NOTE

FOREIGN-INFLUENCE LAWS: THE CONSTITUTIONALITY OF RESTRICTIONS ON INDEPENDENT EXPENDITURES BY CORPORATIONS WITH FOREIGN SHAREHOLDERS

*Jack V. Hoover**

A decade on, legislatures are still coming to terms with the reach of Citizens United*. In a novel push to cabin the effects of the opinion, legislatures have passed or are seeking to pass regulations that raise the specter of foreign intervention in American politics—a menace with which contemporary American political life has become well acquainted. Yet in doing so these legislatures overreach, and they will likely fail to escape the modern Charybdis that is* Citizens United*.*

This Note provides the campaign finance literature's first detailed taxonomy and discussion of what it calls "foreign-influence laws." These regulations bar corporations from making independent expenditures when foreigners own a certain percentage of a firm's shares, a result that appears to directly contradict the Supreme Court's guidance in Citizens United*. Three jurisdictions recently passed foreign-influence laws, and an increasing number of state legislators are proposing them. The statutes emphasize the incompatibility of* Citizens United*, which protects corporate political speech, and* Bluman*, which authorizes restrictions on foreigners' political participation. Nevertheless, neither* Citizens United *nor* Bluman *supports the constitutionality of these laws. This Note also provides the first rigorous constitutional analysis of foreign-influence laws, arguing that the regulations should receive strict scrutiny and that the government has a compelling interest to limit the political speech of foreign entities. However, the laws are not narrowly tailored to that interest, given shareholders' limited power to influence corporate*

* University of Virginia Law School, J.D. expected 2022. The author would like to thank Jackson Myers for his feedback throughout the completion of this Note, as well as Professor Michael Gilbert for his supervision of the project. The author supports campaign finance reform efforts as a policy matter despite the legal conclusions of this Note.

political decisions. As a result, this Note concludes that foreign-influence laws are not constitutional. The Note then provides recommendations to legislatures and courts considering foreign-influence laws, as well as potential alternatives that courts will likely find constitutional.

INTRODUCTION

In January 2020, the Seattle City Council enacted a new ordinance designed to limit the political spending of what it called "foreign-influenced corporations."[1] The law bans any corporation from spending in connection with local elections when a single foreign national owns a 1% stake in the firm, or when foreign nationals in aggregate own 5% or more of the firm.[2] The city council member who sponsored the ordinance explained, "this legislation closes a loophole that previously allowed foreign persons to use their ownership in a corporation to influence political activity."[3] In passing the measure, the city council vice chair

[1] See Seattle, Wash., Ordinance 126,035 (Jan. 17, 2020).

[2] See Seattle, Wash., Mun. Code tit. 2, ch. 4, §§ 10, 400 (2020).

[3] Press Release, Seattle City Council, Council President González's Clean Campaigns Act Passes (Jan. 13, 2020), https://council.seattle.gov/2020/01/13/council-president-gonzalezs-clean-campaigns-act-passes/ [https://perma.cc/6YTT-MZ2Z].

expressed concern over the effects of foreign money on the American democratic process, noting not only foreign nationals' growing ownership shares in U.S. corporations but also that "foreign interests can easily diverge from U.S. interests . . . nationally, and . . . locally in municipal government."[4] Seattle's prohibition on foreign-influenced corporate spending covers not only contributions directly to campaigns, but also contributions to political committees and independent expenditures[5] when foreigners hold stakes in the donating corporation.[6] For corporations with significant foreign shareholders, these rules re-impose the prohibition on corporate independent expenditures that the Supreme Court ruled unconstitutional in *Citizens United v. Federal Election Commission*.[7]

Yet Seattle is not alone in enacting this type of statute. Local and state legislators across the United States have either passed or are considering similar legislation, with support and urging from campaign finance reformers and legal scholars.[8] Despite the fact that these laws prohibit nearly all major U.S. corporations from engaging in independent

[4] City Council 1/13/2020, Seattle Channel, at 35:37–36:03 (Jan. 13, 2020), http://www.seattlechannel.org/FullCouncil/?videoid=x110205&Mode2=Video [https://perma.cc/BQ8C-MHFK].

[5] Independent expenditures are communications advocating the election or defeat of a candidate and are not coordinated with campaigns. See 11 C.F.R. § 100.16 (2020).

[6] See Seattle, Wash., Mun. Code tit. 2, ch. 4, §§ 10, 400 (2020).

[7] 558 U.S. 310, 365–66 (2010).

[8] Supporters include Free Speech for People, FEC Commissioner Ellen Weintraub, and law professors Laurence Tribe and John Coates, among others. Challenging Foreign Influence in Elections, Free Speech for People, https://freespeechforpeople.org/foreign-influence/ [https://perma.cc/P4XN-DA94] (last visited Apr. 10, 2021); Free Speech for People Applauds Provision in Anti-Corruption and Public Integrity Act Banning Political Spending by Foreign-Influenced Corporations, Free Speech for People (Dec. 22, 2020), https://freespeechforpeople.org/free-speech-for-people-applauds-provision-in-anti-corruption-and-public-integrity-act-banning-political-spending-by-foreign-influenced-corporations/ [https://perma.cc/59CN-AVQY]; Ellen L. Weintraub, Taking on Citizens United, N.Y. Times (Mar. 30, 2016), https://www.nytimes.com/2016/03/30/opinion/taking-n-citizens-united.html [https://perma.cc/V5TX-Q3V4]; Letter from Laurence H. Tribe, Professor, Harv. L. Sch., to the Seattle City Council (Jan. 3, 2020), https://freespeechforpeople.org/wp-content/uploads/2020/01/tribe-testimony-1-3-2020-proposed-ordinance-to-limit-political-spending-by-foreign_influenced-corporations.pdf [https://perma.cc/QD7J-SZ8T] [hereinafter Letter from Tribe]; Letter from John Coates, Professor, Harv. L. Sch., to Barry Finegold, Chairman, Mass. State House, and John L. Lawn, Jr., Chairman, Mass. State House (May 14, 2019), https://freespeechforpeople.org/wp-content/uploads/2019/05/2019-Coates-MA-FIC-20190514-PDF-final.pdf [https://perma.cc/MC3Y-YXWK] [hereinafter Letter from John Coates]; infra notes 29–40 and accompanying text.

expenditures,[9] advocates argue that the regulations are not only constitutional,[10] but also critical for protecting American elections from foreign interference.[11] For support, advocates look to *Bluman v. Federal Election Commission*, a 2011 case in which the U.S. District Court for the District of Columbia upheld the federal statute barring foreign nationals from providing anything of value in connection with elections on the federal, state, and local level.[12]

This Note argues, however, that the doctrinal issues stalking laws limiting the political activity of U.S.-based, "foreign-influenced" corporations cannot be so easily dismissed, and *Bluman* does not actually support curtailing U.S. corporate speech. A deeper analysis of the statutes and case law exposes significant problems that supporters have yet to confront. Furthermore, these laws emphasize a clash between the expansion of corporate speech rights in *Citizens United* and the continued constraints on foreign speakers' rights upheld in *Bluman*. This incompatibility is rendered particularly stark by the growing percentage of foreign-owned U.S. corporate stock, as well as the conclusion that publicly-traded American corporations can rarely be considered entirely American.[13] To resolve this mismatch between *Citizens United* and *Bluman*, the Supreme Court will likely need to provide further guidance, and this Note considers several problems foreign-influence laws present in the context of this discord.

This exploration includes the first detailed account of legislatures' efforts to pass foreign-influence laws across the United States at the federal, state, and local levels. Part I discusses the history of these laws, as well as recent enactments and proposals. This represents the first taxonomy of what this Note calls "foreign-influence laws." Part II

[9] See Michael Sozan, Ctr. for Am. Progress, Ending Foreign-Influenced Corporate Spending in U.S. Elections 42 (2019).

[10] Letter from Tribe, supra note 8; City Council 1/13/2020, Seattle Channel, at 27:17–28:09 (Jan. 13, 2020), http://www.seattlechannel.org/FullCouncil/?videoid=x110205&Mode2=Video [https://perma.cc/YJ4Z-CYBX].

[11] See, e.g., Challenging Foreign Influence in Elections, Free Speech for People, https://freespeechforpeople.org/foreign-influence/ [https://perma.cc/G5WP-29XH] (last visited Apr. 10, 2021).

[12] See 18 U.S.C. § 30121 (2018); Bluman v. Fed. Election Comm'n, 800 F. Supp. 2d 281, 283 (D.D.C. 2011). Then-Circuit Judge Kavanaugh wrote the court's opinion. See Letter from Tribe, supra note 8.

[13] According to Federal Reserve data, foreign ownership of U.S. corporate stock grew from about 5% in 1982 to 26% in 2015. See Steven M. Rosenthal & Lydia S. Austin, The Dwindling Taxable Share of U.S. Corporate Stock, 151 Tax Notes 923, 928–29 (2016).

discusses campaign finance laws and decisions related to both corporations and foreigners, before exploring the degree to which *Bluman* and *Citizens United* stand at odds—an aspect of the case law that has to date largely been considered in passing. Part III then argues that foreign-influence laws are likely unconstitutional because they are not narrowly tailored to the government's interest in controlling foreigners' political speech. This Part also considers the degree to which foreign-influence laws chill protected speech and discusses federalism concerns that weigh against deference to local legislatures. These problems lead to the conclusion that foreign-influence laws are likely unconstitutional under current Supreme Court guidance. Finally, Part IV provides recommendations to courts and legislatures considering foreign-influence laws, as well as potential alternative approaches to restricting foreign influence on elections that pose fewer constitutional difficulties.

I. THE EMERGENCE OF FOREIGN-INFLUENCE LAWS

The first proposals for foreign-influence laws followed quickly after the Supreme Court invalidated restrictions on independent expenditures in *Citizens United*. Just five days after the decision, Representative John Hall introduced a bill seeking to extend the federal statute prohibiting foreign nationals from contributing to candidates and making independent expenditures—52 U.S.C. § 30121[14]—to cover not only foreign individuals and firms but also any corporation where the stock "owned directly or indirectly by foreign principals is equal to or greater than 5% of the total number of outstanding shares of the corporation."[15] This proposal set out the basic model for foreign-influence laws by defining the foreign status of the corporation based on stock ownership by foreign nationals and then prohibiting independent expenditures by corporations surpassing that threshold. The bill did not leave committee,[16] but several months later legislators introduced the DISCLOSE Act, which included

[14] The statute was previously codified at 2 U.S.C. § 441e, but for clarity this Note refers to the statute by its contemporary codification throughout. See 2 U.S.C. § 441e ("Section 441e was editorially reclassified as section 30121 of Title 52, Voting and Elections.").

[15] H.R. 4517, 111th Cong. § 2 (2010).

[16] Actions Overview, H.R. 4517, Congress.gov, https://www.congress.gov/bill/111th-congress/house-bill/4517/all-actions-without-amendments [https://perma.cc/77Z7-FAZG] (last visited Apr. 10, 2021).

foreign-influence provisions, in both the House and the Senate.[17] The House proposal sought to extend section 30121's prohibitions to reach any corporation in which a foreign country or government official owns 5% or more of voting shares.[18] For other foreign nationals, the bill set the threshold at 20% or more of voting shares owned by a single shareholder, or 50% of voting shares owned by several foreign nationals, where each of those foreign nationals owns stakes of 5% or greater.[19] These provisions would have introduced a less strict version of the foreign-influence law John Hall introduced previously. The House version of the bill passed 219–206 in the House of Representatives,[20] but it failed in the Senate.[21]

Federal legislators continue to propose various formulations of the DISCLOSE Act on an annual basis, many of which contain provisions restricting foreign-influenced firms.[22] Yet despite significant and continuing efforts to enact campaign finance reform regarding "foreign-influenced" or foreign-controlled firms,[23] Congress has not passed

[17] See H.R. 5175, 111th Cong. §§ 1(a), 102(a) (2010); S. 3295, 111th Cong. § 2 (2010) § 102(a)(3).

[18] See H.R. 5175, 111th Cong. § 102(a) (2010).

[19] See id.

[20] Actions Overview, H.R. 5175, Congress.gov, https://www.congress.gov/bill/111th-congress/house-bill/5175/actions [https://perma.cc/NB86-NBBT] (last visited Apr. 12, 2021).

[21] See David M. Herszenhorn, Campaign Finance Bill Is Set Aside, N.Y. Times (July 27, 2010), www.nytimes.com/2010/07/28/us/politics/28donate.html [https://perma.cc/V6KJ-D6KX].

The Senate version of the DISCLOSE Act never left committee. See Actions Overview, S. 3295, Congress.gov, https://www.congress.gov/bill/111th-congress/senate-bill/3295/all-actions-without-amendments [https://perma.cc/SUC4-FNXK] (last visited Mar. 17, 2021).

[22] For example, the DISCLOSE Act of 2018 contained the same language as the 2010 House version, with a 20% threshold for foreign nationals and a 5% threshold for foreign governments and officials. S. 3150, 115th Cong. § 101(a)(3) (2018); see also S. 1585, 115th Cong. § 101(a)(3) (2017) (proposing the same).

[23] Although many federal proposals have considered the percentage of foreign-owned stock, legislators advanced several alternative methods to restrict foreign influence on corporate political activity. The version of the DISCLOSE Act that passed the House, for example, would have barred the independent expenditures of corporations run by majority-foreign boards. See H.R. 5175, 111th Cong. § 102(a)(3) (2010). Other bills called for bans on contributions and expenditures by political committees associated with firms majority-owned by foreign nationals. See H.R. 195, 113th Cong. § 2 (2013). Some sought to extend section 30121 to all firms controlled by foreign nationals, including United States subsidiaries of foreign corporations. See H.R 5175, 111th Cong. § 2 (2010). This legislation would overwrite FEC guidance allowing domestic subsidiaries of foreign corporations to operate political committees, provided that no foreign national controlled the committee. See, e.g., LLC Affiliated with Domestic Subsidiary of a Foreign Corporation May Administer an SSF, FEC A.O. 2009-14 (Oct. 2, 2009).

legislation expanding the reach of section 30121, and the statute remains unchanged since its introduction in the Bipartisan Campaign Reform Act of 2002 ("BCRA"). However, legislators' regular revival of these restrictions will provide ongoing opportunities for foreign-influence laws to pass at the federal level, should political tides ever shift to support them. This outcome is rendered more likely by broad public distaste for *Citizens United* and growing concern over foreign influence in American elections.[24] A law restricting foreign-influenced corporations formed part of Elizabeth Warren's 2020 presidential campaign platform, where she advocated the strict thresholds of 1% for a single foreign shareholder and 5% for foreign shareholders in aggregate;[25] Warren also introduced a bill in late 2020 that contains foreign-influence provisions.[26] As a presidential candidate, Joe Biden did not make a similarly explicit pledge, although he did propose "a law to strengthen our prohibitions on foreign nationals trying to influence federal, state, or local elections,"[27] and he has expressed concern regarding foreign money in American political campaigns.[28]

Although foreign-influence laws have so far failed in Congress, the legislation has found increasing success in local and state legislatures, and thresholds for foreign influence have become progressively more stringent. In 2017, the city of St. Petersburg, Florida, became the first jurisdiction in the United States to pass a foreign-influence law. The ordinance requires a corporation contributing more than $5,000 to certify

[24] See, e.g., Program for Pub. Consultation, Univ. of Md. Sch. of Pub. Pol'y, Americans Evaluate Campaign Finance Reform 7 (2018), https://www.publicconsultation.org/wp-content/uploads/2018/05/Campaign_Finance_Report.pdf [https://perma.cc/3BZ9-77B2] (finding that 75% of respondents would support a proposed constitutional amendment overturning *Citizens United*); Hannah Hartig, 75% of Americans Say It's Likely that Russia or Other Governments Will Try to Influence 2020 Election, Pew Rsch. Ctr. (Aug. 18, 2020), https://www.pewresearch.org/fact-tank/2020/08/18/75-of-americans-say-its-likely-that-russia-or-other-governments-will-try-to-influence-2020-election/ [https://perma.cc/7KCU-YGN7].

[25] See Getting Big Money out of Politics, Warren Democrats, https://elizabethwarren.com/plans/campaign-finance-reform [https://perma.cc/NQ22-QXRN] (last visited Apr. 12, 2021).

[26] S. 5070, 116th Cong. § 205 (2020).

[27] The Biden Plan to Guarantee Government Works for the People, Biden Harris Democrats, https://joebiden.com/governmentreform/ [https://perma.cc/5V2J-4WUU] (last visited Mar. 17, 2021).

[28] See Joseph Biden & Michael Carpenter, Foreign Dark Money Is Threatening American Democracy, Politico (Nov. 27, 2018), https://www.politico.com/magazine/story/2018/11/27/foreign-dark-money-joe-biden-222690/ [https://perma.cc/Y2P8-PCHQ].

that it is not a "foreign-influenced business entity,"[29] allowing a corporation to make contributions so long as it has made earnest attempts to determine whether foreigners own a significant stake in the firm. The election law defines a foreign-influenced business entity as one owned 5% or more by a foreign national or owned 20% or more by multiple foreign nationals.[30] This threshold—which this Note designates a 5-20 law—represents a much stricter standard than that proposed in the 2010 DISCLOSE Act. In 2018, New York City Council members considered a law that would have employed the same thresholds as the St. Petersburg law. However, instead of allowing for certification, the New York City law would have directly barred any contributions or independent expenditures by foreign-influenced firms.[31] Seattle recently passed its even tougher law, lowering the threshold for a single owner to just 1% and the aggregate threshold to 5%—a 1-5 law.[32]

Proposals for foreign-influence laws at the state level have followed a similar trajectory, with legislators putting forward increasingly strict formulations. Alaska passed the first state-level foreign-influence law, enacting the thresholds of a 5-20 law.[33] Some states have passed other laws rendering U.S. corporations foreign for the purposes of campaign finance regulation. Hawaii, for example, bars domestic subsidiaries of foreign corporations from making contributions or expenditures in state elections,[34] and Colorado includes in its definition of "foreign corporation" any firm that is majority foreign-owned.[35] Efforts to pass foreign-influence laws at the state level continue. Beginning in 2017, Massachusetts legislators have regularly introduced bills to pass a 5-20 foreign-influence law.[36] As of early 2020, the Massachusetts Legislature

[29] See St. Petersburg, Fla., City Code pt. 2, ch. 10, art. iv, § 62 (2021).

[30] St. Petersburg, Fla., City Code pt. 2, ch. 10, art. iii, § 51(m) (2021).

[31] See N.Y.C., N.Y., Introduction No. 1074 (July 17, 2018).

[32] See Seattle, Wash., Mun. Code tit. 2, ch. 4, §§ 10, 400 (2020).

[33] See Alaska Stat. § 15.13.068 (2018). The Alaska law likely only applies to local election campaigns. See Alaska Stat. § 15.13.068(b) (2018); Recent Legislation, 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, 2405–06 (2019).

[34] See Haw. Rev. Stat. § 11-356 (2010).

[35] See Colo. Rev. Stat. §§ 1-45-103(10.5), 1-45-107.5(1) (2019). The Colorado statute next asserts compliance with *Citizens United*'s dictate that corporations and labor organizations not be prohibited from making independent expenditures, which represents either recognition of the state law's incompatibility with the decision or an effort to stand up to it.

[36] See S. 394, 190th Gen. Ct. (Mass. 2017); H. 2904, 190th Gen. Ct. (Mass. 2017).

continued to consider the legislation[37] with support from Harvard professors Laurence Tribe and John Coates, among others.[38] Legislators in Connecticut, Ohio, and Pennsylvania have proposed bills calling for the same ownership thresholds,[39] while Hawaii, Maryland, Minnesota, and New York are considering statutes with strict 1-5 thresholds.[40]

Foreign-influence laws therefore fall into three main categories. Strict 1-5 laws, like that in Seattle, will affect the largest number of corporations. In comparison, 5-20 laws reach fewer corporations but still remain moderately strict. Finally, less stringent forms advocate significantly higher thresholds, such as a 20% or 50% foreign ownership stake. Other related laws—which do not constitute the focus of this Note—look for foreign corporate board members or consider whether shareholders are foreign governments. The remainder of this Note discusses whether designating firms based on proportion of foreign ownership comports with the Supreme Court's precedents, as well as what alternatives may exist. Finding that foreign-influence laws do not fit within the bounds of previous opinions, this Note concludes that the regulations are not constitutional.

II. THE INCOMPATIBILITY OF *BLUMAN* AND *CITIZENS UNITED*

This Part lays out a brief history of campaign finance law relating to corporations and foreigners before discussing the clash between *Citizens United* and *Bluman*. Foreign-influence laws—which regulate speech by both corporations and foreigners—lie at the intersection of these two lines of doctrine and emphasize the friction between them.

---

[37] See S. 401, 191st Gen. Ct. (Mass. 2019); S. 393, 191st Gen. Ct. (Mass. 2019); H. 703, 191st Gen. Ct. (Mass. 2019).

[38] See Letter from Laurence H. Tribe, Professor, Harvard Law Sch., to Barry Finegold, Chairman, Mass. State House, and John L. Lawn, Jr., Chairman, Mass. State House (May 13, 2019), https://freespeechforpeople.org/wp-content/uploads/2019/05/2019-L.-Tribe-testimony-to-Mass-Election-Law-Committee.pdf [https://perma.cc/SR9T-SQQ3]; Letter from John Coates, supra note 8, at 1.

[39] See H.B. 5410, 2020 Sess. (Conn.); H.B. 739, 2734–47, 133d Gen. Assemb. (Ohio 2020); S.B. 349, 2734–47, 133d Gen. Assemb. (Ohio 2020); S.B. 11, 2019 Sess. (Penn.); S.B. 497, 2018 Sess. (Conn.).

[40] See H.B. 2738, 30th Leg. (Haw. 2020); H.B. 34, 441st Gen. Assemb. (Md. 2019); S.B. 87, 441st Gen. Assemb. (Md. 2019); H.F. 3405, 91st Leg. (Minn. 2020); S.B. 7578, 2020 Sess. (N.Y.).

A. Corporations and Campaign Finance Law: From Tillman to Citizens United

Campaign finance law has long sought to balance the preservation of political speech with the protection of representative democracy. For most of the twentieth century, congressional judgment regarding that balance went largely unchallenged by the courts. Congress made its first major foray into the regulation of corporate political money with the 1907 Tillman Act, which prohibited corporations from contributing funds directly to federal political candidates.[41] Congress later expanded "contributions" to include anything of value and criminalized both acceptance and provision of those corporate contributions.[42] In 1947, Congress again augmented this prohibition in the Taft-Hartley Act, banning corporations and labor unions from spending general treasury funds to "make a contribution or expenditure in connection with" any federal election.[43]

However, throughout most of the twentieth century, federal election law lacked any strong enforcement mechanism, and as a result many offenders carried on unpunished and undeterred.[44] In response, and as a result of both pressure for increased disclosure of electoral funding sources and the Watergate scandal,[45] Congress enacted the Federal Election Campaign Act of 1971 ("FECA") and its 1974 amendments.[46]

[41] See Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 394 (2010) (Stevens, J., concurring in part and dissenting in part); Tillman Act, Pub. L. No. 59-36, ch. 420, 34 Stat. 864 (1907).

[42] See McConnell v. Fed. Election Comm'n, 540 U.S. 93, 116 (2003) (citing the Federal Corrupt Practices Act of 1925, ch. 368, §§ 301, 302, 313, 43 Stat. 1070, 1074).

[43] Labor Management Relations Act of 1947, Pub. L. No. 80-101, 61 Stat. 136, 159. In its regulation of elections, Congress made a few stops along the way unrelated to corporate political activity, such as the Hatch Act of 1939, Pub. L. No. 76-252, 53 Stat. 1147 (prohibiting civil service employees of the United States from interfering with elections and making it illegal to promise benefits in exchange for support of or opposition to a candidate or political party).

[44] See Trevor Potter, Money, Politics, and the Crippling of the FEC, 69 Admin. L. Rev. 447, 451 (2017); Bradley A. Smith, Feckless: A Critique of Critiques of the Federal Election Commission, 27 Geo. Mason L. Rev. 503, 512 (2020).

[45] See *McConnell*, 540 U.S. at 118.

[46] Pub. L. No. 92-225, 86 Stat. 3 (1972); see also Robert E. Mutch, Buying the Vote: A History of Campaign Finance Reform, 130–38 (2014) (elaborating on the reasons for renewed campaign finance reform); 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, 795–96 (2016) (explaining the influence of the Watergate scandal on the public's desire for campaign finance reform).

The first iteration of FECA capped media expenditures, bolstered public disclosure requirements, and reinforced criminal provisions, among other reforms.[47] The amendments then severely limited contributions to candidates and established the Federal Election Commission ("FEC") to monitor and enforce federal campaign finance regulations.[48] Congress later again amended FECA to bolster the Taft-Hartley Act's prohibition on the use of corporate general treasury funds to "make a contribution or expenditure in connection with" federal election campaigns.[49]

However, the broad sweep of FECA's restrictions sparked litigation. In 1976, the Supreme Court ruled in *Buckley v. Valeo* that FECA's overall limits on independent expenditures did not pass constitutional muster.[50] The Court also created a critical distinction between contributions and independent expenditures—a bifurcation that continues to guide campaign finance law. Legislatures were permitted to closely regulate contributions made directly to political parties and campaigns because of corruption and the appearance of corruption.[51] In contrast, the Court found independent expenditures—such as purchasing advertisements supporting a candidate without directly coordinating with the political campaign—to present little risk of corruption, finding that the government lacked a substantial interest in regulating those expenditures.[52] In addition to introducing this dichotomy, *Buckley* rejected the rationales that the government may introduce campaign finance regulations to create a level playing field among candidates or reduce money in politics.[53]

The Supreme Court later decided in *Austin v. Michigan Chamber of Commerce* that a state may prohibit corporations from using general

[47] Pub. L. No. 92-225, 86 Stat. 3 at 4, 8–19 (1972).

[48] Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263, 1280–81 (creating the FEC); id. at 1263 (introducing a $1,000 annual limit on a person's contributions to a federal candidate); id. at 1265 (applying the same limit to a person's independent expenditures).

[49] See Federal Election Campaign Act Amendments of 1976 § 321(a), Pub. L. No. 94-283, 90 Stat. 475, 490.

[50] 424 U.S. 1, 45–48 (1976) (deciding that the right to free speech outweighs the government's interest in preventing corruption). *Buckley*'s facts involved independent expenditures by individuals, meaning that the Court took no explicit position on independent expenditures by corporations. See id. at 7–8.

[51] Id. at 23–29.

[52] Id. at 47. The Court later employed this same rationale to strike down corporate spending limits in ballot measure elections. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 788–95 (1978).

[53] *Buckley*, 424 U.S. at 48–49, 57.

treasury funds to make independent expenditures in candidate elections.[54] The Court found a compelling interest in eliminating the distortion caused by corporate spending.[55] The distinction between equalizing the playing field and anti-distortion is murky, meaning that the rationale furthered in *Austin* did not harmonize well with *Buckley*'s finding that some voices may not be restricted in order to enhance others.[56] Despite this, *Austin* stood for another twenty years.

In 2002, Congress passed the Bipartisan Campaign Reform Act ("BCRA"), introducing the broadest changes to campaign finance regulation since FECA.[57] BCRA primarily targeted soft money—funds donated to political parties and not directly to candidates—alongside corporate-dominated independent expenditures, but the law's sweeping changes to federal campaign finance infrastructure prompted numerous lawsuits.[58] In *McConnell v. Federal Election Commission*, the Supreme Court upheld most of BCRA, including restrictions on soft money, relying in large part on the anti-distortion principle furthered in *Austin*.[59] As a result, federal election laws barred corporations, including non-profit organizations, from making "electioneering communications," although natural persons were unimpeded from doing the same.[60] When combined, BCRA and FECA essentially prevented a corporation from engaging in

[54] 494 U.S. 652, 655–56 (1990).

[55] Id. at 660 (Michigan's regulation targets "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas")

[56] *Buckley*, 424 U.S. at 48–49 (describing the idea as "wholly foreign to the First Amendment").

[57] See Pub. L. No. 107-155, 116 Stat. 81 (2002) (introducing new restrictions aimed at limiting special interest influence and new rules for electioneering communications and independent and coordinated expenditures).

[58] See id. §§ 101, 201, 211; McConnell v. Fed. Election Comm'n, 540 U.S. 93, 132 (2003); Richard Briffault, The Future of Reform: Campaign Finance After the Bipartisan Campaign Reform Act of 2002, 34 Ariz. St. L.J. 1179, 1180–81 (2002).

[59] See 540 U.S. at 207–08 (citing *Austin*, 494 U.S. at 668, and remaining "[un]persuaded that plaintiffs . . . carried their heavy burden of proving that [the amended statute] is overbroad"); Richard Briffault, *McConnell v. FEC* and the Transformation of Campaign Finance Law, 3 Election L.J. 147, 147 (2004).

[60] Electioneering communications include "any broadcast, cable, or satellite communication that refers to a clearly identified candidate for Federal office and is made within 30 days of a primary or 60 days of a general election." Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 321 (2010) (citing 2 U.S.C. § 434(f)(3)(A) (2006)) (internal quotations removed).

electioneering activity unless it established a separate political action committee.[61]

In 2010, the Court revisited the tension between *Austin* and *Buckley* in *Citizens United*. Citizens United had sought to broadcast *Hillary: The Movie*—a film encouraging viewers to vote against Hillary Clinton in the 2008 Democratic primary[62]—within thirty days of the election. Given that Citizens United was a non-profit corporation funded in part by for-profit entities,[63] and the movie was an electioneering communication,[64] federal election law prevented the organization from airing the program. Citizens United challenged the law, arguing, among other claims, that it unconstitutionally restricted the organization's political speech, and that the Court should create a narrow exception for organizations like it.[65]

However, the Supreme Court's decision went beyond the narrow issue Citizens United originally asked the Court to resolve, invalidating restrictions on corporate independent expenditures in toto and overruling *Austin*'s anti-distortion rationale. Writing for the majority, Justice Kennedy addressed the conflict between *Buckley*'s anti-corruption rationale and *Austin* and *McConnell*'s anti-distortion rationale, which permitted laws restricting corporate independent expenditures. The opinion championed discursive democracy, envisioning the First Amendment's primary purpose as protecting a speaker's ability to speak and a listener's ability to listen.[66] Kennedy's opinion included strong statements supporting the importance of speech, including admonitions that the government may not use criminal law "to command where a person may get his or her information or what distrusted source he or she may not hear" and that "[t]he First Amendment confirms the freedom to think for ourselves."[67] The decision found that any concerns over distortion should be addressed by allowing all parties to speak, permitting voters to "obtain information from diverse sources," and "by entrusting

[61] Toni M. Massaro, Foreign Nationals, Electoral Spending, and the First Amendment, 34 Harv. J.L. & Pub. Pol'y 663, 669 (2011).

[62] *Citizens United*, 558 U.S. at 319–21.

[63] See Fed. Election Comm'n v. Mass. Citizens for Life, Inc., 479 U.S. 238, 263–65 (1986) (finding that corporations that do not engage in business activities lack the attributes that give corporations the potential to distort or corrupt political discourse, and therefore may not be prohibited from engaging in independent expenditures).

[64] See *Citizens United*, 558 U.S. at 324–25.

[65] Id. at 327.

[66] See Robert C. Post, Citizens Divided: Campaign Finance Reform and the Constitution 44 (2014).

[67] *Citizens United*, 558 U.S. at 356.

the people to judge what is true and what is false."[68] *Citizens United* focused not only on the right to speak but also the right "to hear" information and retain or discard it at one's own discretion.[69] The decision also flatly rejected the appropriateness of speaker discrimination in the campaign finance space, given that "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content."[70]

Based on this reasoning, Justice Kennedy found that *Austin*'s rationale, which allowed for restrictions on corporations' political speech, represented an outlier ungrounded in the Court's precedent.[71] The majority resolved that *Austin*—and therefore the portion of *McConnell* barring corporate electioneering communications—must be overruled.[72] Federal election laws limiting independent expenditures could no longer find traction in the government's anti-distortion interest, and all laws prohibiting corporate independent expenditures were therefore unconstitutional.

Whereas *Citizens United* opened space for corporate interests to engage in political spending, foreign-influence laws place significant restraints on the corporate entities that have the most resources to deploy in support of political causes. However, the laws also involve the thread of campaign finance regulations addressing foreign nationals.

B. Foreigners and Campaign Finance Law: From FARA to Bluman

Congressional concern over foreign interference in American elections has crescendoed alongside the legislature's worries over corporate political spending. Congress's first regulation of foreign campaign activity came in the 1966 amendments to the Foreign Agents Registration Act ("FARA"), which prohibited foreign governments, corporations, and other entities from contributing funds or anything of value to political candidates, including through U.S. citizens.[73] The 1974 amendments to

[68] Id. at 341, 355.
[69] Id. at 339.
[70] Id. at 340–41.
[71] Id. at 348–50.
[72] Id. at 365.
[73] Pub. L. No. 89-486, § 613, 80 Stat. 244, 248–49; United States v. Singh, 924 F.3d 1030, 1042 (9th Cir. 2019). Although Congress enacted FARA in 1938, the law's original formulation primarily targeted foreign propaganda as opposed to activity directed at election campaigns. H.R. Rep. No. 75-1381, at 1–3 (1937) (describing the purpose of the act as

FECA then banned all foreign nationals from contributing to candidates.[74] Following the 1998 release of a Senate Report detailing Chinese government efforts to influence U.S. elections by financing the Democratic Party,[75] Congress banned foreign nationals from contributing funds or anything of value in connection with a federal, state, or local election; donating to a committee of a political party; or financing an electioneering communication.[76]

However, following the Court's focus on anti-corruption as the sole acceptable rationale for regulating campaign expenditures in *Citizens United*, along with the majority opinion's emphasis on the supremacy of the First Amendment and the listener's right to hear, the continued viability of these laws was not immediately certain. Indeed, Justice Kennedy's opinion expressly declined to address the issue of foreigners and American election law.[77] Justice Stevens' partial dissent provided some reassuring words, asserting that the Court had "never cast doubt on laws that place special restrictions on campaign spending by foreign nationals."[78] Yet no appellate or Supreme Court decision had directly considered the issue, at least until the year after *Citizens United*.

In 2011, two foreign citizens in the United States on temporary work visas challenged the statute prohibiting foreign nationals from contributing to candidates and making independent expenditures—52 U.S.C. § 30121.[79] In *Bluman v. Federal Election Commission*, an opinion written by then-Judge Kavanaugh sitting by designation, the D.C. District Court upheld the law and rebuffed the plaintiffs' contention that they should be entitled to fully express their political views while lawfully residing in the United States.[80] The district court rejected a principle based

uncovering propaganda that may "influenc[e] American public opinion"); Pub. L. No. 75-583, 52 Stat. 631, 632 (covering public relations activities but not political activities).

[74] Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263, 1267.

[75] See Comm. on Governmental Affs., Investigation of Illegal or Improper Activities in Connection with 1996 Federal Election Campaigns, S. Rep. No. 105-167, at 33–34 (1998); *Singh*, 924 F.3d at 1042.

[76] Pub. L. No. 107-155, § 441(e), 116 Stat. 81, 96 (2002) (current version at 52 U.S.C. § 30121(a) (2018)); Pub. L. No. 107-155, § 303(2)(a)(1), 116 Stat. 81, 96 (2002).

[77] See *Citizens United*, 558 U.S. at 362 ("We need not reach the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation's political process.").

[78] Id. at 423 (Stevens, J., concurring in part and dissenting in part).

[79] Bluman v. Fed. Election Comm'n, 800 F. Supp. 2d 281, 285 (D.D.C. 2011).

[80] Id. at 283, 292.

on territoriality—where an individual's presence in or absence from the United States determines her ability to participate in political life.[81] Instead, the court adopted an analysis based on the speaker's stake in "the American political community."[82] Foreigners, the court concluded, "do not have a constitutional right to participate in, and thus may be excluded from, activities of democratic self-government."[83] The government could therefore cite a compelling interest in limiting the participation of foreign citizens in activities of American democratic self-government, and the court upheld the law barring foreign election spending.[84] Judge Kavanaugh explicitly extended the holding to foreign corporations, but declined to determine what corporations may be considered "foreign" for the purposes of First Amendment analysis.[85] The Supreme Court subsequently summarily affirmed *Bluman*,[86] but has only referenced the opinion once, citing to dicta in *Bluman* explaining the degree to which foreigners *do* have many constitutionally-protected rights while in the United States.[87]

C. Bluman*'s Relationship to* Citizens United *and Foreign-Influence Laws*

On its own, the D.C. District Court's holding in *Bluman* appears uncontroversial, asserting American control over the nation's political process. However, the opinion clashes starkly with *Citizens United*. Then-retired Justice Stevens, for example, noted that *Bluman*'s "reasoning, though entirely correct, was flatly inconsistent with the proposition undergirding the holding by the majority in *Citizens United* that election-

[81] Id. at 289 ("[P]laintiffs . . . concede that the government may make distinctions based on the foreign identity of the speaker when the speaker is abroad. Plaintiffs contend, however, that the government may not impose the same restrictions on foreign citizens who are lawfully present in the United States on a temporary visa. We disagree.").

[82] Id. at 290; see also Alyssa Markenson, Note, What's at Stake?: *Bluman v. Federal Election Commission* and the Incompatibility of the Stake-Based Immigration Plenary Power and Freedom of Speech, 109 Nw. U. L. Rev. 209, 229 (2015) (discussing *Bluman*'s stake-based rationale).

[83] *Bluman*, 800 F. Supp. 2d at 288 ("It follows, therefore, that the United States has a compelling interest for purposes of First Amendment analysis in limiting the participation of foreign citizens in activities of American democratic self-government, and in thereby preventing foreign influence over the U.S. political process.").

[84] Id. at 288, 292.

[85] Id. at 292 n.4.

[86] Bluman v. Fed. Election Comm'n, 565 U.S. 1104 (2012).

[87] Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 140 S. Ct. 2082, 2086 (2020).

related speech by nonvoters is always entitled to at least as much protection under the First Amendment as speech about other issues."[88] Whereas *Citizens United* extolled unrestricted speech and the citizen's right to hear all that others have to say, *Bluman* upheld the government's power to exclude a class of voices from participating in that conversation. While *Citizens United* viewed voters as the final arbiter of information, *Bluman* found that the government may prevent foreigners from "influenc[ing] how voters will cast their ballots in the elections."[89] This further contradicted the Court's dictate in *Citizens United* that the government may not filter ideas and "command where a person may get his or her information."[90] And where the *Citizens United* majority inveighed against identity-based speaker discrimination,[91] *Bluman*'s bifurcation of foreigners and non-foreigners could not more clearly discriminate based on a speaker's identity.

In addition, *Bluman* fails to identify the harm that foreign speakers actually inflict on the domestic political process, rendering the issue conspicuous by its absence.[92] *Citizens United* concluded that independent expenditures—including those by corporations—do not cause corruption and that more speech is always better. This notion constrained the *Bluman* court's choices when addressing foreign speakers. For example, the *Bluman* court could not find that foreign-linked independent expenditures may corrupt American politicians, that foreign wealth would distort the political process, or that Americans cannot sort through ideas proposed by foreign sources, even if all of these issues represent the real dangers of foreign influence over American elections.[93] Yet finding a compelling interest to restrict political speech without identifying a potential injury renders the opinion somewhat disjointed.

Furthermore, *Citizens United* reaffirmed the notion that independent expenditures do not lead to negative effects on American political life, noting "[t]he fact that a corporation, *or any other speaker*, is willing to

[88] See John Paul Stevens, Six Amendments: How and Why We Should Change the Constitution 69–70 (2014); see also Laurence Tribe & Joshua Matz, Uncertain Justice: The Roberts Court and the Constitution 118 (2014) (noting that the Court "ducked the issue").

[89] *Bluman*, 800 F. Supp. 2d at 288.

[90] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 356 (2010).

[91] Id. at 340–41, 364; Tribe & Matz, supra note 88, at 118.

[92] While *Bluman* correctly identified the existence of a "risk" involved with foreign participation in the American democratic process, the opinion declined to specify what that risk is. *Bluman*, 800 F. Supp. 2d at 291.

[93] See Massaro, supra note 61, at 675.

spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials."[94] In contrast, *Bluman*'s holding rests necessarily on the idea that *some* speakers engaging in independent expenditures may harm American politics. Recognition that independent expenditures can cause trouble generates friction with not just *Citizens United*, but also the core compromise in *Buckley v. Valeo*: that First Amendment rights outweigh the minimized harms posed by independent expenditures.[95]

Setting its conflict with *Citizens United* to the side, *Bluman* on its own terms does not settle the constitutionality of foreign-influence laws.[96] First and foremost, *Bluman* deals entirely with the abstract rights of foreign persons and corporations, but the opinion provides no guidance on *when* a corporation may be considered foreign for the purposes of the First Amendment.[97] *Bluman* therefore provides no support either for the particular foreign ownership thresholds foreign-influence laws impose, or even the general premise that partial foreign ownership can convert a U.S.-incorporated company into a foreign entity for constitutional purposes.

Second, *Bluman*'s reasoning hinges on whether an entity is a member of the American political community, not whether an entity is a U.S. citizen or comprises U.S. citizens. Advocates of foreign-influence laws frequently cite Judge Kavanaugh's intermediate conclusion that "[i]t is fundamental to the definition of our national political community that foreign citizens do not have a constitutional right to participate in, and thus may be excluded from, activities of democratic self-government."[98] Yet foreign-influence laws require another logical step before *Bluman* authorizes them—one must conclude that a partially foreign-owned corporation is in fact a foreign entity. *Bluman* contradicts this point, finding that "American corporations . . . are . . . members of the American political community."[99] This conclusion makes sense in the context of *Bluman*'s reasoning, given that U.S. corporations could be equated in some ways to lawful permanent residents, who "have a long-

[94] *Citizens United*, 558 U.S. at 360 (emphasis added).
[95] See Buckley v. Valeo, 424 U.S. 1, 55–56 (1976).
[96] To be clear, this position disagrees with the stance of those who support foreign-influence laws.
[97] See *Bluman*, 800 F. Supp. 2d at 292 n.4.
[98] Id. at 288.
[99] Id. at 290.

term stake in the flourishing of American society" and are not transiently residing in the country.[100]

Looking to *Bluman* to uphold foreign-influence laws also conflicts with *Citizens United* because it would require one to argue that U.S. corporations do not have a fundamental stake in the American political process. This position is difficult to align with *Citizen United*'s holding that corporations have a right to participate in political discourse. To bar the participation of foreigners living in the United States, Judge Kavanaugh's logic requires rejection of a territory-based dividing line, and acceptance of a stake-based line instead.[101] When justifying the distinction between the rights of non-voting U.S. citizens and foreigners in the United States, Judge Kavanaugh asserted that "minors, American corporations, and citizens of other states and municipalities are all members of the American political community. By contrast . . . '[a]liens are by definition those outside of this community.'"[102] *Bluman* therefore asked as a threshold question whether the entity is a member of the American political community. As implied by the logic and stated explicitly, entities incorporated and based in the United States represented members of the political community regardless of minority foreign ownership. If corporations do not retain this stake in the American political process, this conclusion challenges the core holding of *Citizens United*. On the other hand, if corporations do have this stake in American political life, then *Bluman* does not control and does not serve to bar them from political activity.

Third and finally, it is important to note that the Supreme Court summarily affirmed *Bluman*. As a result, the decision's effect reaches only the validity of section 30121 and represents a "rather slender reed" on which to base decisions considering other statutes.[103] As discussed above, the decision's reasoning does not map on to foreign-influence statutes, and extending *Bluman*'s statement that "foreign citizens . . . may be excluded" to reach the laws in question would rest on tenuous ground.[104]

[100] Id. at 291.

[101] Id. at 290–91; Markenson, supra note 82, at 229.

[102] *Bluman*, 800 F. Supp. 2d at 290 (citing Cabell v. Chavez-Salido, 454 U.S. 432, 439–40 (1982)).

[103] United States v. Singh, 924 F.3d 1030, 1043 (9th Cir. 2019) (citing Morse v. Republican Party of Va., 517 U.S. 186, 203 n.21 (1996)).

[104] *Bluman*, 800 F. Supp. 2d at 288.

Bluman does not provide proper support for foreign-influence laws even when considered on its own. For this reason, it is necessary to investigate the constitutionality of foreign-influence laws without the notion that *Bluman* provides refuge from the question.

III. THE CONSTITUTIONALITY OF FOREIGN-INFLUENCE LAWS

This Part discusses the level of scrutiny a court might apply when considering foreign-influence laws before determining that the regulations would not pass strict scrutiny. The government likely has a compelling interest in limiting foreigners' political speech based on precedent differentiating the political rights of foreigners from those of citizens and the concerns of the Framers. However, foreign-influence laws are not narrowly tailored to that interest because of shareholders' attenuated power to influence corporate spending, the laws' particularly strict natures, and potential chilling effects. This analysis looks to the logic of previous campaign finance decisions to consider how a court may view the new regulations. This Part also considers unique issues of federalism that burden foreign-influence laws.

A. Foreign-Influence Laws and Levels of Scrutiny

When assessing the constitutionality of a law, the first step is to determine which level of scrutiny to apply. Although campaign finance decisions point to strict scrutiny, at least one case regarding speech and foreign affairs supports more deferential review. Because foreign-influence laws straddle these two lines of cases, the appropriate level of scrutiny is not immediately apparent.

On the one hand, the Supreme Court has found that regulations on independent expenditures are subject to strict scrutiny because they interfere significantly with a speaker's ability to disseminate a message, requiring the government to present a compelling interest and a law narrowly tailored to achieve that interest.[105] The Court followed this precedent in *Austin*, *Bellotti*, *Buckley*, *McConnell*, and other campaign

[105] Buckley v. Valeo, 424 U.S. 1, 19 (1976). In contrast, regulations on direct contributions to candidates are subject to a form of "closely drawn" scrutiny, demanding a sufficiently important interest and a means closely drawn to that interest. Id. at 25; McConnell v. Fed. Election Comm'n, 540 U.S. 93, 137 (2003).

finance cases.[106] The Court did not deviate from its precedent in *Citizens United*, employing strict scrutiny because laws limiting corporate independent expenditures burden political speech.[107] If we consider foreign-influence laws under the framework *Citizens United* laid out, a court should subject the regulations to strict scrutiny. The Court's campaign finance decisions provide no other option under which to analyze these statutes.

On the other hand, laws governing foreigners frequently receive more deferential review. In *Bluman*, for example, the government argued for a rational basis standard because section 30121 represents congressional judgment related to foreign affairs and national security.[108] Deference to other branches of government in these areas is well-founded.[109] Although the rights of non-citizens outside the United States may warrant a deferential rational basis standard, applying this low bar to individuals in the United States would represent a deviation from contemporary constitutional norms—and precedent demanding strict scrutiny—when evaluating laws that also affect U.S. entities' political speech rights. Yet the Court took a similar path in *Holder v. Humanitarian Law Project*, employing a form of "deferential strict scrutiny" that afforded significant credence to the legislature's determinations regarding foreign affairs and national security.[110] In *Humanitarian Law Project*, the Court held that the First Amendment permits criminal prosecution of individuals, who engage in non-violent political advocacy and provide legal training supporting a designated terrorist organization.[111] The Supreme Court's

[106] Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 464 (2007); see also Austin v. Mich. Chamber of Com., 494 U.S. 652, 658 (1990); First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 786 (1978); *Buckley*, 424 U.S. at 44–45; *McConnell*, 540 U.S. at 205.

[107] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 340 (2010).

[108] *Bluman*, 800 F. Supp. 2d at 285.

[109] See, e.g., Holder v. Humanitarian L. Project, 561 U.S. 1, 33–34 (2010) (explaining that courts are not well placed to judge issues of national security and foreign affairs); Chi. & S. Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 111 (1948) (explaining that foreign policy concerns are political and reserved to the executive and legislative branches, not the judiciary). But see Martin S. Flaherty, Restoring the Global Judiciary: Why the Supreme Court Should Rule in U.S. Foreign Affairs 191 (2019) (describing the arc of judicial deference in foreign affairs); David Rudenstine, The Age of Deference: The Supreme Court, National Security, and the Constitutional Order 308 (2016) (explaining that the Constitution allocates primary responsibility for national security to the executive and Congress, but "primary responsibility is not exclusive responsibility").

[110] David Cole, The First Amendment's Borders: The Place of *Holder v. Humanitarian Law Project* in First Amendment Doctrine, 6 Harv. L. & Pol'y Rev. 147, 158 (2012).

[111] *Humanitarian L. Project*, 561 U.S. at 10, 40.

standards of review in *Citizens United* and *Humanitarian Law Project* differ greatly,[112] and foreign-influence laws straddle both the political speech rights implicated in the former and the national security concerns involved in the latter. If the Court were to adopt *Humanitarian Law Project*'s deferential standard when analyzing foreign-influence laws, this would likely decide the issue of constitutionality given the weight the opinion afforded to the government's national security arguments.

Nonetheless, a long line of precedent indicates that foreign-influence laws should receive strict scrutiny. Noting that the issue is complicated, Judge Kavanaugh's opinion in *Bluman* pointed to the Court's direction in *Buckley* and *McConnell*, at least implying that strict scrutiny should apply to regulations on foreigners' expenditures while closely drawn scrutiny should apply to their contributions.[113] Justice Kennedy's majority opinion in *Citizens United* also hinted at strict scrutiny for foreign individuals and associations, noting that the opinion did not determine whether the government had a separate compelling interest to regulate foreign speech.[114] While neither of these opinions directly determined the correct level of scrutiny when considering the political speech rights of foreign individuals, the decisions provide no reason to believe that a lower court should deviate from the Supreme Court's guidance that laws burdening political speech garner strict scrutiny. When rights protected directly by *Citizens United* come into question, the Court is unlikely to employ a deferential level of scrutiny.

B. The Compelling Interest in Limiting Foreigners' Political Speech

Although the Supreme Court has not provided clear guidance for defining a compelling interest in any given controversy,[115] this discussion

[112] See Aziz Z. Huq, Preserving Political Speech from Ourselves and Others, 112 Colum. L. Rev. Sidebar 16, 18–20, 23–27 (2012); William D. Araiza, *Citizens United*, *Stevens*, and *Humanitarian Law Project*: First Amendment Rules and Standards in Three Acts, 40 Stetson L. Rev. 821, 822 (2011).

[113] *Bluman*, 800 F. Supp. 2d at 285. Of course, *Bluman* involved foreigners speaking from within the United States—if those individuals had spoken while abroad, the opinion may have found no constitutional bar under which to scrutinize section 30121.

[114] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 362 (2010) ("We need not reach the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation's political process.").

[115] See Richard H. Fallon, Jr., Strict Judicial Scrutiny, 54 UCLA L. Rev. 1267, 1325 (2007). In reality, the division between the compelling interest and narrow tailoring is likely rather malleable, and a court will view these bifurcated steps in tandem. Id. at 1333.

proceeds under the assumption that the government's interest relates to the suppression of foreign influence on American political life. As discussed below, this interest is likely significant and compelling. Justice Kennedy's opinion in *Citizens United* explicitly declined to decide whether the government has a compelling interest to limit foreigners' political activity.[116] Judge Kavanaugh's opinion in *Bluman*, which the Supreme Court summarily affirmed, found that the government does have a compelling interest in limiting the participation of foreign citizens in the democratic process.[117] Indeed, a court reviewing foreign-influence laws can identify several additional reasons to find a compelling interest in restricting the political speech of foreigners, even independently of the reasoning in *Bluman*.

Many authors have noted that a strict reading of the First Amendment implies foreigners should enjoy speech rights equal to those of citizens,[118] and at least one case supports the right to freedom of thought among noncitizens.[119] However, the Supreme Court has also long found that the First Amendment rights of foreign individuals may be differentiated from those of citizens and abridged in a number of contexts.[120] This finding is particularly true when the individual in question is outside of the United

[116] *Citizens United*, 558 U.S. at 362. Before *Bluman*, political expenditures by foreigners represented "the 800-pound gorilla that the Supreme Court ha[d] never confronted." 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, 992 (2011).

[117] *Bluman*, 800 F. Supp. 2d at 288.

[118] See, e.g., Maryam Kamali Miyamoto, The First Amendment After *Reno v. American-Arab Anti-Discrimination Committee*: A Different Bill of Rights for Aliens?, 35 Harv. C.R.-C.L. L. Rev. 183, 184–88 (2000) (arguing that "First Amendment rights are too essential to the values of a democratic society to allow Congress or the courts to restrict them based on an individual's citizenship status"); Massaro, supra note 61, at 665, 681–82 ("analyz[ing] whether foreign speakers can be restricted from making political campaign contributions or expenditures in ways that nonforeign speakers cannot"); David Cole, Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?, 25 T. Jefferson L. Rev. 367, 376 (2003) (arguing that noncitizens deserve the same rights as citizens).

[119] See Girouard v. United States, 328 U.S. 61, 64–65 (1946) (holding that an applicant for citizenship may not be rejected due to religious beliefs that prevent military service); see also Bridges v. Wixon, 326 U.S. 135, 148 (1945); id. at 161 (Murphy, J., concurring) ("[O]nce an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution . . . .").

[120] See, e.g., Harisiades v. Shaughnessy, 342 U.S. 580, 591–92 (1952) (holding that the First Amendment does not prohibit the deportation of legal permanent residents for membership in the Communist Party); Galvan v. Press, 347 U.S. 522, 529–32 (1954) (holding the same).

States, where the Constitution provides no protection.[121] Even within the United States, the rights of foreigners are incomplete. In *Kleindienst v. Mandel*, for example, the Court found that although First Amendment rights were implicated, Congress' plenary power over immigration afforded the government the right to exclude an alien because of his support for international communism.[122] The Court has also repeatedly upheld laws distancing foreigners within the United States from political processes, pointing to a "political function" exception to the Equal Protection Clause.[123] Judge Kavanaugh's stake-based opinion in *Bluman* represents a natural extension and refinement of this rationale.

The Framers also regularly expressed fears over foreign machinations infecting American politics.[124] Federalist 22, for example—written by Alexander Hamilton—noted that "[o]ne of the weak sides of republics . . . is that they afford too easy an inlet to foreign corruption."[125] George Washington's Farewell Address later raised an enduring need to guard against the bête noire of "foreign influence."[126] Through the

[121] See Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 140 S. Ct. 2082, 2086 (2020) ("[I]t is long settled as a matter of American constitutional law that foreign citizens outside U.S. territory do not possess rights under the U.S. Constitution.").

[122] 408 U.S. 753, 765–66 (1972).

[123] Bernal v. Fainter, 467 U.S. 216, 220 (1984) ("This exception has been labeled the 'political function' exception and applies to laws that exclude aliens from positions intimately related to the process of democratic self-government."); Foley v. Connelie, 435 U.S. 291, 296 (1978) ("[A] State may deny aliens the right to vote, or to run for elective office, for these lie at the heart of our political institutions."); Cabell v. Chavez-Salido, 454 U.S. 432, 439 (1982) ("The exclusion of aliens from basic governmental processes is not a deficiency in the democratic system but a necessary consequence of the community's process of political self-definition.").

[124] See Amandeep S. Grewal, The Foreign Emoluments Clause and the Chief Executive, 102 Minn. L. Rev. 639, 644–45 (2017) (discussing Framers' statements on foreign influence); Karl A. Racine & Elizabeth Wilkins, Enforcing the Anti-Corruption Provisions of the Constitution, 13 Harv. L. & Pol'y Rev. 449, 456–58 (2019) (describing the concerns underlying the Emoluments Clause); Vega, supra note 116, at 960 (detailing the Framers' fears of foreign corruption); Marissa L. Kibler, Note, The Foreign Emoluments Clause: Tracing the Framers' Fears About Foreign Influence over the President, 74 N.Y.U. Ann. Surv. Am. L. 449, 465–70 (2019) (discussing the Emoluments Clause as a bulwark against foreign influence); Zephyr Teachout, The Anti-Corruption Principle, 94 Cornell L. Rev. 341, 352–53, 358 (2009) (outlining a constitutional principle against corruption based in part on fear of foreign corruption).

[125] The Federalist No. 22, at 112 (Alexander Hamilton) (Ian Shapiro ed., 2009).

[126] The Farewell Address of George Washington 40 (Frank W. Pine, ed., 1911) ("Against the insidious wiles of foreign influence . . . the jealousy of a free people ought to be constantly awake, since history and experience prove that foreign influence is one of the most baneful foes of republican government.").

Emoluments Clause, the text of the Constitution itself seeks to combat foreign interference in political life.[127] Residency requirements for federal legislators similarly reflected a concern that elected representatives may support the interests of another country, emphasizing an effort to insulate American politics from foreign conspiracies.[128] In addition, one author finds that the Framers may have believed the power to control the political speech and potential interference of foreign actors represented a fundamental aspect of American sovereignty under international law.[129] A historical understanding of the Constitution and core American interests supports the separation of foreigners from the political process.

In contrast, some argue that freedom of speech among foreign entities rises and falls not from the right of the non-U.S. speaker, but rather from the U.S.-based listener.[130] *Citizens United* provided significant support for this idea, noting that the government may not "command where a person may get his or her information or what distrusted source he or she may not hear."[131] Previous Supreme Court jurisprudence supports this idea as well. The Court ruled in 1965 that federal law may not bar the postal service from delivering unsolicited, foreign propaganda materials to addressees; the Court found that the regulation interfered with the receivers' First Amendment rights.[132] The Court has also noted voters'

[127] See U.S. Const. art. I, § 9, cl. 8 (the Emoluments Clause).

[128] Teachout, supra note 124, at 358.

[129] See Vega, supra note 116, at 1004.

[130] See generally RonNell Andersen Jones, Press Speakers and the First Amendment Rights of Listeners, 90 U. Colo. L. Rev. 499 (2019) (arguing that the "unique features" of speaker-listener relationships "should lead to greater appreciation of the press as a special institutional speaker and to greater protection for newsgathering performed on behalf of listeners" under the First Amendment); Joseph Thai, The Right to Receive Foreign Speech, 71 Okla. L. Rev. 269 (2018) (examining First Amendment coverage of speech by foreign speakers "on the listener's end of the speech relationship"); Michael Kagan, When Immigrants Speak: The Precarious Status of Non-Citizen Speech Under the First Amendment, 57 B.C. L. Rev. 1237 (2016) (calling for the Supreme Court to revisit questions concerning immigrant free speech "because current case law is in tension with other principles of free speech law, especially the prohibition on identity-based speech restrictions as articulated in *Citizens United v. FEC*"); Tribe & Matz, supra note 88, at 118–19 (discussing the Supreme Court's treatment of whether foreign corporations can spend money on American elections).

[131] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 356 (2010). The quote continues, "The First Amendment confirms the freedom to think for ourselves." This thread continues elsewhere in the opinion, where the Court finds that "[t]he right of citizens to inquire, *to hear*, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it." Id. at 339 (emphasis added).

[132] Lamont v. Postmaster Gen., 381 U.S. 301, 307 (1965) ("This amounts in our judgment to an unconstitutional abridgment of the addressee's First Amendment rights.").

capacities to think for themselves, rather than find protection in government regulation of political speech.[133] In the context of public broadcasting, as well, the Court has noted that free speech represents a "right of the viewers and listeners" rather than the broadcasters.[134] If a court found these precedents applicable to foreign speech, then American citizens would have a right to hear foreign speakers.[135] As a result, the government would lack a compelling interest to limit that speech.

However, the bulk of precedents indicate that the Supreme Court would not find broad rights among foreign citizens to engage in political speech. This conclusion finds support in jurisprudence differentiating the rights of non-citizens in the United States, which elevates the protection of American political processes. Arguments looking back to the Framers' concerns about foreign influence buttress this point even further. *Citizens United* itself reserved the question, implying that the Court could potentially curtail its powerful support of the First Amendment in the context of foreign speakers. To encapsulate the key point: even independently of the D.C. District Court's reasoning in *Bluman*, the government may create laws that regulate foreign entities' political speech. Many authors agree,[136] and even those who find that the doctrine points in another direction concede that the Supreme Court will likely find a compelling interest supporting these restrictions, as it did when affirming *Bluman*.[137] The ensuing analysis therefore proceeds from the premise that the government may limit the political speech of foreign entities in the abstract. The principal question in the next Section then constitutes whether foreign-influence laws are in fact narrowly tailored to that interest.

[133] Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 454 (2008).

[134] Red Lion Broad. Co. v. Fed. Commc'ns Comm'n, 395 U.S. 367, 390 (1969).

[135] See Tribe & Matz, supra note 88, at 118 ("The logic of this argument seems unassailable, but if taken seriously, it suggests that we should not deny citizens access to political ideas that happen to be expressed by noncitizens.").

[136] See Bruce D. Brown, Alien Donors: The Participation of Non-Citizens in the U.S. Campaign Finance System, 15 Yale L. & Pol'y Rev. 503, 518 (1997); Vega, supra note 116, at 992; Anthony J. Gaughan, Putin's Revenge: The Foreign Threat to American Campaign Finance Law, 62 Howard L.J. 855, 862 (2019).

[137] See Massaro, supra note 61, at 666; Richard L. Hasen, *Citizens United* and the Illusion of Coherence, 109 Mich. L. Rev. 581, 609 (2011).

C. Foreign-Influence Laws Lack Narrow Tailoring

Although the government likely has an abstract compelling interest to regulate and minimize the participation of foreign entities in American politics, this Note argues that foreign-influence laws do not serve that interest. As discussed in Part I, laws and legislative proposals carry several different thresholds. The strictest form of foreign-influence laws regulate political activity when a single foreign shareholder owns a 1% stake in the firm, or foreigners in general own 5%; this is the 1-5 framework Seattle recently enacted, and the threshold that will affect nearly all major American corporations. The more moderate version of foreign-influence laws activates when a single foreign investor owns 5% of the company, or foreigners in aggregate own 20%, a 5-20 model. These laws exist in Alaska and St. Petersburg, Florida. Finally, other legislative proposals advocate higher thresholds—a 50% foreign ownership stake, for example.

From the start, supporters of foreign-influence laws fail to recognize that minority shareholders likely lack the power to alter a firm's political activity or even its activity in general. This means that a law considering the foreign status of a shareholder is not tailored to preventing foreign influence on a firm. One proponent of foreign-influence laws argues that this influence is at least theoretically possible,[138] and multiple judicial opinions have extolled shareholders' power to direct corporate governance.[139] Justice Kennedy's majority opinion in *Citizens United* also pointed to shareholders' capacity to monitor the political activity of the firms in which they invest.[140] Nonetheless, although corporate structures vary greatly, shareholders are often constrained to a limited range of

[138] Harvard law professor John Coates noted that even ownership stakes smaller than 5% make the investor "theoretically capable of exerting influence on . . . corporate political spending." Letter from John Coates, supra note 8, at 6. Coates also stated at an FEC hearing, "[T]he boards of companies that are confronted by 1% shareholders listen to them . . . . [T]hey don't do what they say, necessarily, all the time, but they do engage with them." John Coates, Harv. L. Sch., Federal Election Commission Forum: Corporate Political Spending and Foreign Influence 38 (June 23, 2016), https://www.fec.gov/resources/about-fec/commissioners/weintraub/text/Panel2-Complete.pdf [https://perma.cc/U8J5-EFN2]; see also John C. Coates IV, Thirty Years of Evolution in the Roles of Institutional Investors in Corporate Governance, *in* Research Handbook on Shareholder Power 79, 79–95 (Jennifer G. Hill & Randall S. Thomas eds., 2015) (discussing the increasing power of shareholders).

[139] See, e.g., Blasius Indus. v. Atlas Corp., 564 A.2d 651, 659 (Del. Ch. 1988) ("The shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests."); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 959 (Del. Ch. 1985).

[140] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 370 (2010).

actions to bring about their desired goals, such as selling stock or voting to replace the corporation's board members.[141] Many in academia and the judiciary therefore find that shareholders cannot effectively influence corporate decision making.[142] In contrast to Justice Kennedy's opinion, Justice Stevens found in his separate *Citizens United* opinion that the business judgment rule—which frustrates derivative suits for breach of fiduciary duty—contributes to rendering "almost nonexistent" the rights of corporate shareholders.[143]

The connection between shareholder desires and corporate activity becomes even more tenuous when narrowing the inquiry to a corporate board's political decisions. Managers and companies' government relations staff often retain unchallenged control over firms' political contributions and expenditures, an issue that has affected campaign finance regulation for decades.[144] Legislatures originally introduced corporate political contribution bans to directly combat the issue of separate ownership and control, where managers can abuse power over a firm's assets to engage in political expenditures.[145] Justice Kennedy emphasized this issue in *Citizens United* by pointing out that board members' and managers' power over internal corporate decisions attenuates shareholders' capability to intervene in political activity.[146] As such, management rarely consults with shareholders before making

[141] See *Blasius*, 564 A.2d at 659; *Unocal*, 493 A.2d at 959 ("If the stockholders are displeased . . . the powers of corporate democracy are at their disposal to turn the board out.").

[142] *Blasius*, 564 A.2d at 659; Lucian A. Bebchuk, The Myth of the Shareholder Franchise, 93 Va. L. Rev. 675, 688 (2007); Dov Solomon, The Voice: The Minority Shareholder's Perspective, 17 Nev. L.J. 739, 756 (2017). For additional discussion on blockholders—shareholders owning greater than 5% of a corporation—see generally Alex Edmans, Blockholders and Corporate Governance (Nat'l Bureau of Econ. Rsch., Working Paper No. 19573, 2013), www.nber.org/papers/w19573.pdf [https://perma.cc/8MQ3-BYUW]; Anita Indira Anand, Shareholder-Driven Corporate Governance and Its Necessary Limitations: An Analysis of Wolf Packs, 99 B.U. L. Rev. 1515 (2019).

[143] *Citizens United*, 558 U.S. at 477 (2010) (Stevens, J., concurring in part and dissenting in part).

[144] Id. at 476 (2010) (Stevens, J., concurring in part and dissenting in part); Richard Briffault, The Uncertain Future of the Corporate Contribution Ban, 49 Val. U. L. Rev. 397, 448 (2015) ("Given management's complete control over the decision whether to make campaign contributions, the 'procedures of corporate democracy' are inadequate to protect dissenting shareholder interests."); Adam Winkler, Beyond *Bellotti*, 32 Loy. L.A. L. Rev. 133, 165 (1998) ("When a 'corporation' speaks, it is not the owners of the corporation (shareholders) who do so, it is those who exercise control of the corporation's assets (management).").

[145] Adam Winkler, "Other People's Money": Corporations, Agency Costs, and Campaign Finance Law, 92 Geo L.J. 871, 874–75 (2004).

[146] *Citizens United*, 558 U.S. at 477 (2010).

political expenditures,[147] and shareholders may not even *know* which political causes managers are donating to, let alone possess the capacity to influence those donations.[148] In sum, foreign-influence laws may target the wrong corporate component in light of managerial hegemony and discretion in corporate political decision making, as well as shareholders' relatively weak ability to direct those choices.[149] As a result, the laws are poorly tailored to the interest in reducing foreign influence over American political discourse, meaning that they are overinclusive and apply in many circumstances that do not further the laws' purposes.

Given the difficult nature of influencing corporate political activity, it is not particularly surprising that proponents cannot point to any instances where a foreign entity used or *may have* used a 1% or 5% stake in a U.S. firm to cause that firm to make certain political expenditures. Numerous examples certainly exist where foreign nations and individuals improperly donated to American political candidates or political committees.[150] Yet federal law already prohibits these activities, and in ways that do not limit the political activity of U.S. corporations where Americans control political decisions.[151] This lack of direct evidence that foreign shareholders can and do influence political decisions further suggests that foreign-influence laws do not effectively target foreign influence, while still burdening political speech.[152]

Furthermore, the effects of the strict 1-5 threshold and the more moderate 5-20 threshold vary widely. Advocates of foreign-influence

[147] Joseph K. Leahy, Corporate Political Contributions as Bad Faith, 86 U. Colo. L. Rev. 477, 486 (2015).

[148] *Citizens United*, 558 U.S. at 477 (2010).

[149] Some proposed foreign-influence laws do target firms where a foreign national retains the power to appoint board members. See supra note 23. These provisions may be more effectively tailored to combat foreign activity.

[150] The mid-1990s scandal surrounding Chinese political donations to the Democratic National Committee and other politically-affiliated groups formed the impetus for BCRA. However, the offending individuals—all Chinese citizens—attempted to donate the money directly to the political entities, rather than through a corporation. See Comm. on Governmental Affs., supra note 75, at 35–41. Another report supporting foreign-influence laws points to five prosecutions where foreigners funneled money through shell corporations, foreign-controlled U.S. corporations, and straw men. Sozan, supra note 9, at 16–17.

[151] See 52 U.S.C. § 30121 (2018).

[152] This dearth of examples may prove irrelevant; the Court's decision in *Buckley*, for example, appeared unconcerned that the government could not show significant evidence of corruption when upholding FECA's contribution limits. Buckley v. Valeo, 424 U.S. 1, 29–30 (1976). But see *Citizens United*, 558 U.S. at 360–61 (finding relevant that no evidence was presented showing that independent expenditures lead to corruption).

laws note that statutes barring corporate political activity when a foreigner owns a 5% stake in the firm would affect approximately 9% of publicly traded U.S. corporations.[153] This proportion rises to approximately 74% when statutes implement a 1% threshold.[154] The Norwegian pension fund alone owns approximately 1.4% of worldwide corporate shares,[155] and its ownership stakes in U.S. companies knock out Apple, AT&T, Bank of America, Chevron, Ford, Google, Home Depot, Johnson & Johnson, Microsoft, Pepsico, and Procter and Gamble, among many other firms.[156] When considering aggregate foreign ownership, the proportion of affected firms rises further. Where campaign finance statutes restrict the activity of corporations owned more than 5% by foreigners in total, prohibitions impact 98% of major American corporations.[157] This statistic is striking but simultaneously unsurprising, given that by recent estimates foreigners hold somewhere between 26% and 35% of U.S. stock.[158] It follows that foreign ownership in a significant proportion of U.S. firms would exceed 5%. To find that strict foreign-influence laws are narrowly tailored, a court would have to find this wide sweep acceptable. Given that the laws reach most major American corporations, this finding would conflict with *Citizens United*'s protection of corporate speech and supports the conclusion that they are not narrow.

Many foreign-influence laws are also substantially stricter than those in other areas where legislatures have attempted to balance foreign investment with national interests. For example, the Defense Production Act of 1950 and subsequent amendments afford the Committee on Foreign Investment in the United States ("CFIUS") the power to review national security implications of foreign investments into American

[153] John C. Coates IV, Ronald A. Fein, Kevin Crenny & L. Vivian Dong, Quantifying Foreign Institutional Block Ownership at Publicly Traded U.S. Corporations 8 (Harv. John M. Olin Ctr. for L., Econ., & Bus., Discussion Paper No. 888, 2016), http://www.law.harvard.edu/programs/olin_center/papers/pdf/Coates_888.pdf [https://perma.cc/B6FZ-W6GN].

[154] See Sozan, supra note 9, at 42.

[155] Gwladys Fouche & Alister Doyle, Norway Wealth Fund to Assess Climate Risks in Power, Oil, Materials, Reuters (Feb. 27, 2018), https://www.reuters.com/article/us-norway-swf-idUKKCN1GB0Y7 [https://perma.cc/NHW3-BSZR].

[156] The Norwegian pension fund held stakes of at least 1% in each of these companies as of early 2021. See, e.g., CNBC Ownership Database, https://www.cnbc.com/quotes/?symbol=AAPL&qsearchterm=appl&tab=ownership (last accessed Mar. 25, 2021) [https://perma.cc/3Y43-NMXW].

[157] See Sozan, supra note 9, at 42.

[158] See Rosenthal & Austin, supra note 13, at 928; Steven M. Rosenthal, Slashing Corporate Taxes: Foreign Investors Are Surprise Winners, 157 Tax Notes 559, 564 (2017).

firms. For passive investors,[159] CFIUS does not reach transactions where a foreign person comes to own 10% or less of the firm's voting shares.[160] In addition, federal communications law introduces restrictions where a foreign entity owns more than 20% of the capital stock of a broadcast, common carrier, or aeronautical licensee, or where foreign entities own more than a 25% share in a company that controls a licensee.[161] Outside the context of foreign investment, the Bank Holding Company Act finds control where the investor owns 25% or more of voting stock, or 10% where the investor is the largest shareholder.[162] These regulations do not implicate political speech, and it makes little sense that foreign-influence laws may seek a stricter standard where speech remains central.

Foreign-influence laws raise a separate issue regarding suppression of corporate speech protected under *Citizens United*. This pressure on corporate speech may be considered a chilling effect. In general, laws regulating speech must be relatively straightforward, and a speaker should be able to discern without much inquiry whether or not a particular political message is legal.[163] The Supreme Court has articulated this issue in the context of campaign finance law several times, disparaging hazy lines between independent expenditures and general issue advocacy in *Buckley*,[164] as well as criticizing vague standards in *Citizens United*.[165] To ensure compliance with foreign-influence laws, corporations must be able to discern the nationality of nearly all corporate shareholders. For laws as strict as that in Seattle, the company must know the nationality of at least 95% of its owners to ensure that foreigners in aggregate do not own more than 5% of the company, and the company must discern the nationality of any shareholder who owns a stake greater than 1%. This task requires significant effort. Many companies consult a third-party firm, which will

[159] Passive investors generally do not gain contractual rights to select board members, cannot access sensitive data, and do not influence decisions outside of voting through shares, among other characteristics. See 31 C.F.R. §§ 800.223, 800.211(b) (2020).

[160] 31 C.F.R. § 800.302 (2019).

[161] See 47 U.S.C. § 310(b)(3)–(4); see also Moving Phones P'ship L.P. v. Fed. Commc'n Comm'n, 998 F.2d 1051, 1055–56 (D.C. Cir. 1993) (upholding federal law allowing denial of applications to construct and operate cellular systems where the applicants were more than 20% foreign-owned, based on a national security rationale).

[162] See 12 C.F.R. § 225.41(c)(1)–(2) (2012).

[163] See Randy Elf, The Constitutionality of State Law Triggering Burdens on Political Speech and the Current Circuit Splits, 29 Regent U. L. Rev. 39, 41 (2016).

[164] Buckley v. Valeo, 424 U.S. 1, 40–41. The Court found similar issues compelling in Federal Election Commission v. Wisconsin Right to Life, Inc., 551 U.S. 449, 469 (2007).

[165] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 324, 335 (2010).

in turn collect information from banks, brokers, and other intermediaries to provide the identities of shareholders.[166] Determining the nationality of these shareholders represents a separate question, however. Institutional and corporate shareholders can be easily identified, and retail brokers can provide information regarding their own clients.[167] However, a firm may not be able to easily acquire citizenship information for all of its shareholders or may remain unsure of its ability to comply with the laws, opting instead to forgo political speech. This is particularly true when firms run the risk of being branded as furthering foreign interests for making expenditures when a violation is discovered at a later date. This difficulty discerning compliance, and subsequent suppression of political speech, is precisely the type of chilling effect the Supreme Court criticized in its campaign finance cases and other First Amendment decisions.[168]

Some legislatures have recognized the need for safe harbor provisions, where the law only requires certification that the corporation made due inquiry to determine that it was not foreign-influenced at the time of the independent expenditure.[169] St. Petersburg, Florida, for example, requires any firm spending more than $5,000 to certify that it was not a foreign-influenced business entity on the date of the expenditure or contribution.[170] Laws in this form reduce a firm's uncertainty regarding whether or not its speech complies with the law by introducing a willfulness component to the associated crime, although certification and due inquiry still impose some burdens on protected speech. However, other statutes lack safe harbor provisions, prohibiting foreign-influenced firms from making independent expenditures whether or not they are aware of significant foreign ownership. The Seattle law, for example, requires certification for contributions[171] but does not allow for certification in the context of independent expenditures.[172] This means that a corporation's belief that it is complying with the law cannot protect it from a violation, and a firm is therefore less likely to speak at all.

[166] Letter from John Coates, supra note 8, at 10.
[167] Id. at 11–12.
[168] See, e.g., Laird v. Tatum, 408 U.S. 1, 11 (1972).
[169] See, e.g., S. 393, 191st Gen. Ct. (Mass. 2019).
[170] St. Petersburg, Fl., Mun. Code ch. 10, § 10.62 (2019).
[171] Seattle, Wash., Mun. Code tit. 2, ch. 2.04, § 370(E)(2) (2020).
[172] Seattle, Wash., Mun. Code tit. 2, ch. 2.04, § 400 (2020).

For these reasons, foreign-influence laws lack narrow tailoring.[173] Shareholders simply do not have the tools to effectively influence corporations' political expenditures. Strict formulations of the laws affect a large number of firms and lead to a result that conflicts with the Court's holding in *Citizens United* finding that U.S. corporate entities constitute part of the American political community.[174] Foreign-influence laws do not appear to track a general understanding of the thresholds indicating risk of foreign sway within an American corporation, and their exacting requirements may introduce a chilling effect. For these reasons, foreign-influence laws are likely unconstitutional.[175] The existence of alternatives, discussed in Part IV, only serves to strengthen this conclusion.[176]

D. Federalism and Foreign-Influence Laws

The principles of federalism may also represent trouble for foreign-influence laws, given that all of the laws enacted—as well as a majority of those being considered—are at the state and local levels, rather than at the federal level through expansion of section 30121. Federal interests may preempt local statutes where national interests dominate so strongly that the federal system precludes state or local action on the same

[173] This lack of narrow tailoring may be so pronounced as to indicate pretextual motives. Then-Professor Elena Kagan notes that "notwithstanding the Court's protestations in *O'Brien* . . . First Amendment law . . . has as its primary, though unstated, object the discovery of improper governmental motives." Elena Kagan, Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine, 63 U. Chi. L. Rev. 413, 414 (1996). This ancillary motive may include counteracting the effects of *Citizens United*.

[174] The laws also lead to a result allowing some corporations to speak while silencing others. The *Citizens United* majority criticized regulations that produce this outcome. See Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 324 (2010).

[175] First Amendment controversies, and those in the campaign finance space in particular, often include claims of overbreadth, where laws leading to a "substantial number of impermissible applications" are found unconstitutional. New York v. Ferber, 458 U.S. 747, 771 (1982). Foreign-influence laws are not vulnerable to separate claims of overbreadth because the reason the law bars one firm from engaging in independent expenditures—a foreigner's 1% stake in the company—is the exact same reason for restrictions on all other firms with similar ownership stakes. The law is either valid in all applications, or valid in no application. This means that overbreadth and narrow tailoring are two sides of the same coin in relation to foreign-influence laws. See also *Citizens United*, 558 U.S. at 362 (criticizing the underinclusive and overinclusive nature of legislation).

[176] For example, in *Buckley*, the Court considered whether bribery laws alone would be effective enough to root out corruption arising from unregulated contributions to political candidates. See Buckley v. Valeo, 424 U.S. 1, 27–28 (1976).

subject.[177] Preemption may also occur when local laws conflict with federal laws by presenting an obstacle to the accomplishment of Congress's objectives.[178] In *Crosby*, for example, the Supreme Court found that a state law undermined the federal government's prerogative to form a cohesive national foreign policy when imposing sanctions on Myanmar and that the state law was preempted as an obstacle to the federal law's objectives.[179] Foreign-influence laws similarly run up against federal concerns in two ways. First, foreign-influence laws intrude on federal control of foreign status determinations. Second, federal campaign finance regulations so comprehensively lay out regulation of foreign political activity that local statutes may present an obstacle to the government's national response to foreign influence.[180] These problems also indicate that courts might not defer to local and state legislatures when considering foreign-influence laws.

Foreign-influence laws extend beyond the normal scope of local election laws and instead seek to classify corporate entities as either foreign or domestic.[181] For example, the Seattle foreign-influence ordinance might find that Apple is foreign, and therefore unable to claim the First Amendment protections of *Citizens United*, based on the Norwegian Pension Fund's 1% stake in the company.[182] States cede control to the federal government on questions of foreign individuals, and federal powers are "at their apex in matters pertaining to alienage."[183] In addition, the Supreme Court has found that policies toward aliens are "intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government."[184] As such, states must tread carefully

[177] See Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372 (2000).

[178] Id. at 372–73; Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); Caleb Nelson, Preemption, 86 Va. L. Rev. 225, 227–28 (2000).

[179] *Crosby*, 530 U.S. at 368, 373–74.

[180] Foreign-influence laws may also implicate foreign affairs preemption. See Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 413 (2003); Zschernig v. Miller, 389 U.S. 429, 432 (1968); Jack Goldsmith, Statutory Foreign Affairs Preemption, 2000 Sup. Ct. Rev. 175, 203–05 (2000). However, the laws do not target foreigners or foreign investors, but rather U.S. corporations. Negative effects on U.S. foreign relations are also difficult to discern.

[181] This determination may also conflict with the internal affairs doctrine, under which the state of incorporation should decide core issues regarding a corporation's internal affairs. This might include whether the corporation is in fact a U.S. entity. See Frederick Tun, Before Competition: Origins of the Internal Affairs Doctrine, 33 J. Corp. L. 33, 39–41 (2006).

[182] CNBC Ownership Database, supra note 156.

[183] See Bluman v. Fed. Election Com'n, 800 F. Supp. 2d 281, 290 (D.D.C. 2011).

[184] Harisiades v. Shaughnessy, 342 U.S. 580, 588–89 (1952).

when they enact laws regulating aliens' activity within their jurisdictions. For example, the Court struck down a Pennsylvania alien registration statute, noting that a state's power to register aliens remains "subordinate to supreme national law."[185] The Court also ruled that a state could not deny in-state tuition rates to certain non-immigrant visa holders because of federal immigration classification, as doing so violated the Supremacy Clause.[186] Exclusive, plenary federal power over immigration has strengthened over time, in part due to concerns over state discrimination against immigrants.[187]

The case for federal control over foreign status determinations becomes stronger when considered in concert with the government's concurrent interests surrounding foreign influence over political processes. In *Chae Chan Ping v. United States*, a case that solidified the plenary power doctrine in the late nineteenth century, the Court characterized immigration control as closely connected to broader policy regulating national security and foreign affairs.[188] The Court further noted that local authorities could not legislate in that space, where they may have "different climates and varied interests" that the federal government does not experience.[189] Determination of foreign status, in the context of a national response to foreign interference in American elections and national security, may then fall squarely within this federal ambit of power.[190]

In addition to the strong federal interest inherent in laws determining who is a foreigner, federal campaign finance regulations may represent a singular, national approach to foreign interference in elections that local patchworks of regulations hinder. Congress provided for federal campaign finance law to explicitly preempt state and local law in the context of federal elections.[191] In general, federal election law extends

[185] Hines v. Davidowitz, 312 U.S. 52, 65–68 (1941).

[186] Toll v. Moreno, 458 U.S. 1, 17 (1982).

[187] See Cristina M. Rodríguez, The Significance of the Local in Immigration Regulation, 106 Mich. L. Rev. 567, 613 (2008).

[188] 130 U.S. 581, 605–06 (1889).

[189] Id. at 606.

[190] Although local and state governments retain significant power over elections, the Supreme Court's relevant decisions do not reach the issue of foreign entities. *James v. Bowman*, 190 U.S. 127, 142 (1903), and *Oregon v. Mitchell*, 400 U.S. 112, 125 (1970), both champion local power over elections. Neither case applies directly to questions involving foreign citizens. See United States v. Singh, 924 F.3d 1030, 1043 (9th Cir. 2019) (vacated on other grounds).

[191] 52 U.S.C. § 30143 (2018).

only to contributions and expenditures influencing federal elections,[192] as this represents the reach of the Elections Clause.[193] Section 30121 is different, however, given that it is one of the few provisions of federal election law that reaches elections for state and local positions[194]—it therefore must find its footing in the government's plenary power over foreign affairs and immigration.[195] In section 30121, Congress has introduced legislation to tackle issues within the federal realm of control, and it has cast the statute's net as wide as the federal government deems appropriate. In addition, Congress provided extensive definitions for a "foreign principal" and other foreign entities.[196] Federal prohibitions on political participation by foreign nationals, along with FEC rulings on the matter, may represent a comprehensive, nationwide response to foreign political interference to which local laws represent an obstacle.

The central question when considering these federalism issues revolves around whether determinations of foreign status and broad issues of national security policy can be appropriately made by state and local governments, or whether the federal government should retain control over these concerns. Even if federalism concerns are not determinative, courts might hesitate to water down federal control over these issues.

IV. THE PATH FORWARD

Foreign-influence laws expose a difficult problem in campaign finance jurisprudence. Upholding strict versions—like that in Seattle—would in practice overrule *Citizens United* as applied to a large number of for-profit, American corporations. In contrast, striking down foreign-influence laws means ruling against measures governments have taken to protect elections from undue influence by those outside the American political community. This clash arises in part from the fact that foreigners own significant stakes in U.S.-based corporations, and in part because the Court itself chose not to address the issue of foreigners in *Citizens United*.

[192] See Emily's List v. Fed. Election Comm'n, 581 F.3d 1, 20 (D.C. Cir. 2009) (citing McConnell v. FEC, 540 U.S. 93, 122, 124 (2003)).

[193] U.S. Const., art. I, § 4; McConnell v. Fed. Election Comm'n, 540 U.S. 93, 186 (2003).

[194] The FEC has determined that all of the statute's prohibitions apply to state and local elections, not just the prohibitions of section 30121(a)(1)(A). See 11 C.F.R. § 110.20(f) (2020). For the FEC's reasoning, see Expenditures, Independent Expenditures, and Disbursements, 67 Fed. Reg. 69,945 (Nov. 19, 2002).

[195] United States v. Singh, 924 F.3d 1030, 1042 (9th Cir. 2019).

[196] See 22 U.S.C. § 611.

To fully resolve this conflict, the Supreme Court will likely need to bridge the mismatch between *Citizens United* and *Bluman* or provide guidance that at least allows lower courts to escape the conflict.[197] This resolution may require a deeper renovation of campaign finance law, recognizing that corporate political money cannot be fully extricated from foreign interests so long as the American economy remains open for international business.

In the interim, courts confronted with litigation challenging foreign-influence laws should rule in the manner least offensive to current Supreme Court jurisprudence. For the reasons set out in Part III, this requires striking down many of the foreign-influence laws currently in effect, including 1-5 and 5-20 formulations. A lawsuit challenging Seattle's foreign-influence law, for example, should result in the ordinance's invalidation. However, given that the ordinances implicate an unresolved conflict in Supreme Court case law, lower courts should expect appeal. Courts may even consider certifying the principal questions of law to higher courts. Courts should also not defer to local judgments regarding foreign interference in state and local elections, given that the laws operate in a space often reserved for the federal government.

Legislatures evaluating foreign-influence laws should remain aware that these regulations are vulnerable to complicated litigation, given that their constitutionality remains doubtful. Legislators seeking to combat foreign influence should consider higher ownership thresholds to more narrowly tailor the regulations to the underlying concerns of foreign influence. Laws targeting a firm's board makeup or the independence of its political decisions may also prove more effective. Proposals should include safe harbor provisions to mitigate the risk that foreign-influence laws will suppress activity that *Citizens United* protects. In addition, legislators should consider alternatives that do not find friction with Supreme Court guidance.

Legislatures interested in the problem of foreign influence on corporate political spending may take a renewed look at the power of derivative suits. In principle, at least, corporate managers' fiduciary duties should prevent undue foreign influence. Corporate directors and officers must

[197] The Court could, for example, uphold strict foreign-influence laws based on the rationale explained in *Bluman*. This would represent doctrinal incoherence, and it would further entangle the disorderly environment of campaign finance law. See Hasen, supra note 137, at 610.

typically fulfill duties of care, loyalty, and good faith to the corporation and its stockholders.[198] If a corporate manager breaches this fiduciary duty, shareholders may bring a derivative action against the offending manager to challenge a decision perceived as imprudent, or use other methods of corporate governance to address the transgression. This could occur if a manager uses corporate funds to further a personal political cause rather than an issue that benefits the firm. In *Bellotti*, for example, the Supreme Court recognized the power of derivative suits to address improper political spending.[199] The Supreme Court alluded to this notion again in *Citizens United*, noting that the procedures of corporate democracy can correct any abuse of general treasury funds and that technology renders these mechanisms even more effective than in previous years.[200] Based on these precedents, fiduciary duties and tools of corporate governance should suffice—at least doctrinally—to address foreign-influenced political spending within American corporations, given that the expenditures would be made in the best interests of the foreign actor and not in the interests of the corporation itself.

However, in practice, the issue cannot be so easily resolved. The business judgment rule[201] generally provides managers with a strong shield against shareholder claims.[202] As a result, corporate shareholders bringing a derivative suit must clear a high bar, and fiduciary duties often carry limited weight.[203] Justice Stevens recognized this issue in his *Citizens United* opinion, finding the tools of corporate democracy, as well as derivative suits, insufficient to address inappropriate political

[198] See, e.g., Leo E. Strine, Jr., Lawrence A. Hamermesh, R. Franklin Balotti & Jeffrey M. Gorris, Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law, 98 Geo. L.J. 629, 640–45 (2010) (describing duty, loyalty, and good faith).

[199] See First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 794–95 (1978); see also McConnell v. Fed. Election Comm'n, 540 U.S. 93, 324 (2003) (Kennedy, J., concurring in part and dissenting in part) (referring to the same issue raised in *Bellotti*).

[200] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 361–62, 370 (2010).

[201] The business judgment rule is "a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984); see also Andrew S. Gold, Dynamic Fiduciary Duties, 34 Cardozo L. Rev. 491, 499–500 (2012) (discussing the "tremendous amount of discretion" the business judgment rule affords to managers).

[202] See René Reich-Graefe, Deconstructing Corporate Governance: Absolute Director Primacy, 5 Brook. J. Corp. Fin. & Com. L. 341, 370 (2011).

[203] See id.; Michelle M. Harner & Jamie Marincic, The Naked Fiduciary, 54 Ariz. L. Rev. 879, 889 (2012); Kelli A. Alces, Debunking the Corporate Fiduciary Myth, 35 J. Corp. L. 239, 240 (2009).

spending.[204] Indeed, if tools of corporate democracy do not serve as an alternative to foreign-influence laws due to their ineffective nature, then it is difficult to posit that a foreign shareholder with a small stake in a firm can direct the political spending of the firm. Conversely, if the foreign shareholder can use these tools to cause the corporation to engage in particular independent expenditures, then it stands to reason that other shareholders can use the tools of corporate democracy to pressure managers to fulfill their fiduciary duties and engage in only those expenditures that benefit the corporation.[205] Although fiduciary duties and derivative suits form part of a complicated corporate ecosystem, legislatures seeking to combat foreign influence might introduce stronger tools for shareholders to hold managers accountable.

Broader disclaimer and disclosure requirements represent another less-onerous option to combat the strength of foreign-influenced messages. The Court has repeatedly found that laws demanding disclosure of funding sources prior to speaking impose an acceptable burden on the speaker, in part because they do not actually prevent anyone from speaking.[206] In *Citizens United*, the Court upheld provisions requiring disclaimers on *Hillary: The Movie* and associated advertisements, even while striking down regulations restricting independent expenditures.[207] Current campaign finance regulations require election-related communications to clearly identify the source of the advertisement, as well as funding sources.[208] For a television advertisement not directly authorized by a political candidate, for example, the message must include the organization's contact information and a statement disclosing the entity "responsible for the content of this advertising."[209] Similar requirements for political communications carrying links to foreign funders, such as a foreign-influenced firm, may prove sufficient to assuage concern over foreign messages unduly swaying the American

[204] *Citizens United*, 558 U.S. at 477 (Stevens, J., concurring in part and dissenting in part) ("In practice, however, many corporate lawyers will tell you that these rights are so limited as to be almost nonexistent . . . ." (internal quotations omitted)).

[205] In this sense, foreign-influence laws may be self-refuting. If foreigners represent 5% of a firm's ownership, the other 95% of non-foreign owners should in theory counteract that influence.

[206] See *Citizens United*, 558 U.S. at 366–67; Buckley v. Valeo, 424 U.S. 1, 64 (1976); McConnell v. Fed. Election Comm'n, 540 U.S. 93, 201 (2003).

[207] *Citizens United*, 558 U.S. at 366–71.

[208] 52 U.S.C. § 30120 (2018).

[209] 52 U.S.C. §§ 30120(a)(3), (d)(2) (2018).

electorate. This alternative may even have the same effect as foreign-influence laws, given that corporations and associated PACs would be reluctant to run ads saying "a foreign-influenced entity is responsible for this advertisement." Relying on disclosure would also align properly with the Court's strong statements in *Citizens United* supporting increased speech and providing voters the raw materials with which to decide for themselves.

Finally, another alternative would consist of expanding the Foreign Agents Registration Act ("FARA") or similar legislation to require notification of the government when a corporation partially owned by foreigners plans to engage in political activities[210] in the United States. On the federal level, this could be accomplished by expanding FARA's definition of an "agent of a foreign principal" to include corporations owned in part by foreign principals.[211] Unlike laws restricting independent expenditures, the Supreme Court has found FARA to place "no burden on protected expression," even when the law labels communications as "political propaganda."[212] Similarly to campaign finance regulations, FARA requires speakers to disclose the identity of the foreign principal on whose behalf a pamphlet or advertisement is being transmitted.[213] Congress could modify the statute to require disclosure of major foreign shareholders related to the communication, or state governments could create a local analogue. For example, if Amazon or an associated PAC ran an election-related advertisement, that advertisement would need to note that the Norwegian Pension Fund owns a 1% stake in the company. Expansion of FARA would create an effect similar to that of extending disclosure rules and would also allow for Americans to make political decisions themselves. FARA registration and government oversight may also mitigate the risk of the cloak-and-dagger schemes that proponents of foreign-influence laws fear.

CONCLUSION

Through foreign-influence laws, legislators and campaign finance reformers attempt to apply a bandage to a problem that demands complicated surgery. As this Note discussed, the growing movement to

[210] Political activities are defined broadly in 22 U.S.C. § 611(o) (2018).
[211] 22 U.S.C. § 611(c) (2018).
[212] Meese v. Keene, 481 U.S. 465, 480 (1987).
[213] 22 U.S.C. § 614(b) (2018).

enact foreign-influence legislation will likely face significant challenges from Supreme Court guidance and contemporary constitutional principles. Yet even if they are struck down, foreign-influence regulations may succeed in backing courts into a corner. On the one hand, if courts uphold the laws, the legislation partially overturns core portions of *Citizens United*. In the alternative, if courts strike down foreign-influence laws, they reject an idea that makes fundamental sense—that the government may keep foreign political interference at bay.

By exposing a paradox resulting from *Citizen United*'s endorsement of broad corporate participation in the political arena, foreign-influence laws may provide the impetus for reconsidering even more fundamental principles of campaign finance doctrine, such as *Buckley*'s division between contributions and independent expenditures. Litigation surrounding foreign-influence laws will present the Supreme Court with an opportunity to dig up and replace the foundations of campaign finance law. The Court should not waste it.