chairman[234]—argued that finding for Caperton would require overturning the Supreme Court's "longstanding jurisprudence that independent expenditures are not and cannot be corrupting."[235] There was no accusation of explicit quid pro quo corruption in the case, or any indication that Justice Benjamin received any personal (as opposed to political) benefit from Blankenship's independent expenditures. Instead, the benefit to Justice Benjamin, Smith argued, resulted only from the persuasive effect of Blankenship's advocacy on the choices made by voters. As Smith's brief put it: "Brent Benjamin did not 'get' $3 million. The most that can be said that he 'got' was elected, though this was necessarily the result of many factors, not the least of which were the intervening decisions of hundreds of thousands of West Virginia voters."[236]

The Brennan Center for Justice at New York University School of Law (the Brennan Center), writing an amicus curiae brief for the petitioner (arguing that recusal was necessary) likewise recognized the connection between the question presented and the Court's treatment of independent expenditures in campaign finance cases.[237] The Brennan Center, with several other institutional supporters of campaign finance regulations, pointed in their brief to the "pervasive" belief on the part of the public that campaign contributions "buy influence on the bench."[238] That most of Blankenship's spending came in the form of independent expenditures or contributions to PACs (rather than directly to Justice Benjamin's campaign committee) had only "marginal salience," the Brennan Center argued, when evaluating the "fundamental fairness concerns" at issue and the "overwhelming probability of bias" on the part of Benjamin, requiring recusal.[239] The question was thus presented squarely to the Supreme Court: would the Court agree with Caperton that large independent expenditures made on behalf of a state supreme court justice were likely to engender a constitutionally impermissible "debt of gratitude" in the elected official toward the individual who financed independent expenditures in support of his election?[240]

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[234] Brief for Center for Competitive Politics as Amicus Curiae Supporting Respondents at 1–2, *Caperton*, 556 U.S. 868 (No. 08-22) (arguing that recusal was not necessary).

[235] *Id.* at 6.

[236] *Id.* at 9.

[237] Brief for the Brennan Center for Justice at NYU School of Law et al. as Amicus Curiae Supporting Petitioners, *Caperton*, 556 U.S. 868 (No. 08-22) [hereinafter Brief for the Brennan Center].

[238] *Id.* at 12–13.

[239] *Id.* at 23–24 (citation omitted).

[240] *Caperton*, 556 U.S. at 882.

The Supreme Court ruled for the petitioners, holding that Justice Benjamin's refusal to recuse violated the federal constitutional right to due process. Justice Kennedy wrote the majority opinion. Justice Kennedy's opinion recognized that there was no allegation of a quid pro quo exchange between Blankenship and Justice Benjamin.[241] Justice Kennedy also recognized that Blankenship's expenditures benefited Justice Benjamin only because of the intervening choices made by West Virginia voters. As Justice Kennedy wrote, "[i]n the end the people of West Virginia elected [Justice Benjamin], and they did so based on many reasons other than Blankenship's efforts."[242] Nonetheless, Justice Kennedy went on, stating that due process requires recusal when the circumstances "offer a possible temptation" toward judicial bias.[243] In this case, he concluded, "the risk that Blankenship's influence engendered actual bias is sufficiently substantial that it 'must be forbidden if the guarantee of due process is to be adequately implemented.'"[244] Even in the absence of a quid pro quo, Blankenship's "extraordinary contributions" to Justice Benjamin's electoral efforts created a "serious, objective risk of actual bias."[245]

As the dissenting Justices pointed out, the majority reached this conclusion *despite* the fact that all but $1,000 of Blankenship's spending in support of Justice Benjamin was in the form of either independent expenditures or contributions to pro-Justice Benjamin PACs.[246] The bulk of Blankenship's spending, in other words, was not put under the control of Justice Benjamin or his campaign committee. Notably, though, this distinction between contributions and independent expenditures, usually so important in campaign finance cases, seemed of only minimal importance to *any* of the justices in *Caperton*. The Justices in the majority clearly regarded it as irrelevant to their determination that there was a constitutionally unacceptable risk that Justice Benjamin's sense of gratitude for Blankenship's expenditures would create the appearance or actuality of bias.[247] But even Chief Justice Roberts's principal dissent directed most of its criticism toward what the dissenters saw as the expanded and unmanageable recusal standard adopted by the majority, rather than the purportedly important distinction between contributions

241 *Id.* at 886–87.

242 *Id.* at 884. This distinction is key to understanding why the appropriate remedy for this manifestation of possible corruption was a recusal rather than prohibiting the political activity at issue.

243 *Id.* at 885 (quoting Tumey v. Ohio, 273 U.S. 510, 532 (1927)).

244 *Id.* (quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975)).

245 *Id.* at 886.

246 *Id.* at 900–01 (Roberts, C.J., dissenting).

247 *Id.* at 882 (majority opinion).

and independent expenditures.[248] Even in the portion of the dissent that did address the issue, Chief Justice Roberts did not assert that Blankenship's expenditures would not create a feeling of indebtedness or gratitude in Justice Benjamin. Instead, he argued only that the Court had previously held that independent expenditures are not controlled by candidates and therefore are *less* valuable to them than direct contributions.[249]

As many scholars have pointed out, *Caperton*, like *Bluman*, seems to be in significant tension with *Citizens United*.[250] Election law scholar Richard Hasen highlights the decision in his seminal article, Citizens United *and the Illusion of Coherence*.[251] As Hasen points out, the Court in *Citizens United* rejected each of the arguments that could have supported the *Caperton* corruption decision rationales: the anti-distortion rationale (that spending unconnected to underlying support for the ideas asserted distorts democratic discourse); the actual corruption rationale (that the beneficiary of independent spending would feel improperly indebted to the spender in a potentially corrupting way); and the appearance of corruption rationale (that the risk of the appearance of improper indebtedness warrants regulation even in the absence of actual corruption). Hasen speculates that perhaps Justice Kennedy (the sole Justice in the majority in both cases) "does not quite believe" the sweeping statements about the effect of independent spending on corruption made by the Court in *Citizens United*. Alternatively, he posits that Justice

248 This concern about the need for "bright-line" tests runs throughout the Court's campaign finance jurisprudence. In *Buckley*, the Court was quite clear that the distinction between express and issue advocacy was driven by the need for a bright-line test rather than any judicial illusion that "issue" advocacy could not be used to influence voters as effectively as "express" advocacy. Buckley v. Valeo, 424 U.S. 1, 42–47 (1976). Similarly, in *Citizens United*, Justice Kennedy's majority opinion rejected the dissenters' reliance on an undue "influence theory" to prohibit corporate expenditures as "unbounded" and "susceptible to no limiting principle." Citizens United v. FEC, 558 U.S. 310, 359 (2010) (quoting McConnell v. FEC, 540 U.S. 93, 296 (2003) (Kennedy, J., concurring in part and dissenting in part)). Foreign financing bans present no similar problem—once the constitutionally required risk of situationally specific quid pro quo corruption is established—because, in most situations, source bans themselves provide a "bright-line" test. Domestic subsidiaries of international corporations present a special and more complicated case, *see* Matt A. Vega, *The First Amendment Lost in Translation: Preventing Foreign Influence in U.S. Elections After* Citizens United v. FEC, 44 LOY. L.A. L. REV. 951 (2011), but foreign financing bans are, in most cases, fairly clear in their coverage.

249 *Caperton*, 556 U.S. at 900–01 (Roberts, C.J., dissenting).

250 Samuel P. Siegel, Comment, *Reconciling* Caperton *and* Citizens United*: When Campaign Spending Should Compel Recusal of Elected Officials*, 59 UCLA L. REV. 1076, 1102 (2012) (noting that *Caperton* and *Citizens United* "appear to be in considerable tension with one another" at first glance); *see also* Adam Liptak, Caperton *After* Citizens United, 52 ARIZ. L. REV. 203, 203 (2010) (noting that the two cases are "in some ways hard to reconcile").

251 Richard L. Hasen, Citizens United *and the Illusion of Coherence*, 109 MICH. L. REV. 581 (2011).

Kennedy may believe that the role of elected judges is different than that of elected representatives.[252]

Contextualizing the corruption question presented in *Caperton* in light of the deep doctrinal dive done above allows us to see a third alternative: *Citizens United* and *Caperton* are not as contradictory as they first appear because *Citizens United* did not assert that independent expenditures cannot in fact engender feelings of indebtedness and gratitude. Rather, it held that such feelings are appropriate, not corrupting, in the context of the duties elected representatives owe their constituents. When such representatives respond to their donors with this type of gratitude, consequently, they are not acting corruptly; they are acting in accordance with their institutional role relative to the political spender. Elected judges, however, have a different institutional role, meaning the same feelings of indebtedness and ingratiation when engendered in them do pose an unacceptable risk that their use of judicial power will be corrupted by the exact same type of spending.[253]

As we saw with the Hatch Act cases, when viewed this way, *Caperton*'s reasoning does not conflict with *Citizens United* at all. Instead, the majority opinion in *Caperton* fits comfortably within the Court's other jurisprudence, by recognizing the validity of regulations addressed at preventing the risk that public officials will corruptly use their public power in ways inappropriate to their particular institutional duties relative to the proposed speaker. This has nothing to do with fears that the speech will somehow "corrupt" voters or the political process. Rather, as the Brennan Center's amicus curiae brief in *Caperton* put it:

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252 *Id.* at 613–15.

253 *See, e.g.*, Jacob Eisler, McDonnell *and Anti-Corruption's Last Stand*, 50 U.C. DAVIS L. REV. 1619, 1639 (2017) (noting the "role differentiation" between judges and elected officials); *see also* Williams-Yulee v. Fla. Bar, 575 U.S. 433, 445 (2015) (recognizing a state's compelling interest in prohibiting judicial candidates from personally soliciting campaign funds to protect the integrity and appearance of the judiciary's impartiality).

> Elected legislators are expected to serve interest-group constituencies, including contributors. The representative branches function best when officials are lobbied by contributors and non-contributors alike. Judges, including elected judges, are different in constitutionally salient ways. Judges are responsible for the fundamental promise of fair, impartially-decided cases. Judges function properly when they are "lobbied" only within the structured adversarial process and solely on the basis of law—not on the basis of personal, financial, or electoral interests. Everyone suffers when a judicial decision reinforces suspicions that the biggest donor, not the best case, wins.[254]

C. *Corruption in the Context of Foreign Financing*

The examples above illustrate the Supreme Court's acceptance of several propositions: (1) independent expenditures can in fact engender feelings of gratitude and ingratiation in the elected officials who benefit from them, even if this effect is less than in the case of direct contributions; (2) because this type of responsiveness does not constitute the misuse of public power in electoral politics, these feelings of ingratiation and indebtedness are not corrupting when the beneficiaries are elected representatives, and therefore preventing them cannot support restrictions on political speech; (3) but when political speech *does* facilitate the misuse of public power by public officials considered in the context of their particular duties and relationship to the "speaker," the government's anti-corruption interest can be sufficiently strong to support restrictions on some political activities.

We can now see how failure to properly contextualize the anti-corruption interest underlying foreign financing bans has cast unnecessary doubt on the constitutional validity of current prohibitions on the foreign financing of independent expenditures. The interest at stake in these prohibitions is not the constitutionally insufficient goal of preventing "corruption" of the political process by exposing Americans to disfavored speech, but rather the constitutionally compelling interest in preventing the corrupt use of public power by elected officials. And the Supreme Court has not held that independent expenditures do not engender feelings of ingratiation and indebtedness in those who benefit from them—only that those feelings are an appropriate form of responsiveness in electoral politics and therefore are not corrupting when

[254] Brief for the Brennan Center, *supra* note 237, at 20–21.

formed between officials who are supposed to be responsive in this way and the people to whom they are supposed to be responsive.

Thus, *Bluman* is unconvincing, not because it reaches the wrong result but because it uses the wrong framework.[255] *Bluman* framed foreign funding bans as being about protecting voters from foreign influence. Like Justice Black's dissent in *Mitchell*, this fails to correctly contextualize the corruption concerns primarily underlying these bans. But the historical record shows clearly that concerns about the corrupting influence of foreign election activity *on public officials* have deep roots in our constitutional regime and were the dominant concerns underlying the foreign financing prohibitions in current law. Foreign financing prohibitions are not designed to prevent corruption of American voters; they exist to prevent the corrupt use of public power by public officials. A review of the evolution of restrictions on foreign spending in domestic elections demonstrates the long recognition, by Congress and the courts, that foreign financing bans were enacted to prevent this same type of risk.

1. The Founders' Fears

As Professor Matt Vega has scrupulously documented, the founding generation was deeply fearful that foreign interests would corrupt the new nation's public officials.[256] James Madison argued that a stronger national government was necessary to "secure the Union against the influence of foreign powers over its members."[257] Alexander Hamilton worried that members of the Senate might be willing to "prostitut[e] their influence in that body as the mercenary instruments of foreign corruption," and that republics "afford[] too easy an inlet to foreign corruption."[258] John Jay was concerned that elected officials might use unconstrained power to

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[255] Bluman v. FEC, 800 F. Supp. 2d 281, 288 (D.D.C. 2011). Commentators have fallen into a similar trap. *See, e.g.*, Massaro, *supra* note 127, at 666 (noting that upholding the foreign funding ban would require the Supreme Court to ignore *Citizens United* and its "soaring rhetoric about the sophistication of American voters"); James Ianelli, *Noncitizens and* Citizens United, 56 LOY. L. REV. 869, 878 (2010) (describing the foreign independent expenditure ban as aiming to "prevent foreign speech from entering the United States and influencing voters in federal elections"); Joseph Thai, *The Right to Receive Foreign Speech*, 71 OKLA. L. REV. 269, 294–95 (2018).

[256] Vega, *supra* note 248, at 960–62.

[257] *Id.* at 960 (emphasis added) (quoting James Madison, *Opposition to the New Jersey Plan (June 19)*, *in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES: THE CLASHES AND THE COMPROMISES THAT GAVE BIRTH TO OUR FORM OF GOVERNMENT 79, 83 (Ralph Ketcham ed., 1986)).

[258] *Id.* at 961 (first quoting THE FEDERALIST NO. 66, at 435 (Alexander Hamilton); and then quoting STEPHEN MILLER, SPECIAL INTEREST GROUPS IN AMERICAN POLITICS 297 (1983)).

corruptly enter into treaties to advance their private interests.[259] These concerns were not casual.[260] As Hamilton wrote in Federalist 68:

> Nothing was more to be desired than that every practicable obstacle should be opposed to cabal, intrigue, and corruption. These most deadly adversaries of republican government might naturally have been expected to make their approaches from more than one quarter, but chiefly from the desire in foreign powers to gain an improper ascendant in our councils.[261]

This concern is most plainly manifested in the Emoluments Clause, which prohibits any person holding an "[o]ffice of [p]rofit or [t]rust" from accepting any present of any kind from a foreign state.[262] Notably, this clause does not just prohibit bribery; it eliminates the risk of unconstitutional influence by prohibiting entirely the acceptance of unauthorized gifts, regardless of any expectation or evidence of a quid pro quo. As U.S. Supreme Court Justice Story wrote almost 200 years ago, the Emoluments Clause "is founded in a just jealousy of foreign influence of every sort."[263]

The fear of foreign influence of public officials was not only expressed in the Emoluments Clause, however. It also underlies the

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259 *Id.* at 962 (citing THE FEDERALIST NO. 64 (John Jay)).

260 Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 361 (2009) ("[D]elegates were deeply concerned that foreign interests would try to use their wealth to tempt public servants and sway the foreign policy decisions of the new government . . . ."). Professor Seth Tillman has questioned the scope of Professor Teachout's conclusions on this point. *See generally* Seth Barrett Tillman, *The Original Public Meaning of the Foreign Emoluments Clause: A Reply to Professor Zephyr Teachout*, 107 NW. U. L. REV. COLLOQUY 180 (2013).

261 THE FEDERALIST NO. 68 (Alexander Hamilton).

262 U.S. CONST. art. I, § 9, cl. 8.

263 Ciara Torres-Spelliscy, *From a Mint on a Hotel Pillow to an Emolument*, 70 MERCER L. REV. 705, 713 (2019) (quoting 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES: WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES, BEFORE THE ADOPTION OF THE CONSTITUTION 243, § 1352 (3d ed. 1858)); *see also* Meredith M. Render, *Fiduciary Injury and Citizen Enforcement of the Emoluments Clause*, 95 NOTRE DAME L. REV. 953, 960 n.20 (2020) ("Pinkney urged the necessity of preserving foreign Ministers [and] other officers of the U.S. independent of external influence and moved to insert . . . [the Emoluments Clause]." (alterations in original) (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 389 (Max Farrand ed., rev. ed. 1937))); NORMAN L. EISEN, RICHARD PAINTER & LAURENCE H. TRIBE, GOVERNANCE STUD. AT BROOKINGS, THE EMOLUMENTS CLAUSE: ITS TEXT, MEANING, AND APPLICATION TO DONALD J. TRUMP 10 (2016), https://www.brookings.edu/wp-content/uploads/2016/12/gs_121616_emoluments-clause1.pdf [https://perma.cc/B9AZ-UCBV] ("Familiar with the corruption of King Charles II of England by lavish pensions and promises from King Louis XIV, the Framers manifestly did not see national leaders as immune from foreign influence.").

residency requirement for federal officeholders,[264] the Elections Clause,[265] the impeachment clauses, the treaty-making and appointments provisions,[266] and parts of Article II regarding the structure of the Executive branch.[267] The FARA, FECA, and BCRA provisions regarding foreign financing of election activity make clear that these regulations were also concerned with this corruption of public officials. Current events demonstrate that the risk remains and is difficult to address in other ways.

2. Foreign Financing Bans and the Corruption of Elected Officials

a. Foreign Agents Registration Act

As noted above, FARA was enacted in 1938 in response to concerns about the distribution of Nazi propaganda.[268] Later amendments, however, shifted the focus of the statute as foreign efforts to influence domestic elections were seen as shifting away from efforts to influence public opinion and toward efforts to influence elected officials.[269] This can be seen both in the text of the 1966 amendments (discussed above), and also in the remedies chosen by Congress in response to each distinct threat. When the original purpose of FARA, in 1938, was to "publicize the

264 THE FEDERALIST NO. 62 (James Madison) (justifying the nine-year residency requirement for U.S. senators on the grounds that this was a sufficient amount of time to prevent the creation of a "channel for foreign influence on the national councils").

265 THE FEDERALIST NO. 59 (Alexander Hamilton) (explaining that Congress needs to be the ultimate authority regarding the time, place, and manner of elections for the House of Representatives, in part because of the risk that state legislatures could be vulnerable to the "intrigues of foreign powers"). The Elections Clause states: "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." U.S. CONST. art. I, § 4, cl. 1.

266 THE FEDERALIST NO. 66 (Alexander Hamilton) (explaining the two-thirds requirement in the Senate for the ratification of treaties as protection against the "few leading individuals in the [S]enate, who should have prostituted their influence in that body as the mercenary instruments of foreign corruption" being able to consent to an "improper treaty").

267 THE FEDERALIST NO. 68 (Alexander Hamilton) (justifying the electoral college method of choosing the President as useful in stymying the "desire in foreign powers to gain an improper ascendant in our councils"); *see also* Teachout, *supra* note 260, at 366 ("The Framers gave the Executive the treaty-making power after much disturbed debate. The delegates were concerned that the short executive tenure could lead Presidents to be seduced by promises of future opulence by foreign powers, and give over their country for their own advantage."); THE FEDERALIST NO. 75 (Alexander Hamilton) (defending the President as equally able, as a hereditary monarch, to void "any material danger of being corrupted by foreign powers" and also noting the risk that an "ambitious man might make his own aggrandizement, by the aid of a foreign power, the price of his treachery to his constituents").

268 AM. L. DIV., *supra* note 19, at 3–5.

269 *Id.* at 9–11.

nature of subversive or other similar activities" to deter the spread of foreign propaganda among American voters, the statutory remedy chosen by Congress and upheld by the Supreme Court was disclosure, not prohibition.[270] But when the perceived danger shifted in 1966 to foreign influence on elected officials rather than voters, the law shifted as well, choosing prohibition rather than disclosure as the contextually appropriate remedy for this new threat.

The Court's decisions addressing FARA, *Viereck v. United States*[271] and *Meese v. Keene*,[272] demonstrate this. *Viereck*, decided in 1943, was the Court's first opportunity to review FARA. As required by the Act, the petitioner, in 1940, had registered as an agent of the German government.[273] In several supplemental disclosure statements, he disclosed his work on behalf of his German principal in regard to the distribution in the United States of various communications made in the course of that work, including preparing and distributing editorials, pamphlets, and a book denouncing the British war efforts.[274] It was later revealed that he had done significant additional work promoting German interests in the war and denigrating those of the British, including writing and distributing speeches for members of Congress.[275] He defended his nondisclosure of these additional efforts by claiming that they were done on his own behalf, rather than in the course of his work as an agent of a foreign entity, and therefore not subject to FARA's disclosure rules.[276]

At the time of his activities, the statute was unclear as to whether disclosure of this type of purportedly personal activity was required—the question presented in the case was whether the text of the original law allowed the Secretary of State to require the disclosure of all political activities *while* a registered agent or only *as* a registered agent. The 1942 amendments to the Act clearly adopted the more expansive interpretation,[277] but the *Viereck* majority held that the law, as in effect when the petitioner made his disclosures, did not permit the Secretary to require any disclosures other than those he had made. In doing so, however, the Court cast no doubt on the constitutionality of the later,

270 Robert G. Waters, Note, *The Foreign Agents Registration Act: How Open Should the Marketplace of Ideas Be?*, 53 MO. L. REV. 795, 799 (1988).

271 318 U.S. 236 (1943).

272 481 U.S. 465 (1987).

273 *Viereck*, 318 U.S. at 239.

274 *Id.* at 239–40.

275 *Id.*

276 *Id.* at 240.

277 *Id.* at 243, 245–47.

more expansive version of the statute;[278] it held only that those broader disclosure requirements could not be applied ex post facto to the petitioner.[279]

The dissent, written by Justice Black and joined by Justice Douglas, makes this point clear. Justices Black and Douglas, the Court's renowned First Amendment warriors, believed the Court erred only in not permitting the expanded disclosure requirement to have been applied to the petitioner's full range of activities. Justice Black reached this conclusion by recognizing the important role disclosure plays in facilitating First Amendment values. FARA, Justice Black wrote, was intended to enable the "proper evaluation of political propaganda emanating from hired agents of foreign countries."[280] As such, he said, it rests on the "fundamental constitutional principle that our people, adequately informed, may be trusted to distinguish between the true and the false" and ensure the American people will not be "deceived by the belief that the information comes from a disinterested source."[281] *Viereck*, then, stands for the principle that when the political activity of foreign nationals is regulated for the purpose of protecting the public, disclosure is an appropriate, and indeed ideal, remedy.

This same theme was reiterated more than forty years later when the Court again examined FARA in *Meese*.[282] The dispute in *Meese* was about whether FARA's requirement that certain foreign-sourced material be labeled as "political propaganda" unconstitutionally chilled free expression. The challenge was brought by a U.S. citizen who wanted to show Canadian films distributed in the United States by a registered agent of the Canadian government. The films met the statutory definition of "political propaganda" and therefore under FARA had to be labeled as such. The petitioner argued that "political propaganda" is a pejorative term and that applying the label to the films at issue would harm his reputation and therefore dissuade him from showing the films. The majority opinion, written by Justice Stevens, disagreed. FARA required registration and disclosure of agents of both friendly and unfriendly nations, and defined "political propaganda" as including not just

[278] The Court said:

> While Congress undoubtedly had a general purpose to regulate agents of foreign principals in the public interest by directing them to register and furnish such information as the Act prescribed, we cannot add to its provisions other requirements merely because we think they might more successfully have effectuated that purpose.

Id. at 243–44.

[279] *Id.* at 247.

[280] *Id.* at 251 (Black, J., dissenting).

[281] *Id.*

[282] Meese v. Keene, 481 U.S. 465 (1987).

misleading advocacy but also "advocacy materials that are completely accurate and merit the closest attention and the highest respect."[283] The petitioner, therefore, was incorrect to assume that the public would find the term inherently pejorative.[284] In reaching this conclusion, the Court confirmed that the rationale underlying the registration provisions of FARA was to "requir[e] public disclosure by persons engaging in propaganda activities" so that "the people of the United States may be informed of the identity of such persons and may appraise their statements and actions in the light of their associations and activities."[285] A constitutional mandate requiring the *withholding* of this information, not its statutorily mandated disclosure, would be what would "paternalistically" prevent American voters from evaluating its worth for themselves.[286]

These cases demonstrate that FARA's earliest restrictions on the political activities of foreign nationals were aimed at the effect those activities might have on public opinion and the choices made by American voters. In this context, FARA's chosen remedy—disclosure of the foreign source of the materials at issue—was repeatedly upheld by the Court as not only permissible under the First Amendment but as affirmatively facilitating the values underlying it. Nothing in these cases, however, addresses the question of what restrictions might be necessary and constitutionally appropriate to combat the very different corruption concern regarding the risk that foreign-funded political activity might corruptly influence elected officials. This question came into focus only later, when the 1966 amendments to FARA shifted congressional concern to the corrupting effect of foreign political spending on members of Congress. As noted above, the 1966 amendments were triggered by a series of scandals revealing the extent to which foreign entities, including foreign governments, were making campaign contributions to congressional candidates.[287] Recognizing that foreign efforts to influence

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[283] *Id.* at 467, 469–72, 476–77.

[284] Justice Stevens was correct about the intent of the 1966 amendments to the statute, as discussed in the 1977 Congressional Research Service Report. *See* AM. L. DIV., *supra* note 19, at 13 (citing Claude-Leonard Davis, Note, *Attorneys, Propagandists, and International Business: A Comment on the Foreign Agents Registration Act of 1938*, 3 GA. J. INT'L & COMPAR. L. 408, 427 (1973)) ("The changes in focus already accomplished by the 1966 Amendments can be significantly advanced by simple language changes within the law to eliminate pejorative connotations.").

[285] *Meese*, 481 U.S. at 469 (quoting Foreign Agents Registration Act of 1938, Pub. L. No. 75-532, 56 Stat. 248, 248–59 (codified as amended at 22 U.S.C. §§ 611–616)).

[286] *Id.* at 481–82.

[287] AM. L. DIV., *supra* note 19, at 169, 174; *see also* Jeffrey K. Powell, Comment, *Prohibitions on Campaign Contributions from Foreign Sources: Questioning Their Justification in a Global Interdependent Economy*, 17 U. PA. J. INT'L ECON. L. 957, 960 (1996) (describing this shift and its causes).

U.S. policy had shifted from influencing voters to directly influencing legislators, the focus of Congress shifted as well by prohibiting foreign agents from contributing money or any other thing of value in connection with an election for public office.[288] The appropriateness of prohibitions as the necessary remedy for this distinct corruption risk is discussed in Part III.

b. Federal Election Campaign Act

The expanded prohibitions on foreign financing of election activities, included in the 1974 amendments to FECA, likewise rested on concerns about foreign influence on public officials rather than voters. As discussed above, they resulted from the revelations of the Watergate investigation, which revealed that President Nixon had accepted more than ten million dollars in overseas donations during his 1972 re-election campaign, including allegedly from Mexican, Iranian, and French interests.[289] Senator Lloyd Bentsen (D-Tex.), who introduced the 1974 amendments, was clear about their anti-corruption purpose:

> Mr. President, all 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 banks; and we have heard allegations of concessions being made by the Government to foreign contributors.[290]

"Many in this country," Bentsen concluded, "have expressed concern over the inroads of foreign investment in this country . . . . Is it not even more important to try to stop some of these foreigners from trying to control our politics?"[291] Additional amendments added in 1975 clarified the statutory text to make clear that direct contributions by foreign nationals (not just those made on behalf of foreign principals) were also prohibited. These restrictions were subsequently re-codified again in the 1976 amendments to the same statute, which formed the version of the statute addressed by the Supreme Court in *Buckley v. Valeo*.[292]

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288 Powell, *supra* note 287, at 961.

289 *Id.* at 961 n.20.

290 AM. L. DIV., *supra* note 19, at 174.

291 *Id.* at 175.

292 *See id.* at 29. *See generally* Buckley v. Valeo, 424 U.S. 1 (1976).

c. Bipartisan Campaign Reform Act

Concerns about foreign financing of election activities were raised yet again in the aftermath of the 1996 elections, when the Senate Governmental Affairs Committee undertook a special investigation into "illegal or improper activities in connection with 1996 federal election campaigns."[293] The Committee, chaired by Senator Fred D. Thompson (R-Tenn.), traced the history of the foreign funding ban back through FARA and FECA, including how those laws since 1966 had explicitly banned foreign financing of election activity.[294] The Report then went on to explain how developments since the last major FECA amendments, including the unlimited ability of political parties to raise soft money[295] to spend on "issue ads" by avoiding the use of *Buckley*'s "magic words," had changed the legal landscape of campaign financing and threatened to undermine the earlier goals of reforms.[296]

To the Republicans concerned about the fundraising tactics used by President Clinton's election team, these concerns most certainly included foreign financing. A "central focus of the Committee's investigation," the Report stated, "was the manner in which illegal foreign money made its way into the federal election process."[297] Citing the 1966 FARA amendments, the Report noted that current law "explicitly makes it illegal for any foreign national to contribute to any federal or non-federal election in the United States, either directly or indirectly."[298] Nonetheless, the Committee reported that such financing occurred. "[T]he DNC's obviously desperate and aggressive search for large contributions" led donors, including foreign nationals, to believe that their contributions were "more likely than ever to lead to personal gain."[299] Members of the House also saw this as a national security matter, referring to voting for the foreign funding ban as "stand[ing] up for national security."[300]

The Committee backed up these assertions with numerous examples of foreign nationals receiving benefits in apparent exchange for access or influence over the Clinton Administration. These examples included donations to the DNC made by a South Korean businessman hoping the

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293 S. REP. NO. 105-167, pt. 1, at 11 (1998).

294 *Id.* pt. 3, at 4471, 4480 (presenting the Committee's proposed reforms to then-existing campaign finance regulations).

295 *See id.* at 4472–73.

296 *Id.* at 4462 ("This is an area of the law where vagueness, court interpretations, and FEC guidance have encouraged those active in campaigns to avoid the restrictions of the system in a manner that the authors of the FECA could not have possibly foreseen.").

297 *Id.* at 4471.

298 *Id.*

299 *Id.* at 4471–72.

300 148 CONG. REC. H448 (daily ed. Feb. 13, 2002) (statement of Rep. J.D. Hayworth).

administration would support his business activities in the United States,[301] involvement of the Chinese government in "funding, directing, or encouraging" foreign contributions,[302] and the strawman donations received by Vice President Al Gore during a fundraising event at a Buddhist temple.[303] These and similar incidents, the Committee reported, demonstrated "the DNC and White House's reckless fundraising disregarded," in the Committee's words, "an obvious risk—the danger that powerful foreign nationals, or even governments, would attempt to buy influence through campaign contributions."[304]

This "flood of foreign money," the Committee noted, may have "permitted interested foreign parties to influence the U.S. political process," including by using foreign nationals as conduits to promote the interests of foreign governments and acquire influence over political appointments, foreign policy and national security, and U.S. trade policy.[305] The Committee had good reason for these concerns. It found that money was funneled to the DNC from individuals close to the foreign governments, including at least one agent of the Chinese government who subsequently attempted to hide that relationship.[306] Another donor was connected to Chinese intelligence,[307] while yet another "may possibly have had a direct financial relationship" with the Chinese government.[308] These efforts, the Committee concluded, were part of an effort by China to influence U.S. policy toward the nation, specifically through influencing U.S. politics by financing the election campaigns of public officials.[309]

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301 S. REP. NO. 105-167, pt. 3, at 4472 (1998).

302 *Id.* pt. 1, at 33–34.

303 *Id.* at 38. The Committee detailed what it believed donors expected in return for their financing, including political appointments, *see id.* at 48, access to high level officials for themselves and their associates, *see id.* pt. 2, at 2504, changes in U.S. foreign policy, *see id.* at 2907, policy decisions advantageous to the donor's business interests, *see id.* pt. 3, at 4472, and security clearances. *See id.* at 4503.

304 *Id.* pt. 1, at 33.

305 *Id.* at 46–50.

306 *Id.* at 46–47 ("The Committee has learned that Maria Hsia has been an agent of the Chinese government, that she has acted knowingly in support of it, and that she has attempted to conceal her relationship with the Chinese government.").

307 *Id.* at 47 ("The Committee has further learned from recently-acquired information that James and Mochtar Riady have had a long-term relationship with a Chinese intelligence agency.").

308 *Id.*

309 *Id.* The challenges of determining whether a foreign national is working on behalf of a foreign government are made even more complicated by the complexity of international banking, transnational corporate ownership, and the entanglement of many governments with their domestic banks. *See, e.g.*, Jesse Drucker, *Kremlin Cash Behind Billionaire's Twitter and Facebook Investments*, N.Y. TIMES (Nov. 5, 2017), https://www.nytimes.com/2017/11/05/world/yuri-milner-

The Committee saw this as posing an unacceptable risk of corruption even when the financing was not put under the direct control of the candidate. The DNC, the Committee noted, was not formally under the control of Clinton's campaign committee but, like Super PACs and other "independent" groups today, was nonetheless deeply entwined with the President's re-election efforts.[310] It was operated by Clinton loyalists, who hatched the (then) novel plan to use the new legal categories created by *Buckley* and subsequent Supreme Court decisions to enable the DNC to finance issue ads with unregulated soft money raised by selling access to members of the Administration.[311] The corrupting potential of this scheme was clear to the Committee: in the words of one witness, "the person solicited for a $250,000 soft money contribution would logically anticipate something in return."[312]

The result of the Committee's extensive investigation was BCRA. BCRA Title 1, subtitled "Reduction of Special Interest Influence," prohibited political parties and candidates from soliciting or accepting soft money, thus closing that avenue for foreign nationals (and others) hoping to gain access to, and influence with, public officials.[313] Determined to close all the loopholes identified by the Thompson Committee, BCRA also changed the prohibition on foreign financing of political activity to include for the first time an explicit prohibition not just on foreign contributions but also on foreign funding of expenditures and independent expenditures. As explained in the Federal Register, in a provision titled "'Strengthening Foreign Money Ban,' Congress amended [52 U.S.C. § 30121] to further delineate and expand the ban on contributions, donations, and other things of value," by explicitly prohibiting foreign financing of contributions, electioneering communications, expenditures, and independent expenditures.[314]

facebook-twitter-russia.html (last visited Dec. 26, 2022) (detailing, among other things, the creation in the United States of Russian billionaire investor Yuri Milner's apparent shell corporation in the lead-up to the 2016 election, the Russian government's ownership of sixty-one percent of Russia's second largest bank, and the inclusion of an intelligence officer from the former East Germany on the bank's supervisory board).

310 S. REP. No. 105-167, pt. 1, at 111, 117 (1998) (describing the "special relationship" between the DNC, White House, and the Clinton/Gore 1996 campaign committee).

311 *Id.* at 58–60, 65.

312 *Id.* pt. 3, at 4472 (quoting the testimony of Ann McBride from Common Cause).

313 Congress later amended BCRA to clarify that the foreign financing prohibition also applied to state and local elections, but specifically declined to extend it to referendum campaigns, again demonstrating the congressional focus on candidate, not voter, corruption. *See* Broussard Statement of Reasons, *supra* note 150.

314 Contribution Limitations and Prohibitions, 67 Fed. Reg. 69928, 69940 (Nov. 19, 2002) (to be codified at 11 C.F.R. pts. 102, 110). "Electioneering communications" were newly defined in BCRA as broadcast messages clearly identifying a candidate for federal election distributed in the relevant

It is these prohibitions that were at issue in *Bluman*. Unlike earlier versions of FARA and other similar laws designed to protect voters from persuasive, if unpalatable, speech, these restrictions on foreign election activities are squarely aimed at preventing the corruption of public officials. These restrictions are perfectly constitutional, then, because the sense of indebtedness and ingratiation that even independent expenditures can engender in their beneficiaries poses a risk of corruption of public officials when done by foreign entities.

III. FOREIGN AFFAIRS, NATIONAL SECURITY, AND THE APPROPRIATENESS OF PROPHYLACTICS

At this point, this Article has demonstrated three things. First, the Court has never said that independent expenditures do not *in fact* engender feelings of obligation and indebtedness on the part of the elected officials who benefit from them. Rather, the Court has leaned into that sense of obligation as a valid part of democratic self-government. There is, however, no similar value to self-government when elected officials feel obligated to foreign financers. Indebtedness to foreign actors, in sharp contrast to the sense of obligation examined in cases like *Citizens United*, has been seen as dangerously corrupting since the nation's founding. Second, as we have seen in situations like those presented in *Caperton* and the Hatch Act cases, the Supreme Court has contextualized its understanding of the risk of constitutionally compelling corruption. Elected judges, for example, have a different contextual relationship with their voters and different institutional duties than do elected representatives, and therefore the risk of constitutionally salient corruption posed by independent expenditures is different for judges than for elected representatives. Finally, we have seen that current restrictions on foreign financing of election activity clearly target this latter type of corruption, the risk that elected officials will inappropriately reward foreign financial supporters, rather than some vague idea that foreign-financed speech poses a unique risk of "corrupting" voters or distorting public discourse—rationales that the contemporary Court has consistently rejected as constitutionally sufficient reasons to regulate election activity.

This alone is sufficient to support the compelling interest in regulating the political contributions and express expenditures of foreign

media market within thirty days of a primary election or sixty days of a general election. 52 U.S.C. § 30104(f)(3). Defining a "thing of value" has been more challenging for courts. *See generally* Anthony J. Gaughan, *Trump, Twitter, and the Russians: The Growing Obsolescence of Federal Campaign Finance Law*, 27 S. CAL. INTERDISC. L.J. 79, 105–07 (2017).

funders. The entanglement of foreign election activity with national security and foreign affairs, however, provides yet an additional reason it is appropriate for Congress to address this risk with broadly prophylactic remedies and why the Court should be extremely cautious about replacing its judgment for those of the elected branches in this area. Simply put, the Justices do not have the institutional capacity to investigate or assess the type of corruption risk posed by foreign financing of election-related activities or how to best remedy it, and should not attempt to do so.[315] "Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention."[316] Instead, "[t]he Constitution primarily delegates the foreign affairs powers 'to the political departments of the government . . . ,' not to the Judiciary."[317] This is prudent, because "[d]ecisionmaking in this area typically is highly political" as well as "delicate" and "complex."[318] It also is necessary, because issues involving national security and foreign affairs often implicate "evolving threats in an area where information can be

315 These challenges were why Justice Black objected to his brethren's narrow reading of FARA in *Vierick v. United States*. 318 U.S. 236, 251–52 (1943) (Black, J., dissenting) ("As a practical matter, the very fact that in the instant case it is extremely difficult to determine with conviction which activities the petitioner carried on in his own behalf and which he carried on in behalf of Germany is reason enough for requiring him to report on both. The Act did not contemplate that a foreign agent could evade its terms by claiming that all unreported political activities, upon their discovery by this government, were undertaken on his own behalf.").

316 Haig v. Agee, 453 U.S. 280, 292 (1981).

317 Zivotofsky *ex rel.* Zivotofsky v. Clinton, 566 U.S. 189, 213 (2012) (Breyer, J., dissenting) (quoting Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948)); *see also* Bank Markazi v. Peterson, 578 U.S. 212, 234 (2016) (stressing that foreign affairs is a "domain in which the controlling role of the political branches is both necessary and proper"); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 412 (1964), *superseded by statute*, 22 U.S.C. § 2370(e)(2), *as recognized in* Fed. Republic of Ger. v. Philipp, 141 S. Ct. 703, 711 (2021) ("The courts whose powers to further the national interest in foreign affairs are necessarily circumscribed as compared with those of the political branches . . . ."); Sosa v. Alvarez-Machain, 542 U.S. 692, 727 (2004) (stating that the "potential implications for . . . foreign relations" in recognizing private causes of action for violations of international law "should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs"); United States v. Pink, 315 U.S. 203, 222–23 (1942) ("[T]he conduct of foreign relations is committed by the Constitution to the political departments of the Federal Government . . . the propriety of the exercise of that power is not open to judicial inquiry . . . ."); Kiobel v. Royal Dutch Petrol. Co., 569 U.S. 108, 124 (2013) ("[Judicial caution] guards against our courts triggering . . . serious foreign policy consequences, and instead defers such decisions, quite appropriately, to the political branches."); Ziglar v. Abbasi, 137 S. Ct. 1843, 1861 (2017) (stating that "[n]ational security . . . is the prerogative of the Congress and President, [and] [j]udicial inquiry into [this] realm raises 'concerns for the separation of powers in trenching on matters committed to the other branches'" (citation omitted) (quoting Christopher v. Harbury, 536 U.S. 403, 417 (2002))).

318 *Zivotofsky*, 566 U.S. at 213 (Breyer, J., dissenting) (quoting *Chi & S. Air Lines, Inc.*, 333 U.S. at 111).

difficult to obtain and the impact of certain conduct difficult to assess."[319] Thus, while courts need not abdicate their "judicial role" in such cases, their relative "lack of competence" makes "respect for the Government's conclusions . . . appropriate."[320]

Foreign financing of election activity raises all of these concerns in abundance. Imagine a scenario in which a foreign national finances millions of dollars in expenditures in support of the election of a U.S. presidential candidate. The candidate wins and proceeds to make a series of decisions favorable to the financier's country. Even if fully disclosed, how would the nation expose whether the President's actions constituted the type of corrupt foreign entanglements that so concerned the founding generation? How would we know whether the financier was working, officially or unofficially, for a foreign government? Or where the financier got the money used to pay for the expenditures? Can we ask the President whether he made an implicit or explicit promise in exchange for the expenditures? Can we determine whether the actions taken toward the financier's country were evidence of a quid pro quo or just things the President would have done regardless of the foreign expenditures? Can the President be forced to reveal conversations evidencing whether the expenditures were even in fact independent? More to the point, can we *make* the President, the State Department, the Joint Chiefs of Staff, or the CIA answer *any* of these questions, even in the rare situations where we know enough about the underlying scenarios to ask them?

As this Part illustrates, Congress and special investigators have struggled to get answers to questions like these, even when wielding the full power of the federal government and even when focused narrowly on specific acts of suspected corruption. The inability to do so, given the national security, foreign affairs, and executive privilege issues swirling around the questions they raised, is obvious. Congress was acutely aware of this when enacting the prohibitions. For instance, when enacting the original version of FARA, Congress stated that the law was necessary to "protect the national defense, internal security, and foreign relations of the United States."[321] This purpose was reaffirmed again in 1963, when chair of the Senate Foreign Relations Committee, Senator J.W. Fulbright (D-Ark.), noted the "increasing numbers of incidents involving attempts

319 Holder v. Humanitarian L. Project, 561 U.S. 1, 34 (2010); *see also* Zemel v. Rusk, 381 U.S. 1, 17 (1965) (noting the "changeable and explosive nature of contemporary international relations").

320 *Holder*, 561 U.S. at 34 (quoting Rostker v. Goldberg, 453 U.S. 57, 65 (1981)); *see also* Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1414 (2018) (Gorsuch, J., concurring in part) (advising judicial restraint when the "practical consequences" of judicial action "would likely involve questions of foreign affairs and national security—matters that implicate neither judicial expertise nor authority").

321 AM. L. DIV., *supra* note 19, at 6 (citing the original bill).

by agents of foreign principals to influence the conduct of U.S. foreign policy using techniques outside normal diplomatic channels," and again in 1976, when Congress amended the act to include the current prohibitions, noting that "the statute is tinged with overtones of national security."[322]

Experience has shown these concerns to be well warranted. The challenges inherent to investigating corruption in this context can be demonstrated by a review of three congressional efforts, spanning more than two decades, to use its investigatory powers to determine whether elected officials were corruptly influenced by specific incidents of foreign election activities.

A. *The Inadequacy of Congressional Investigations*

1. The Thompson Committee

The Thompson Committee issued its final report regarding the 1996 presidential election on March 10, 1998.[323] Its work, according to the final report, had been repeatedly stymied. It was unable to obtain information from the People's Republic of China, or from purportedly cooperative witnesses—indeed, many of the individuals the Committee sought information from had left the country.[324] Others explicitly refused to cooperate, claiming a Fifth Amendment right against self-incrimination.[325] Nonprofit entities defied subpoenas and made it otherwise impossible for the Committee to gather the information it sought.[326] The Committee also faced challenges in tracing the source of the financing they were investigating, noting that the "[money] trails wend their way from foreign countries through one bank account after another, ending up mainly in DNC coffers."[327]

322 *Id.* at 12, 131.

323 S. REP. NO. 105-167, pt.1 (1998).

324 *Id.* at 16–17, 46.

325 *Id.* at 46.

326 *Id.* at 3834–35 ("The Committee encountered substantial resistance to these subpoenas. Entirely apart from the ten individuals who fled the country or the thirty-five witnesses who invoked their Fifth Amendment right against self-incrimination, a large number of individuals who had been subpoenaed for depositions simply refused to appear or declined to answer substantive questions.").

327 *Id.* at 2503 ("Committee staff discovered a number of money trails that led from the DNC and other Democratic causes back overseas, and, particularly, to Greater China."); *see also id.* at 2504 ("Maria Hsia was involved in soliciting contributions to the DNC that were laundered through several Buddhist monks and may have derived from foreign sources.").

Domestic actors hindered the Committee's work as well. The final report accused the Clinton White House of "[s]low-walking" document production,[328] making broad claims of executive privilege,[329] and manipulating the timing of the release of the documents it did produce.[330] The Committee also reported that cooperation from some federal agencies was "spotty."[331] In addition to these problems, the Committee was unable, because of national security reasons, to fully reveal to the public even that information it managed to compile.[332] To even describe the "gaps" in the Committee's information, the report stated, could "lead to the inadvertent disclosure of certain sources and methods" used to obtain information about sensitive matters of foreign affairs.[333]

Given these concerns, the Committee felt compelled to conduct much of its investigation behind closed doors, because "[v]irtually all of the information gathered by the Committee was classified, much of it at top secret and compartmented levels."[334] It took further "extraordinary steps" of limiting access to the information it gathered, using secured facilities in its proceedings, and imposing numerous additional special restrictions on its work, as requested by U.S. intelligence agencies.[335] The result, according to the Committee, was that, because of the "sensitivity of the subject, the Committee has been unable to share with the American people most of the documentary or testimonial evidence" supporting its conclusions.[336]

The Thompson Committee report thus demonstrates the extraordinary challenges even the U.S. Senate faces when attempting to investigate the possibility that foreign financing has corruptly influenced the actions of elected officials. More recent events, involving the presidency of Donald Trump, provide even more justification for judicial caution in this area.

2. The Mueller Investigation

On July 13, 2018, Special Counsel Robert S. Mueller, III charged Russian Intelligence actors—the Main Intelligence Directorate of the

328 *Id.* at 4278.
329 *Id.* at 4281.
330 *Id.* at 4283–89.
331 *Id.* at 2501.
332 *Id.* at 2501–02.
333 *Id.* at 2501.
334 *Id.*
335 *Id.*
336 *Id.* at 2502.

General Staff (GRU)—for stealing and releasing emails of U.S. citizens for the purposes of interfering with the 2016 presidential election.[337] The indictment charged eleven named Russian GRU officers with knowingly and intentionally conspiring to "hack" into the computers of U.S. citizens and entities, stealing documents from those computers, and staging the release of the stolen documents to interfere with the election. Emails and documents stolen were from the DNC; the Democratic Congressional Campaign Committee; John Podesta, Chairperson of the Clinton campaign; and at least one congressional candidate (whose messages were shared with the candidate's opponent).[338] The stolen documents also included Democratic strategy documents related to the presidential campaign, donor records, and personally identifying information of more than 2,000 Democratic donors.[339] The GRU then staged the release of the stolen documents on an online webpage that received more than one million page views before being shut down in March 2017.[340]

According to the indictment, at least one individual involved in these events was "a person who was in regular contact with senior members of the presidential campaign of Donald J. Trump."[341] Communications between the GRU-controlled accounts, "Organization 1," and the individual in communication with the Trump campaign made clear that the stolen documents should be released strategically to harm Clinton. Communications between GRU-controlled accounts and the individual in contact with the Trump campaign included offers to help the campaign and discussions of the Democratic strategy documents.[342] More than 50,000 stolen emails and documents were ultimately released between the lead-up to the Democratic National Convention and Election Day.[343] A declassified version of the Intelligence Community Assessment (ICA) examining these events, released on January 6, 2017, reported the ICA's belief that "Russian President Vladimir Putin ordered an influence campaign" in the 2016 presidential election to "undermine public faith in the US democratic process, denigrate Secretary Clinton, and harm her electability and potential presidency."[344]

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337 Indictment, United States v. Netyksho, No. 18-cr-00215 (D.D.C. July 13, 2018).

338 *Id.* at 2, 15–16.

339 *Id.* at 10–11, 16.

340 *Id.* at 2–3, 6, 13–15, 17–19.

341 *Id.* at 16.

342 *Id.* at 16–18. "Organization 1" is widely assumed to be WikiLeaks. The U.S. Intelligence community reached conclusions similar to those eventually set out in the July 13, 2018, indictment. NAT'L INTEL. COUNCIL, INTELLIGENCE COMMUNITY ASSESSMENT: ASSESSING RUSSIAN ACTIVITIES AND INTENTIONS IN RECENT US ELECTIONS 2–3 (2017), https://www.dni.gov/files/documents/ICA_2017_01.pdf [https://perma.cc/N6PH-X52B].

343 Indictment, *supra* note 337, at 6, 19.

344 NAT'L INTEL. COUNCIL, *supra* note 342, at 1.

A former director of the Federal Bureau of Investigation (FBI), Mueller was appointed by the U.S. Department of Justice (DOJ) as a special counsel to investigate. Mueller was given a broad mandate, including the power to investigate not just foreign interference in the 2016 election, but also any links or coordination between Russian actors and the Trump campaign.[345] His final report (the Mueller Report) was released to the public in March 2019. He concluded that Russian actors, including Russian intelligence agents, financed and carried out a broad "active measures" campaign during the 2016 election.[346] These efforts included purchasing express expenditures promoting Trump and disparaging his general election opponent, Hillary Clinton.[347] Mueller also identified several links between the Trump campaign and the Russian government, and concluded that the campaign expected to benefit from information stolen and released as part of the Russian effort.[348] Despite documenting numerous contacts between members of the Trump family and campaign team, including offers of campaign assistance that the Trump team was "receptive" to, Mueller did not establish that any of the individuals closest to Trump conspired or coordinated with the Russian government in these efforts, in part because of uncertainty about whether they had the requisite knowledge of the criminal conspiracy in which the Russians were engaged.[349]

As special prosecutor, Mueller had the full force and authority of the FBI at his disposal. Yet his investigation, like that of the Thompson Committee, was stymied by unavailable witnesses, claims of executive privilege, and transnational financial dealings.[350] These challenges are evident throughout his final report, which is itself heavily redacted.[351] Indicted foreign nationals remained (and still remain) beyond the reach of U.S. judicial process.[352] Witnesses appear to have deleted relevant text

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345 *See* 1 ROBERT S. MUELLER, III, U.S. DEP'T OF JUST., REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 1 (2019) [hereinafter MUELLER REPORT], https://www.justice.gov/archives/sco/file/1373816/download [https://perma.cc/DKK8-WHTK].

346 *Id.* at 14.

347 *Id.* at 25 ("During the U.S. presidential campaign, many IRA-purchased advertisements explicitly supported or opposed a presidential candidate or promoted U.S. rallies organized by the IRA . . . . As early as March 2016, the IRA purchased advertisements that overtly opposed the Clinton Campaign.").

348 *Id.* at 1–2, 72–74, 93, 113, 129; 2 MUELLER REPORT, *supra* note 345, at 15–16, 98–99.

349 1 MUELLER REPORT, *supra* note 345, at 65–66, 173–75.

350 *Id.* at 10; *see also* Deborah Ramirez & Greer Clem, *Fortifying the Rule of Law: Filling the Gaps Revealed by the Mueller Report and Impeachment Proceedings*, 13 NE. U. L. REV. 1, 7, 29, 31 (2021).

351 *See* 1 MUELLER REPORT, *supra* note 345.

352 *Id.* at 175 ("As of this writing, all 12 defendants remain at large.").

messages,[353] concealed evidence,[354] and forgotten relevant details.[355] Others, including individuals connected to the Trump campaign, made false statements to investigators or otherwise attempted to obstruct the special counsel's work.[356]

Trump also engaged in apparent efforts to hinder the investigation. Investigators outlined in some detail the evidence of obstruction they had collected. This included Trump's untrue statements about his ongoing business interests in Russia,[357] his demand of "loyalty" from, and later firing of, the FBI director,[358] his instruction to a subordinate to create a false record of his directions to his National Security Advisor regarding the NSA's discussion with his Russian counterparts,[359] and his urging of the Attorney General to "unrecuse" himself from the Russian investigation.[360] Citing concerns about indicting a sitting president, the special prosecutor declined to make a prosecution recommendation regarding prosecuting Trump for obstruction of justice in relation to these actions, but nonetheless itemized them in the final report.[361]

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353 *Id.* at 156 ("Prince's phone contained no text messages prior to March 2017, though provider records indicate that he and Bannon exchanged dozens of messages. Prince denied deleting any messages but claimed he did not know why there were no messages on his device before March 2017. Bannon's devices similarly contained no messages in the relevant time period, and Bannon also stated he did not know why messages did not appear on his device." (footnotes omitted)).

354 *Id.* at 187.

355 2 MUELLER REPORT, *supra* note 345, at 37 ("Flynn responded that he may have forgotten details of his calls, but he did not think he lied.").

356 1 MUELLER REPORT, *supra* note 345, at 180 ("[S]everal U.S. persons connected to the [Trump] Campaign made false statements about [their] contacts [with Russian nationals] and took other steps to obstruct the Office's investigation and those of Congress.").

357 2 MUELLER REPORT, *supra* note 345, at 3 ("Trump also denied having any business in or connections to Russia, even though as late as June 2016 the Trump Organization had been pursuing a licensing deal for a skyscraper to be built in Russia called Trump Tower Moscow.").

358 *Id.* ("[T]he President invited FBI Director Comey to a private dinner at the White House and told Comey that he needed loyalty."); *id.* at 4 ("Comey testified in a congressional hearing, but declined to answer questions about whether the President was personally under investigation. Within days, the President decided to terminate Comey.").

359 *Id.* at 3 ("Shortly after requesting [National Security Advisor] Flynn's resignation and speaking privately to Comey, the President sought to have Deputy National Security Advisor K.T. McFarland draft an internal letter stating that the President had not directed Flynn to discuss sanctions with Kislyak. McFarland declined because she did not know whether that was true, and a White House Counsel's Office attorney thought that the request would look like a quid pro quo for an ambassadorship she had been offered.").

360 *Id.* ("[A]fter Sessions announced his recusal on March 2, the President expressed anger at the decision and told advisors that he should have an Attorney General who would protect him. That weekend, the President took Sessions aside at an event and urged him to 'unrecuse.'").

361 The Report did make clear that if the investigators had confidence that the President did not obstruct justice, they would have said so. *Id.* at 1–2 ("The Office of Legal Counsel (OLC) has issued an opinion finding that 'the indictment or criminal prosecution of a sitting President would

Trump also seems to have misled the public about the course of events. He directed aides to not release emails related to a meeting between Trump associates and Russian nationals at Trump Tower, and, when the emails were released anyway, he edited a press release to obscure what was discussed at the meeting.[362] He also again asked subordinates to create false records, this time regarding his efforts to remove the special counsel.[363] He repeatedly reached out to potential witnesses to tell them to "stay on message," "stay strong," or adhere to the "party line."[364] When one witness nonetheless began cooperating with the investigation, Trump publicly denounced him as a "'rat,' and suggested that his family members had committed crimes."[365]

In the end, neither Trump nor any of his family members were criminally prosecuted for these events. Although the release of DNC and other stolen emails may be a "thing of value" as defined in federal election law, and therefore within the ban on foreign financing of election activity, the special prosecutor expressed uncertainty whether the information offered would meet the threshold value ($2,000) required by the statute.[366]

impermissibly undermine the capacity of the executive branch to perform its constitutionally assigned functions' in violation of 'the constitutional separation of powers.' Given the role of the Special Counsel as an attorney in the Department of Justice and the framework of the Special Counsel regulations, this Office accepted OLC's legal conclusion for the purpose of exercising prosecutorial jurisdiction. . . . "[I]f we had confidence after a thorough investigation of the facts that the President clearly did not commit obstruction of justice, we would so state. . . . Accordingly, while this report does not conclude that the President committed a crime, it also does not exonerate him." (footnote omitted) (citations omitted) (quoting A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. 222, 222, 260 (2000))).

362 *Id.* at 5.

363 *Id.* at 5–6 (describing how, after press reports that Trump's White House Counsel had threatened to resign rather than carry out Trump's instruction to have the special counsel removed, Trump ordered White House aides to "create a record stating [the White House Counsel] had not been ordered to have the Special Counsel removed"). When the White House Counsel informed the aides that the press accounts were accurate, they refused to create the requested record.

364 *Id.* at 6.

365 *Id.*

366 1 MUELLER REPORT, *supra* note 345, at 188. Campaign finance experts have expressed significant skepticism over these conclusions. *See, e.g.*, Hasen, *supra* note 127. Trump's adult son, Donald Trump, Jr., also chimed in on this issue, expressing credulity that it would have been better if the campaign had paid for the Clinton materials, as of course payment at fair market rates would have rendered it a normal transaction rather than a "favor." *See* CAROLINE C. HUNTER, FEC, FEC REPORT TO THE COMMITTEES ON APPROPRIATIONS ON ENFORCING THE FOREIGN NATIONAL PROHIBITION 13 (2018) [hereinafter FEC REPORT] (first citing FEC Advisory Op. 2007-22 (Dec. 3, 2007), https://saos.fec.gov/aodocs/2007-22.pdf [https://perma.cc/5PJG-3XPB]; and then citing FEC Advisory Op. 2010-05 (May 27, 2010), https://www.fec.gov/files/legal/aos/2010-05/AO-2010-05--final.pdf [https://perma.cc/BU4F-AFEQ]), https://www.fec.gov/resources/cms-content/documents/Foreign_National_Report_To_Congress.pdf [https://perma.cc/4MMZ-VWZW] ("[G]oods and services provided to political committees at the usual and normal charge by foreign nationals are permissible and do not constitute contributions.").

He also was unable to prove that those closest to Trump coordinated with foreign nationals to release the information, or that they "knowingly and willfully" violated the prohibition on soliciting or accepting foreign support (the standard necessary in this area for a criminal prosecution by the DOJ).[367] Nor, of course, could the special prosecutor prove that Trump entered into a quid pro quo arrangement in exchange for the release of damaging information, despite significant concern about his pro-Russian, anti-NATO policies.[368]

3. The Ukrainian Impeachment Inquiry

All of these investigatory challenges, and more, arose again in 2020 when a whistleblower complaint alerted the House Intelligence Committee that Trump may have been withholding critical military aid to Ukraine, which was battling growing Russian aggression in its territory.[369] The Ukrainian scandal irrupted in 2020, culminating in Trump's first impeachment.[370] According to the House Impeachment Inquiry Report, Trump engaged in a "months-long effort . . . to use the powers of his office to solicit foreign interference on his behalf in the 2020 election."[371]

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367 1 MUELLER REPORT, *supra* note 345, at 187. The FEC has jurisdiction over enforcement of FECA, but the DOJ has criminal enforcement authority over "knowing and willful" violations of FECA. *See* FEC REPORT, *supra* note 366, at 5 (citing 52 U.S.C. § 30109(d)(1)). Deborah Ramirez and Greer Clem have argued that U.S. law should be amended to require campaigns and candidates to report offers of foreign assistance, in part to avoid these problems of proof. *See* Ramirez & Clem, *supra* note 350, 30–31.

368 *See, e.g.*, 1 MUELLER REPORT, *supra* note 345, at 124, 130–40 (detailing pro-Russian changes to the Republican Party platform and efforts by Trump's then-campaign chairman to advance a Russian-developed "peace plan" that would establish a pro-Russian government in eastern Ukraine).

369 H.R. REP. NO. 116-335, at 15–16 (2019).

370 *Id.* at 1–2. He later was impeached a second time, in connection with the attack on the U.S. Capitol that took place on January 6, 2021, as Congress was meeting in joint session to confirm the results of the 2020 presidential election, which Trump lost. *See* H.R. Res. 24, 117th Cong. (2021); Press Release, Select Comm. to Investigate the January 6th Attack on the U.S. Capitol, Thompson, Cheney, Murphy, & Raskin Opening Statements at Select Committee Hearing (July 12, 2022), https://january6th.house.gov/news/press-releases/thompson-cheney-murphy-raskin-opening-statements-select-committee-hearing [https://perma.cc/3WM2-ASFQ]. The Select Committee's investigation also demonstrates the challenges of pulling information out of the U.S. security apparatus: the U.S. Secret Service erased text messages from January 5 and 6, 2021, just days after the congressional request that they be turned over to the committee. *See generally* Jamie Gangel, Zachary Cohen & Ryan Nobles, *Secret Service Erased Text Messages from January 5 and 6, 2021—After Oversight Officials Asked for Them, Watchdog Says*, CNN (July 15, 2022, 11:12 AM), https://www.cnn.com/2022/07/14/politics/secret-service-text-messages-erased/index.html [https://perma.cc/Z8T6-WBTN].

371 H.R. REP. NO. 116-335, at 1 (2019).

The underlying accusations are now well known. Volodymyr Zelensky was elected president of Ukraine in 2019, largely on an anti-corruption platform.[372] Zelensky's victory was seen as a win by U.S. foreign policy experts, who believed it was in the U.S. national security interests to support Zelensky's efforts to combat corruption and counter Russian aggression in the region.[373] Congress shared this view, and had appropriated funds to support the Ukrainian armed forces.[374] Zelensky's team also had been engaged with the White House since his election to coordinate a White House visit to showcase U.S. support for Zelensky and his new administration. Trump, however, had come to believe that Ukrainians (rather than Russians) were behind the foreign interference in the 2016 elections, and that they had worked on Hillary Clinton's (rather than his) behalf. This interpretation of the evidence had been rejected by the U.S. intelligence community, but continued to be a mainstay of various online conspiracy groups.[375] Trump purported to believe that proof of this pro-Clinton intervention could be found on a DNC server that had been hidden in Ukraine.[376] Finally, he believed he could make political hay out of the involvement of Joe Biden's son, Hunter Biden, with a Ukrainian company called Burisma Holdings, Ltd. Biden was at the time the likely Democratic nominee for the 2020 presidential election, and the work of his son on the Burisma board had, like the DNC server, become a focus of Trump's campaign.[377]

Trump's response to this confluence of events, according to the House Impeachment Report, was to ask Zelensky for "a favor."[378] Against the advice of his own national security and foreign relations teams, Trump purportedly conditioned both a White House visit and release of military assistance to Ukraine on Zelensky publicly announcing that he had initiated an investigation into Hunter and Joe Biden, as well as the alleged Ukrainian interference in the 2016 election.[379] According to an unclassified readout of a phone call between Trump and Zelensky shortly after Zelensky's election, Trump began by congratulating Zelensky on his election victory, repeatedly emphasizing how "good" the United States

372 *Id.* at 6.

373 *Id.* at 8–13.

374 *Id.* at 7 ("For fiscal year 2019, Congress appropriated and authorized $391 million in security assistance to Ukraine . . . . support for Ukraine security assistance was overwhelming and unanimous among all of the relevant agencies and within Congress.").

375 *See id.* at 88–89.

376 *Id.* at 17.

377 *Id.* at 3–4.

378 *Id.* at 2.

379 *Id.* at 3 ("The President's decision to freeze the aid, made without explanation, sent shock waves through the Department of Defense (DOD), the Department of State, and the [National Security Council], which uniformly supported providing this assistance to our strategic partner.").

has been to Ukraine. When Zelensky raised the issue of U.S. military support, however, Trump responded by saying "I would like you to do us a favor though," and then proceeded to ask Zelensky to work with Trump's personal attorney, Rudy Giuliani, to "get to the bottom" of the DNC server and Hunter Biden issues. Trump advisors involved in negotiating with Ukraine during this time period later confirmed that their understanding of this comment was that the White House visit, and perhaps the security assistance, would be contingent on Zelensky publicly announcing an investigation into Biden.[380]

In other words, as summarized by the Impeachment Inquiry Report, Trump was "withholding official acts," such as the White House visit and release of the security funding, "while soliciting something of value to his reelection campaign—an investigation into his political rival."[381] But like earlier efforts, the House committee's ability to explore the matter, however, was repeatedly hindered. Trump, according to the House Inquiry Report, "engaged in an unprecedented campaign of obstruction" of its inquiry. Claiming sweeping executive privilege, Trump ordered all federal agencies and officials to disregard requests for information from the congressional committee, including duly issued subpoenas.[382] The White House never produced any documents to the House investigators despite investigators' belief that numerous responsive documents existed. At the President's instruction, the Secretaries of State, Defense, and Energy likewise refused to cooperate with Congress's efforts to investigate the alleged presidential corruption.[383]

The President also attempted to prevent members of Congress from accessing the whistleblower complaint. Under federal law, whistleblower complaints are reviewed by the Inspector General to determine if they

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380 *Id.* at 87–88 (quoting Memorandum of Telephone Conversation with President Zelensky of Ukraine 3 (July 25, 2019), https://trumpwhitehouse.archives.gov/wp-content/uploads/2019/09/Unclassified09.2019.pdf [https://perma.cc/5V9Y-WDW7]); *id.* at 8 ("Ambassador Sondland was unequivocal in describing this conditionality, testifying 'I know that members of this committee frequently frame these complicated issues in the form of a simple question: Was there a quid pro quo? As I testified previously with regard to the requested White House call and the White House meeting, the answer is yes.'"); *id.* at 118 ("Ambassador Sondland briefly spoke to President Zelensky's aide, Mr. Yermak. . . . [and] conveyed his belief that 'the resumption of U.S aid would likely not occur until Ukraine took some kind of action on the public statement that we had been discussing for many weeks' regarding the investigations that President Trump discussed during the July 25 call.").

381 *Id.* at 5.

382 *Id.* at 2, 19 (citing Letter from Pat A. Cipollone, Couns. to the President, to Nancy Pelosi, Speaker, House of Representatives, Eliot L. Engel, Chairman, House Foreign Affs. Comm., Adam B. Schiff, Chairman, House Permanent Select Comm. on Intel., and Elijah E. Cummings, Chairman, House Comm. on Oversight & Reform (Oct. 8, 2019), https://s3.documentcloud.org/documents/6459967/PAC-Letter-10-08-2019.pdf [https://perma.cc/X33F-H6KK]).

383 *Id.* at 200–22.

appear credible. If so, they are to be promptly disclosed to the chairs of the relevant congressional committees, in this case, the intelligence committees. Upon receiving the whistleblower complaint about the purported withholding of official acts for political favors, the Inspector General concluded that the complaint raised a credible matter of "urgent concern." Despite this, the complaint was, at the request of the DOJ, withheld from the appropriate members of Congress on the unprecedented grounds that it contained "potentially privileged communications by persons outside the Intelligence Community."[384] The efforts to prevent public disclosure of the President's actions did not end there, however. Throughout the House Committee's investigation, Trump repeatedly broadcast, through his Twitter account, attacks, ridicule, and threats of retaliation against individuals cooperating with the investigation.[385] The President also appeared to threaten the whistleblower and those who cooperated with them, suggesting they should be severely punished for their "treason."[386] According to the House Impeachment Inquiry Report, the sitting President made more than 100 public statements regarding the whistleblower during the course of just two months.[387]

The whistleblower and other cooperating witnesses were not, of course, the only people fearful of the President's wrath: President Zelensky also had reason to be cautious. Throughout the ordeal, he and his aides reportedly expressed repeated discomfort at becoming a pawn in U.S. domestic politics, yet he appeared in the end prepared to conduct an interview with CNN announcing the Biden and Burisma investigations, in order to secure the desperately needed security assistance and White House visit.[388] As Lieutenant Colonel Alexander

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384 *Id.* at 129 (quoting Letter from Jason Klitenic, Gen. Couns., Off. of the Dir. of Nat'l Intel., to Richard Burr, Chairman, Select Comm. on Intel., Adam Schiff, Chairman, Permanent Select Comm. on Intel., Mark Warner, Vice Chairman, Select Comm. on Intel., Devin Nunes, Ranking Member, Permanent Select Comm. on Intel. 3 (Sept. 13, 2019), https://s3.documentcloud.org/documents/6419391/Sept-13-Letter.pdf [https://perma.cc/MDE2-RQJN]) (stating the complaint was withheld from Congress for weeks before being released on September 25, 2019).

385 *Id.* at 31.

386 *Id.* at 221 ("I want to know who's the person who gave the whistleblower the information because that's close to a spy. You know what we used to do in the old days when we were smart with spies and treason, right? We used to handle it a little differently than we do now." (quoting Eli Stokols, *Listen: Audio of Trump Discussing Whistleblower at Private Event 'That's Close to a Spy'*, L.A. TIMES (Sept. 26, 2019, 3:57 PM), https://www.latimes.com/politics/story/2019-09-26/trump-at-private-breakfast-who-gave-the-whistle-blower-the-information-because-thats-almost-a-spy [https://perma.cc/VW9D-P7KU])).

387 *Id.*

388 *Id.* at 12–13 ("Mr. Yermak[, Zelensky's aide,] balked at getting drawn into U.S. politics . . . . President Zelensky expressed concern that even an appearance of wavering support from the United States for Ukraine could embolden Russia.").

Vindman testified before the House impeachment committee, Zelensky had little choice, given that he was dependent on support from the United States:

> So, Congressman, the power disparity between the President of the United States and the President of Ukraine is vast, and, you know, in the President asking for something, it became—there was—in return for a White House meeting, because that's what this was about.
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> . . . .
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> . . . [It] was "inappropriate."[389]

As the Supreme Court recognized more than 100 years ago in upholding the Hatch Act, it is easy to see in such situations "that what begins as a request may end as a demand."[390] More to the point for current purposes, whether or not it *is* a demand will frequently be impossible to prove. If foreign actors are empowered to make expenditures to promote the election or defeat of candidates for public office, how, given the extraordinary web of power and secrecy surrounding national security and foreign affairs, would the public ever know if an improper *quid* had been promised for a foreign financed *quo*? In such circumstances, judicial deference to the judgment of Congress that a prophylactic approach is necessary to lessen the temptation of such corruption by prohibiting all foreign financing of election-related activity is more than warranted.[391]

B. *The Risk of Corruption at the State and Local Level*

Nor is this risk limited to the office of the President or, indeed, even federal office seekers. James Madison, explaining the purpose of the Guarantee Clause (which guarantees to every state in the union a

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389 *Id.* at 92–93.

390 *Ex parte* Curtis, 106 U.S. 371, 374 (1882). The Supreme Court has also more recently recognized how a "favor" can readily become a demand. Justice Kennedy, writing for the majority in *Citizens United*, referred to the danger that elected officials can abuse their public power to force "cooperation" of corporate lobbyists. This "cooperation," Justice Kennedy noted, "may . . . be voluntary, [but also] may be at the demand of a Government official who uses his or her authority, influence, and power to threaten corporations to support the Government's policies." Citizens United v. FEC, 558 U.S. 310, 355 (2010); *see also* McCutcheon v. FEC, 572 U.S. 185, 192 (2014) ("The hallmark of corruption is the financial *quid pro quo*: dollars for political favors." (quoting FEC v. Nat'l Conservative Pol. Action Comm., 470 U.S. 480, 497 (1985))).

391 Professor Matt A. Vega, arguing that permitting campaign spending by American subsidiaries of foreign corporations also "poses an unacceptable risk of quid pro quo corruption," notes that a "large percentage of foreign companies doing business in the United States are based in countries" that have "cultures of bribery" much worse than that of the United States, and that this risk is "particularly acute in the defense industry" because it raises "national security concerns." Vega, *supra* note 248, at 996.

"republican" form of government) noted that state governments, not just the federal government, could be vulnerable to the "secret succors from foreign powers."[392] Writing for the D.C. District Court in *Bluman*, Judge Kavanaugh also recognized this connection, citing to *Harisiades v. Shaughnessy* in which the Court determined that "any policy toward aliens is vitally and intricately interwoven with" not only "foreign relations[and] the war power, [but also] the maintenance of a republican form of government" at home.[393]

More recent events, once again, demonstrate the validity of these concerns. In just the past few years, federal investigators revealed several foreign entanglements on the part of congressional, state, and local elected officials. In 2022, the FEC entered into a settlement in which a congressional candidate from Rhode Island acknowledged that he knowingly solicited campaign assistance from individuals he associated with Russian intelligence. Specifically, he sent a Twitter message to a Russian agent stating, "I could use your help to defeat [my general election opponent,] cicilline."[394] The agent replied, "it seems [I] have a dossier on cicilline . . . I can send [yo]u a dossier via email."[395] The candidate promptly provided his email, and received the dossier, apparently generated from stolen computer files.[396]

This was not an isolated incident. In July 2022, the DOJ indicted a Russian national working on behalf of the Russian government for allegedly orchestrating a years-long influence campaign using U.S. political groups to sow domestic discord and interfere in U.S. elections, including groups in Georgia, Florida, and California.[397] A Russian oligarch was indicted for breaking campaign finance law in relation to his support for a gubernatorial candidate in Nevada, and remains at large in Russia.[398] An associate of former New York City Mayor Rudy Giuliani pleaded guilty in 2021 for illegally soliciting foreign campaign

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392 THE FEDERALIST NO. 43 (James Madison). The Guarantee Clause states: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." U.S. CONST. art. IV, § 4.

393 Bluman v. FEC, 800 F. Supp. 2d 281, 287, 290 (D.D.C. 2011) (citing Harisiades v. Shaughnessy, 342 U.S. 580, 588–89 (1952)).

394 FEC MUR 7207 (H. Russell Taub), Conciliation Agreement at 2 (Jan. 19, 2022), https://www.fec.gov/files/legal/murs/7207/7207_45.pdf [https://perma.cc/7VQG-3BRM].

395 *Id.* (second alteration in original).

396 *Id.*

397 Indictment at 2–6, United States v. Ionov, No. 22-cr-259-WFJ (M.D. Fla. July 26, 2022).

398 Humberto Sanchez, *Russian Oligarch Indicted in Campaign Finance Plot to Win Cannabis License in Nevada*, NEV. INDEP. (Mar. 14, 2022, 2:19 PM), https://thenevadaindependent.com/article/russian-oligarch-indicted-in-campaign-finance-plot-to-win-cannabis-license-in-nevada [https://perma.cc/7PP7-P5ZJ].

contributions for Democratic and Republican candidates in furtherance of his U.S.-based business interests.[399] A former House member from Nebraska was convicted in 2022 of concealing information about and making false statements to the FBI regarding illegal foreign contributions to his campaign.[400] Even the Thompson Committee report recognized these types of activities, noting illegal foreign contributions made to a California congressman,[401] and the involvement of a mayor in connecting the Clinton White House with a foreign businessman considering locating a factory in the mayor's city.[402] If there is ever a place for judicial deference to the considered judgment of Congress about what poses an unacceptable risk of quid pro quo corruption, surely it is here.[403]

C. *Bright Lines and Overbreadth*

As the Court has explicitly found in relation to contribution limits, a broad rule is constitutionally permissible as a preventative measure even when most individual acts subject to the rule will not themselves carry a risk of quid pro quo corruption.[404] As the Court held in *Buckley*:

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399 Dan Mangan & Kevin Breuninger, *Rudy Giuliani Associate Igor Fruman Pleads Guilty to Soliciting Foreign Campaign Contributions*, CNBC (Sept. 10, 2021, 7:05 PM), https://www.cnbc.com/2021/09/10/rudy-giuliani-associate-igor-fruman-set-to-plead-guilty-in-court.html [https://perma.cc/DU85-DZ9U].

400 Press Release, Dep't of Just., U.S. Att'y's Off., Cent. Dist. of Cal., Congressman Jeff Fortenberry Found Guilty of Concealing Facts and Lying to Investigators Probing Illegal Campaign Contributions (Mar. 24, 2022), https://www.justice.gov/usao-cdca/pr/congressman-jeff-fortenberry-found-guilty-concealing-facts-and-lying-investigators [https://perma.cc/43XF-A2M8].

401 S. REP. NO. 105-167, pt. 4, at 4567–68 (1998).

402 *Id.* pt. 3, at 4472.

403 States seem fully aware of this risk. *See, e.g.*, ALASKA STAT. § 15.13.068 (2018) (incorporating foreign financing prohibitions into state law after such bans were upheld in *Bluman*). Other states have enacted similar bans. *See, e.g.*, *Election Law—Limits on Political Spending by Foreign Entities—Alaska Prohibits Spending on Local Elections By Foreign-Influenced Corporations.—Alaska Stat. § 15.13.068 (2018)*, 132 HARV. L. REV. 2402, 2403–04 (2019).

404 Buckley v. Valeo, 424 U.S. 1, 29–30 (1976).

> Appellants' first overbreadth challenge to the contribution ceilings rests on the proposition that most large contributors do not seek improper influence over a candidate's position or an officeholder's action. Although the truth of that proposition may be assumed, it does not undercut the validity of the $1,000 contribution limitation. Not only is it difficult to isolate suspect contributions, but, more importantly, Congress was justified in concluding that the interest in safeguarding against the appearance of impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated.
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> . . . Congress' failure to engage in such fine tuning does not invalidate the legislation.[405]

The Supreme Court cited this language approvingly in *McCutcheon*, adding that the *Buckley* Court found the contribution limit was not overly broad because "it was too 'difficult to isolate suspect contributions,'" and because "Congress was justified in concluding that the interest in safeguarding against the appearance of impropriety require[d] that the opportunity for abuse" be eliminated.[406]

In *Buckley* and *McConnell*, of course, the Court was analyzing the overbreadth of contribution limits, but as the above examples illustrate, this contextualized approach is even more appropriate in regard to foreign funding bans than it is in regard to domestic contributions. Senator Thompson, Special Prosecutor Mueller, and the House Impeachment Inquiry Committee regarding Ukraine held all the investigatory power of their offices and were charged with investigating specific, known events. Yet their work was repeatedly stymied. Public officials, including U.S. presidents, used the powers of their office to limit their access to people and documents and to bully witnesses. Foreign entities fled beyond the jurisdiction of domestic investigators. Intelligence agencies refused to share sensitive data or did so in ways that prevented the information from being disclosed to the broader public.

Some of these actions were likely appropriate, given the national security and foreign affairs issues in play. Others, undoubtedly, were not. We, the public, cannot know. That is precisely why a prophylactic remedy is appropriate here. Proving the presence of a quid pro quo exchange under such circumstances will rarely be possible and will always be costly. More fundamentally, if foreign financing of election activity was not illegal, there would be even fewer tools available to investigate potentially corrupt exchanges, and we would have even less ability to hold our public officials to account for their undemocratic actions.

405 *Id.*

406 McCutcheon v. FEC, 572 U.S. 185, 198 (2014) (quoting *Buckley*, 424 U.S. at 30).

CONCLUSION

In *Bluman v. FEC*, the court held that foreign nationals could be prohibited from making even independent expenditures because such expenditures risked inappropriately influencing the choices made by American voters. The result in *Bluman* is correct, but the court's reasoning is wrong. Foreign financing bans are constitutional not because foreign speech may "inappropriately" influence voters, but for the same reason all successful restrictions on political speech are constitutional: because of the risk they pose to the appearance or actuality of corrupting the conduct of public officials. The sense of indebtedness or ingratiation independent expenditures can induce in elected officials may be a contextually appropriate part of responsive self-government when done by domestic actors but has no place in the interactions between elected officials and foreign financiers and is well within the power of Congress to prevent.

Our founders understood this, as did the members of Congress who enacted FARA, FECA, and BCRA. The challenges faced by investigators trying to untangle the web of national security, foreign affairs, and executive privilege issues that will inevitably spin around accusations of corrupt activities tied to foreign financing amply demonstrate their collective wisdom. The Supreme Court has long recognized that the judiciary is the branch least suited for dealing with problems such as these and should respect the choices of our elected representatives to address them by enacting appropriately prophylactic measures in this complex area of contextualized corruption.