

3-2014

## Outside Influence

Anthony Johnstone

*Alexander Blewett III School of Law at the University of Montana*, [anthony.johnstone@umontana.edu](mailto:anthony.johnstone@umontana.edu)

Follow this and additional works at: [http://scholarship.law.umt.edu/faculty\\_lawreviews](http://scholarship.law.umt.edu/faculty_lawreviews)

 Part of the [Constitutional Law Commons](#), [Law and Politics Commons](#), and the [State and Local Government Law Commons](#)

---

### Recommended Citation

Anthony Johnstone, *Outside Influence*, 13 Election L.J. 117 (2014),  
Available at: [http://scholarship.law.umt.edu/faculty\\_lawreviews/95](http://scholarship.law.umt.edu/faculty_lawreviews/95)

This Article is brought to you for free and open access by the Faculty Publications at The Scholarly Forum @ Montana Law. It has been accepted for inclusion in Faculty Law Review Articles by an authorized administrator of The Scholarly Forum @ Montana Law.

## Outside Influence

Anthony Johnstone

### ABSTRACT

This article considers how much outside influence matters to the constitutional analysis of state politics. It defends the political community principle applied in *Bluman v. Federal Election Comm'n* as an exception to the otherwise universal speaker-neutrality rule of *Citizens United v. Federal Election Comm'n*. It draws parallels between efforts to police national and state boundaries in politics, and the competing rights claims of outsiders to cross those boundaries and participate fully in domestic politics. The article suggests that the structural constitutional principle of political community supports certain state regulations of outside influence across a range of political activities. Part I reviews the structural and historical basis for the constitutional concern about outside influence. Part II considers the gnarled doctrinal roots of *Bluman*, and how they might help support state, as well as national, safeguards against outside influence. Part III proposes an important state interest in regulating, but not excluding, outside influence in state and local politics, and suggests some applications of the principle to outside influence in several spheres of political activity.

### INTRODUCTION

**B**Y WHAT RIGHTS DO OUTSIDERS influence state or local politics? By “outsiders” I mean an array of persons other than the citizens of the community, including non-resident individuals, corporations, and various other organizations that channel the influence of those outsiders into a state or local political process. By “state or local politics” I mean all politics, including elections held by states for federal officials. The question recurs in voting, petitioning, campaign finance regulation, and lobbying, as well as other areas related to political activity such as corporate governance.

Relatively recent developments have accelerated the nationalization of American politics. Nationalizing forces, including the strengthening of non-party national political interest groups by federal legislation and judicial decisions, and national efforts to counter those groups’ interests, pose the question of outside influence more urgently now. Meanwhile, the concern underlying the question has deep roots in the constitutional conception of republicanism and is complicated by an often unseemly history of state efforts to block the entry of civil rights and other valuable national movements into state politics.

As a political matter, outsiders bear a potent connotation captured in the Reconstruction-Era epithet “carpetbagger.”<sup>1</sup> Candidates with backgrounds from outside their hoped-for constituency face questions like that posed to New York Senate

---

Anthony Johnstone is an assistant professor at the University of Montana School of Law, Missoula, MT. The author thanks participants at the Baldy Center for Law and Social Policy conference “Under the Influence: Interest Groups, Lobbying, and Campaign Finance” for helpful comments, Samir Aarab for editorial assistance, and his family for their support. The author served as counsel for the State of Montana in *American Tradition Partnership v. Bullock*, for 26 States as amici curiae in *Citizens United v. Federal Election Comm'n*, and for 13 States as amici curiae in *Nader v. Brewer*.

---

<sup>1</sup>See Ted Tunnel, *Creating “The Propaganda of History”: Southern Editors and the Origins of “Carpetbagger and Scalawag”*, 72 *Journal of Southern History* 789, 790-94 (Nov. 2006) (explaining origins of “carpetbagger” in Southern newspapers during the state constitutional conventions held under the Reconstruction Acts).

candidate Robert F. Kennedy: “Why should you represent a state where you cannot even vote?”<sup>2</sup> The suspicion of outside influence extends to campaign finance. Two recent Colorado state legislative recall elections attracted hundreds of thousands of dollars of “outside money” from out-of-state interest groups. One side accused pro-recall groups as being “too extreme for Colorado,” while the other side responded that former New York Mayor Michael “Bloomberg[’s] money has been pushing this entire issue from the start.”<sup>3</sup> In the 2013 Virginia gubernatorial election, super political action committees (PACs) funded by Bloomberg and a San Francisco hedge-fund manager spent more than \$2 million each, in one case running an ad that itself played on outside money concerns.<sup>4</sup> Outside influence has had similar impacts in petition circulation,<sup>5</sup> ballot issue campaigns,<sup>6</sup> and lobbying and other legislative advocacy.<sup>7</sup> While the original carpetbaggers and more recent outsiders like the National Association for the Advancement of Colored People (NAACP) took the side of basic civil rights,<sup>8</sup> the current forces of outside influence align on both sides of major political controversies.

As a constitutional matter, however, the conventional account of outside influence holds its “outsider” status to be irrelevant for all, or nearly all, political processes short of qualifications for public office and voting. Even in voting, courts view suspiciously all but the most basic distinctions between insiders and outsiders arising from residence. Yet in other political activities, outsiders play important and sometimes leading roles in state and local politics. Just beyond the insiders-only ballot box, outsiders drop in to get out the vote and police the polling place. A little further away, they stand with clipboards gathering signatures to qualify a ballot issue or candidate petition. After the votes are counted, outsiders may claim a decisive influence on the outcome through campaign contributions and expenditures that may exceed the total amount raised by candidates or spent by insiders. When the elected official arrives on the job, outsiders will lobby, draft legislation for, and contribute to (or threaten to spend against) the official to exert continuing influence over the political process.

In all of this, the law draws little or no distinction between the outsider and insider participants in the process. Of course, a successful elected official must be concerned, or be seen to be concerned, with insiders more than outsiders. Only insiders

vote. But the elected official also must look beyond the ballot box to voter mobilization, ballot access, ballot issues, campaign contributions and independent expenditures, and successful negotiation of the legislative process. At each stage of the political process outsiders can have as much or more influence than the insiders the elected official technically represents. This gives “outside influence” a salience in political campaigns that is noticeably absent from election law and constitutional doctrine.

The lack of a legal account for outside influence revealed itself starkly in *Citizens United v.*

---

<sup>2</sup>Adam Nagorney, *In a Kennedy’s Legacy, Lessons and Pitfalls For Hillary Clinton; Carpetbagger Issue Has Echoes of ‘64, But Differences Could Prove Crucial*, N.Y. TIMES (Sept. 10, 2000); see also Sean Sullivan, *Liz Cheney’s Biggest Challenge: The Carpetbagger Label*, WASH. POST.: THE FIX (July 17, 2013); James Nani, *Eldridge Declares Candidacy, Gibson’s Campaign Attacks*, THE FRAY (Sept. 23, 2013), available at <<http://blogs.hudsonvalley.com/fray/2013/09/23/eldridge-declares-candidacy-gibsons-campaign-attacks/>> (“Eldridge’s deep pockets have already been a mode of attack for the congressional Republican committee, who have attacked him as a rich, elite carpetbagger.”).

<sup>3</sup>Nancy Watzman, *Out of State Money Pouring into Colorado Gun Recall Races*, Sunlight Foundation Blog (Sept. 4, 2013), available at <<http://sunlightfoundation.com/blog/2013/09/04/colorado-guns/>>.

<sup>4</sup>Peter Overby, *Outside Money Plays Big Role in Va. Race for Governor*, Nat’l Public Radio (Nov. 8, 2013) (quoting ad from NextGen Climate Action arguing “an attorney general is paid by the taxpayers to stick up for us, not an out-of-state energy company that gave him a bunch of money. Ken Cuccinelli cares more about campaign contributions than what’s right or wrong.”).

<sup>5</sup>See Editorial, *Carpetbaggers Wanted*, ST. LOUIS POST-DISPATCH (Apr. 14, 2008) (“A guy from California e-mails a New York-based conservative website trying to recruit a couple dozen more carpetbaggers to join his false flag operation.... If one of Mr. Connerly’s carpetbaggers asks you to sign a petition “ensuring civil rights,” just say no and wish him a nice trip back to wherever he came from.”).

<sup>6</sup>See Jesse McKinley and Kirk Johnson, *Mormons Tipped Scale in Ban on Gay Marriage*, N.Y. TIMES A1 (Nov. 14, 2008) (Protect Marriage, proponents of anti-same-sex marriage issue California’s Proposition 8, estimated “as much as half of the nearly \$40 million raised on behalf of the measure was contributed by Mormons” in an effort led out of Utah).

<sup>7</sup>See Ed Pilkington and Suzanne Goldenberg, *ALEC Facing Funding Crisis From Donor Exodus in Wake of Trayvon Martin Row*, GUARDIAN (Dec. 3, 2013) (describing the American Legislative Exchange Council (ALEC), a legislative advocacy group including nearly 2000 state legislators and funded by more than 200 national corporations).

<sup>8</sup>See *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 451 (1958) (considering Alabama’s efforts to exclude under its foreign corporation statute the National Association for the Advancement of Colored People (NAACP), “a nonprofit membership corporation organized under the laws of New York,” fostering its purposes “on a nationwide basis.”).

*Federal Election Commission*. One of the broadest implications of *Citizens United*, consistent with the general absence of insider-outsider lines in most political activity, is that outside influence does not matter. At least, it does not matter enough to justify specific restrictions on outsiders. “[T]he First Amendment generally prohibits the suppression of political speech based on the speaker’s identity,”<sup>9</sup> the Supreme Court held. There is a little more to the Court’s most recent consideration of outsiders than that, but not much. In a short section, the Court explained it “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,” because the law at issue was not so limited.<sup>10</sup> The dissent briefly took issue with the Court’s distinction of foreigners as “outside” speech, and hinted at a broader principle of “outsiders” by noting “even domestic corporations may be ‘foreign’-controlled in the sense that they are incorporated in another jurisdiction and primarily owned and operated by out-of-state residents.”<sup>11</sup> Neither opinion offered any cases to support a distinction as to foreigners or other outsiders.

Then came Benjamin Bluman, a five-year New York resident and taxpaying lawyer who not only could not vote, but could not spend even a dollar printing and distributing flyers supporting candidates in the state where he lives because he is an outsider, a Canadian.<sup>12</sup> He and Asenath Steiman, an Israeli similarly interested in engaging her fellow New Yorkers, challenged the ban on foreign nationals’ financial influence on elections that the Court did not consider in *Citizens United*. Suddenly, outsider status mattered. A three-judge court upheld the law based on what it called a “straightforward principle” about outside influence: “[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.”<sup>13</sup> Forced to confront the issue the Supreme Court avoided, Judge Kavanaugh wrote for the court a detailed opinion on the constitutionality of barriers to foreign participation in the political process, adopting in part the reasoning of the *Citizens United* dissent. Forced to confront the *Bluman* case on direct appeal,<sup>14</sup> the Supreme Court again avoided the outside influence issue by affirming in a one-sentence order.<sup>15</sup>

Under the *Bluman* principle, absent other constitutional limitations, the concern with outside influence should matter to subnational communities too. Nearly all participation in “activities of democratic self-government” takes place at the state and local level. It is at these levels that the traditional concern about outside influence is most deeply rooted. Yet two years after *Citizens United* the Court decided *American Tradition Partnership v. Bullock*, which summarily held there is no meaningful distinction between *Citizens United* and a “foreign-controlled” (out-of-state) corporation’s challenge to a state corporate campaign expenditure restriction.<sup>16</sup> This suggests that outside influence cannot matter as much for states as it does for the nation. While *no* foreign actors have the right to participate in *any* national political process, according to the logic of current doctrine *all* national actors would appear to have the right to participate in *all* state political processes beyond voting itself. The constitutional logic runs counter to political experience, but even so the distinction may be a matter of degree, not of kind. Assuming, as the Court in *Citizens United* suggests, the answer to *whether* outsiders may participate is

---

<sup>9</sup>*Citizens United v. Federal Election Comm’n*, 130 S.Ct. 876, 905 (2010). The Court’s rationale:

Speech restrictions based on the identity of the speaker are all too often simply a means to control content... Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker’s voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each.... We find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers.

*Id.* at 899.

<sup>10</sup>*Id.* at 911.

<sup>11</sup>*Id.* at 971 n. 70 (Stevens, J., dissenting).

<sup>12</sup>*Bluman v. Federal Election Comm’n*, 800 F.Supp.2d 281 (D.D.C. 2011) (three-judge court).

<sup>13</sup>*Id.* at 288.

<sup>14</sup>See Bipartisan Campaign Reform Act of 2002 (BCRA) § 403(a)(3), Pub. L. No. 107-155, 116 Stat. 81, 113–14.

<sup>15</sup>*Bluman v. Federal Election Comm’n*, 132 S.Ct. 1087 (2012).

<sup>16</sup>*American Tradition Partnership v. Bullock*, 132 S.Ct. 2490 (2012).

yes, there remains a question of *how* outsiders participate. By taking categorical speech restrictions off the table, while opening new channels for increased and increasingly complex intervention by outsiders in domestic politics, *Citizens United* encourages states to regulate outside influence in campaign finance and beyond. Properly understood, it also allows states do so through less restrictive means than prohibitions on speech or related political activity.

This article considers how much outside influence matters to the constitutional analysis of state politics. It defends the principle applied in *Bluman* as an exception to the otherwise universal rule of *Citizens United*, applicable at the state as well as the national level, and to out-of-state as well as foreign outside interests. It does so by drawing parallels between legal efforts to police national and state boundaries in politics, and assessing the competing rights claims of outsiders to cross those boundaries and participate fully in domestic politics. The article suggests that a structural constitutional principle of political community supports certain state regulations, but not prohibitions, of outside influence across a range of political activities.

The argument proceeds from theory to doctrine to practice. Part I reviews the structural and historical basis for the constitutional concern about outside influence. The republican form of government the Constitution establishes at the federal level and guarantees at the state level requires basic conditions of self-government that limit outside influence. Part II considers the gnarled doctrinal roots of *Bluman*, and how they might help support state, as well as national, safeguards against outside influence. The political function doctrine developed under the Equal Protection Clause can begin to fill the gap *Citizens United* exposed in First Amendment's application to outside influence. That doctrine, rooted in "[t]he sovereign's obligation to preserve the basic conception of a political community," should be understood to extend in a limited fashion to outside influence from out-of-state interests. Part III proposes an important state interest in regulating, but not excluding, participation in state and local politics by out-of-state interests. It suggests some applications of "the basic conception of a political community" to outside influence in several spheres of political activity. This doctrinal move harmonizes the First Amendment's principle of speaker neutrality in election

law with the Constitution's broader commitment to self-governance through the republican form of government.

## I. WHOSE REPUBLIC(S)?

Outside influence matters. It matters because limiting the participation of outsiders is fundamental to the definition of a political community. That national political community consists of many confederated subnational political communities, states and localities. For all the attention politicians, the media, and voters pay to the national government, state and local boundaries persistently structure the civic life of Americans. Even in an increasingly globalized, online world, almost everything that happens to citizens before they get to the polling place happens within the structures of state and local government: family, home, school, work, play, church, community. The margins of these structures have messy edges, and cases can and should be made for overlapping national claims of citizenship's rights and duties. Yet state and local communities will have the primary claim of citizenship as long as we live in a physical world practically circumscribed by the radius of daily life. Still, this principle of a basic conception of a political community—of insiders distinguished from outsiders—is nowhere expressed in so much constitutional text. Instead it must be drawn from the structure of the political community the Constitution establishes.

Concern about outsiders runs through the Constitution. Under the Foreign Emoluments clause, for example, federal officials cannot receive "any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State," without the consent of Congress.<sup>17</sup> Along with this clause, Zephyr Teachout's argument that the Framers' "obsession with foreign influence derived from a fear that foreign powers and individuals had no basic investment in the well-being of the country,"<sup>18</sup> was

<sup>17</sup>U.S. CONST. art. I, § 9, cl. 8.

<sup>18</sup>See Zephyr Teachout, *The Anti-Corruption Principle*, 91 Cornell L. Rev. 341, 346–73 (2009) but see Seth Barrett Tillman, *The Original Public Meaning of the Foreign Emoluments Clause: A Reply to Prof. Zephyr Teachout*, 107 NW. U.L.Rev. Colloguy 180 (2013) (arguing the clause applies only to unelected federal positions).

the only authority relied upon by the *Citizens United* dissent in its discussion of foreign influence.<sup>19</sup> As the dissent put it, “[w]hen they brought our constitutional order into being, the Framers had their minds trained on a threat to republican self-government that this Court has lost sight of.”<sup>20</sup>

Outside influence also colors the composition of the national government from the States. “[T]he People of the several States” elect Congress.<sup>21</sup> Each of the people’s representatives in Congress must “be an Inhabitant of that State in which he shall be chosen.”<sup>22</sup> Presidential electors “shall meet in their respective States.”<sup>23</sup> These provisions, Teachout explains, are rooted in what George Mason explained as a fear that “foreigners and adventurers,” outsiders in other words, would “make laws for us & govern us.”<sup>24</sup> By default rule, the Constitution provides states the power to prescribe “[t]he Times, Places and Manner of holding Elections for Senators and Representatives,”<sup>25</sup> subject to alteration by Congress. Except as expressly provided by the voting rights amendments, the Constitution leaves to the States the qualifications of the electors in state and federal elections, adopting for congressional elections “the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.”<sup>26</sup> States also have the power to direct the manner, though not the time, of appointment for presidential electors.<sup>27</sup> The original Constitution says little about state elections beyond repeated implications that the states will have legislatures, and some form of executive and judicial officers.<sup>28</sup> Beyond this, the Constitution simply requires the national government to guarantee the states a “Republican Form of Government.”<sup>29</sup>

The Guarantee Clause distills the Constitution’s concerns about outside influence at the national level into republicanism, and through this maps these concerns onto state governments. In a part of the Constitution that primarily protects outsiders’ privileges and immunities<sup>30</sup> and judgments,<sup>31</sup> Article IV also “guarantee[s] to every State in this Union a Republican Form of Government.”<sup>32</sup> Taking this guarantee in its broadest terms, in James Madison’s terms simply as “a Government in which the scheme of representation takes place,”<sup>33</sup> it reflects the system the Constitution establishes for the national government in the systems the Constitution presupposes for the state governments. The republican form of government presupposes a “pub-

lic” to whom the “res,” the state object, belongs. This, in turn, implies that there are those to whom the state does not belong. Like the national system, those state subsystems also need defense against what Madison called “aristocratic or monarchical innovations,” particularly factions that may “possess such a superiority of pecuniary resources, of military talents and experience, or of secret succours from foreign powers.”<sup>34</sup>

The question remains whether those “foreign powers” against which the Constitution defends must be exclusively foreign to the nation, or may also be within the nation but foreign to a state. The republican guarantee protects both spheres against foreign influence. The guarantee preserves the Union by protecting each state from outside influence exerted by factions from other states. “The influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States,” Madison writes in *The Federalist No. 10*.<sup>35</sup> Assuming federalist protections against outside influence in the states, any “improper or wicked

<sup>19</sup>*Citizens United*, 130 S.Ct. at 948 n. 51 (Stevens, J., dissenting), citing Zephyr Teachout, *supra* n. 18 at 393 n. 245 (2009).

<sup>20</sup>*Citizens United*, 130 S.Ct. at 964 (Stevens, J., dissenting).

<sup>21</sup>U.S. CONST. art. I, § 2, cl. 1 (House); U.S. CONST. amend. XVII, § 1 (Senate).

<sup>22</sup>U.S. CONST. art. § 2, cl. 2 (House); U.S. CONST. art. I, § 3, cl. 3 (Senate).

<sup>23</sup>U.S. CONST. amend. XII.

<sup>24</sup>Teachout, *supra* n. 18 at 358, quoting Notes of James Madison, (Aug. 8, 1787), in 2 *The Records of the Federal Convention of 1787*, at 216 (Max Farrand ed., rev. ed. 1966) (1937).

<sup>25</sup>U.S. CONST. art. I, § 4; see also U.S. CONST. amend. XVII (providing for direct election of Senators).

<sup>26</sup>U.S. CONST. art. I § 2; U.S. CONST. amend. XVII.

<sup>27</sup>U.S. CONST. art. II, § 1.

<sup>28</sup>See, e.g., U.S. CONST. art. VI (“The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution”).

<sup>29</sup>U.S. CONST. art. IV, § 4.

<sup>30</sup>U.S. CONST. art. IV, § 2, cl. 1 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”).

<sup>31</sup>U.S. CONST. art. IV, § 1 (“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”).

<sup>32</sup>U.S. CONST. art. IV, § 4.

<sup>33</sup>*The Federalist No. 10*, at 62. (James Madison) (Jacob E. Cooke ed., 1961)

<sup>34</sup>*The Federalist No. 43*, *supra* n. 33, at 291, 294.

<sup>35</sup>Madison, *The Federalist No. 10*, *supra* n. 33, at 64.

project, will be less apt to pervade the whole body of the Union, than a particular member of it; in the same proportion as such a malady is more likely to taint a particular county or district, than an entire State.”<sup>36</sup> The difference between national and state protections against outside influence is a matter of degree, not of kind. This suggests a more complicated view of the regulation of politics than the one in which Benjamin Bluman is categorically excluded from spending even a dollar (or casting a single vote) in support of candidates in the state where he lives,<sup>37</sup> while, for example, out-of-state organizations are categorically included in spending nearly a million dollars in opposition to judicial candidates in another state.<sup>38</sup>

Federalism, after all, presupposes borders between insiders and outsiders *within* the nation, among the states as well as between the states and the national government. The reservation of powers<sup>39</sup> and rights<sup>40</sup> not enumerated by the Constitution to the states and the people is a guarantee against certain outside influence in a state by the federal government representing the (other) People of the United States. Reconstruction narrowed that reservation significantly by introducing the conception of “privileges or immunities of citizens of the United States,” guaranteeing all persons “equal protection of the laws,” and setting up the later incorporation of federal rights against the States.<sup>41</sup> Most notably for the political process, the Fourteenth Amendment generalized the prohibition against abridging the freedoms of speech, press, assembly, and petition.<sup>42</sup> The Constitution also extended the vote on the basis of race,<sup>43</sup> sex,<sup>44</sup> and age,<sup>45</sup> though on this reading these amendments expanded the definition of insiders within the states rather than established rights of those outside the states to exert influence. Unlike other intra-state jurisdictional boundaries that are subject to troubling border manipulation to exclude certain insiders,<sup>46</sup> state borders like national borders are all but fixed.<sup>47</sup> The basic scheme of representation in the states therefore belongs to a constitutionally persistent set of insiders: the people of each state who elect and are elected to govern each state.

If state political outcomes do not generally reflect the state’s own political balance, weighed in terms not only of voting but all the political factors that influence politics, the state falls short of a republican form of government. As the Court held in *Printz*, “[i]t is an essential attribute of the States’ retained sovereignty that they remain independent

and autonomous within their proper sphere of authority.”<sup>48</sup> Beyond the state’s own sovereignty, outside influence may threaten the whole federal system across the range of federal models. Each model, in fact, depends on distinctions between insiders and outsiders in political participation, and some limits on outside influence. Take Heather Gerken’s taxonomy of federalism: “(1) the *de jure* autonomy associated with the sovereignty account; (2) the *de facto* autonomy associated with process federalism; and (3) the power of the servant...within a cooperative federal regime.”<sup>49</sup> Under the state sovereignty model, limits on outside influence simply follow from the national sovereignty logic of *Bluman*’s exclusion of foreigners applied back to the states. Under the state autonomy model, limits on outside influence are a precondition for political safeguards of federalism, so elected officials are accountable primarily to an organic state constituency rather than merely reflecting national interests channeled back through the states. Under the cooperative federalism model, limits on outside influence ensure that states as “servants” provide faithful feedback on the local administration of federal policy, again rather than merely reflecting national perspectives on the policy. No form of federalism, and therefore no form of

<sup>36</sup>*Id.*

<sup>37</sup>*Bluman v. Federal Election Comm’n*, 800 F.Supp.2d 281 (D.D.C. 2011) (three-judge court).

<sup>38</sup>See Ian C. Bartrum, *Constitutional Rights and Judicial Independence: Lessons from Iowa*, 88 WASH. U. L. REV. 1047, 1048 (2011) (describing overwhelming spending of the National Organization for Marriage in Iowa’s supreme court elections).

<sup>39</sup>U.S. CONST. amend. X.

<sup>40</sup>U.S. CONST. amend. IX.

<sup>41</sup>U.S. CONST. amend. XIV, § 1.

<sup>42</sup>U.S. CONST. amend. I.

<sup>43</sup>U.S. CONST. amend. XV, § 1.

<sup>44</sup>U.S. CONST. amend. XIX, § 1.

<sup>45</sup>U.S. CONST. amend. XXVI, § 1.

<sup>46</sup>See, e.g., *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960) (holding the redefinition of Tuskegee, Alabama borders “to remove from the city all save only four or five of its 400 Negro voters while not removing a single white voter or resident” violates the Fifteenth Amendment).

<sup>47</sup>See U.S. CONST. art. IV, § 3, cl. 1 (“no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.”).

<sup>48</sup>*Printz v. United States*, 521 U.S. 898, 928 (1997).

<sup>49</sup>Heather Gerken, *Our Federalism(s)*, 53 Wm. & Mary L. Rev. 1549, 1560 (2012).

government under the Constitution, works without limits on outside influence in the states.

Those limits need not be prohibitive. Any structural theory of regulating outside influence among the states must reconcile with the equally powerful rights doctrine reflected in *Citizens United* that “voters must be free to obtain information from diverse sources in order to determine how to cast their votes.”<sup>50</sup> Even if the threat of outside influence justifies excluding foreign speakers from participation in national politics, the total exclusion from one state of citizens of other states raises more serious constitutional and practical concerns. Even under a strong conception of federalism, state politics is semi-autonomous at best, particularly when drawn to include the state’s elections of federal representatives. The economic and social, as well as political, integration of the union gives outsiders legitimate interests in influencing politics across state lines.<sup>51</sup> To be sure, the Constitution emphasizes open interstate borders for commercial traffic<sup>52</sup> and civil privileges and immunities,<sup>53</sup> not political participation. Yet state borders are much more permeable to political activity than national political borders. National political issues cross borders, and media markets, Internet coverage, and interest groups (including national political parties) follow. One way of reconciling limits on outside influence with the speaker neutrality rationale of *Citizens United* is to hold that states may regulate outside political speech, but may not suppress that speech altogether.<sup>54</sup>

## II. BLUMAN GROUPS: INSIDERS AND OUTSIDERS IN CONSTITUTIONAL DOCTRINE

Unlike the great debates in *Citizens United* over whether and how the First Amendment extends to corporations,<sup>55</sup> there has been no parallel doctrinal development of the First Amendment’s application to outsiders’ participation in politics. Indeed, in both *Citizens United* and its summary affirmance in *Bluman*, the Court avoided the question. The political function doctrine developed under the Equal Protection clause may begin to fill this gap. *Bluman* begins to delineate a constitutional borderline that might clarify the rights of outsiders to participate in the political process.

Federal law prohibits a “foreign national,” a non-citizen who is not admitted to permanent residence,

from contributing to candidates or parties, or making independent expenditures, in any “Federal, State, or local election.”<sup>56</sup> Plaintiffs pleaded *Bluman* solely as a First Amendment case, arguing that their campaign spending constitutes “core political speech entitled to the strongest protection under the First Amendment,” and that the law’s prohibitions on foreign campaign spending are “arbitrary and irrational.”<sup>57</sup> Yet the court declined to frame the case as part of the “great debates” concerning the First Amendment and campaign finance laws. Instead, according to the court, “this case raises a preliminary and foundational question about the definition of the American political community.”<sup>58</sup>

This is similar to the same foundational question outside influence poses with regard to state regulations of political participation. The “definition of the American political community,” as a constitutional matter, includes the states as politically separate (though not wholly sovereign or autonomous) republics. The answers, *Bluman* shows, are not obvious from existing constitutional doctrine. A pure speaker-neutrality rule under First Amendment doctrine cannot account for outside influence unless it subject to limitation by a sufficiently important or compelling state interest. Outsiders in politics raise but do not resolve what that interest may be. Even as to exclusion of foreign citizens, a national security interest is unlikely to fit a broad prohibition on participation. After *Citizens United*, no broad conception of “foreign corruption” would serve to exclude other American citizens from political participation in states. Only an appropriately broad conception of the political community, such as

<sup>50</sup>*Citizens United*, 130 S.Ct. at 899.

<sup>51</sup>See Part III.A, *infra*.

<sup>52</sup>See, e.g., Art. I, § 8, cl. 2 (congressional power over interstate commerce); Art. I, § 10 cl. 2 and 3 (restricting state duties on imports and exports).

<sup>53</sup>See Art. IV, § 2, cl. 1 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”).

<sup>54</sup>*Cf. Citizens United*, 130 S.Ct. at 886.

<sup>55</sup>See *Citizens United*, 130 S.Ct. at 899, *citing inter alia* *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) and *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

<sup>56</sup>2 U.S.C. § 441(e); 11 C.F.R. § 110.20(f) (extending expenditure prohibition to state and local elections).

<sup>57</sup>*Bluman v. Federal Election Comm’n*, No. 1:10-cv-01766, Complaint at 6–7 (Oct. 19, 2010).

<sup>58</sup>*Bluman*, 800 F. Supp. 2d at 286.

that developed in equal protection law for alienage classifications in political function cases, could support a similarly broad principle distinguishing between insiders and outsiders in political participation.

*A. The First Amendment and the limits of speaker-neutrality*

The *Bluman* court first looked to *Citizens United* for its basic doctrinal framework under the First Amendment, assuming strict scrutiny applied due to the law's speaker-based prohibition on campaign expenditures.<sup>59</sup> Conceding that "the Supreme Court has never squarely addressed the issue" of foreign campaign spending, however, the court had little law on which to rely in the opinion.<sup>60</sup> The Supreme Court expressly "did not reach the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation's political process."<sup>61</sup> To amplify the Court's signal that it was aware of exactly the issue it was avoiding, the opinion in *Citizens United* then cited the foreign campaign contribution and expenditure law at issue in *Bluman*.<sup>62</sup> Despite this, the court in *Bluman* relied on the *Citizens United* dissent's criticism of the majority's "categorical approach to speaker identity" as "untenable" and surprising, given the law and the Framers' longstanding distinctions between foreigners and citizens.<sup>63</sup> Paradoxically, it was the force of the *Citizens United* dissent on this point—and, it may be assumed, the majority's lack of a response to it—that the *Bluman* court found "to be a telling and accurate indicator of where the Supreme Court's jurisprudence stands on the question of foreign contributions and expenditures."<sup>64</sup>

There the supporting First Amendment doctrine ran out. Conceding "that foreign citizens in the United States enjoy many of the same constitutional rights that U.S. citizens do,"<sup>65</sup> the court reached back to a McCarthy-Era case upholding the deportation of aliens, who had resided in the United States for decades, on the grounds of their past membership in the Communist Party.<sup>66</sup> Yet that case, *Harisiades v. Shaughnessy*, departed from the Court's then-recent embrace in *Bridges v. Wixon* of the principle that "[f]reedom of speech and of press is accorded aliens residing in this country."<sup>67</sup> *Bridges* previously led the Court to a much more skeptical

view of a similar record of Communist Party affiliation in its reversal of a deportation order. And *Harisiades* had long since been cabined as exemplifying the broad scope of the federal government powers over immigration.<sup>68</sup> The Supreme Court's most recent citation of the case in the First Amendment context occurred twenty-five years ago in which a dissent reframed it, rather generously to the government given the *Harisiades* defendants' disavowals of violence, as an incitement case involving unprotected speech.<sup>69</sup> No simple approach under the First Amendment alone could answer the question of how to define American political communities and their interests in regulating outside influence.

*B. Equal Protection and "the sovereign's obligation to preserve the basic conception of a political community"*

With nothing left to say about the First Amendment, the *Bluman* court turned to cases involving distinctions in political participation rights under the Equal Protection Clause. Assuming that strict scrutiny applied, the court asked if "the sovereign's obligation to preserve the basic conception of a political community" is a sufficiently compelling

<sup>59</sup>*Id.*

<sup>60</sup>*Id.* at 289.

<sup>61</sup>*Citizens United*, 130 S.Ct. at 911.

<sup>62</sup>*Id.*

<sup>63</sup>*Bluman*, 800 F. Supp. 2d at 289, citing *Citizens United*, 130 S.Ct. at 948 n. 51 (Stevens, J., dissenting).

<sup>64</sup>*Bluman*, 800 F. Supp. 2d at 289.

<sup>65</sup>*Id.* at 286.

<sup>66</sup>*Harisiades v. Shaughnessy*, 342 U.S. 580, 591–92 (1952), citing *Dennis v. United States*, 341 U.S. 494 (1951).

<sup>67</sup>*Bridges v. Wixon*, 326 U.S. 135, 148 (1945), citing *Bridges v. California*, 314 U.S. 252 (1941).

<sup>68</sup>See, e.g., *Arizona v. United States*, 132 S.Ct. 2492, 2498 (2012) ("The federal power to determine immigration policy is well-settled"); *Plyler v. Doe*, 456 U.S. 202, 225 (1982) ("Drawing upon this power [under Art. I, § 8, cl. 4 to establish a uniform Rule of Naturalization], upon its plenary authority with respect to foreign relations and international commerce, and upon the inherent power of a sovereign to close its borders, Congress has developed a complex scheme governing admission to our Nation and status within our borders.").

<sup>69</sup>See *Rankin v. McPherson*, 483 U.S. 378, 397 (1987). In *Holder v. Humanitarian Law Project*, the Court distanced itself from any suggestion that "a regulation of independent speech would pass constitutional muster, even if the Government were to show that such speech benefits foreign terrorist organizations." *Id.*, 130 S.Ct. 2705, 2730 (2010).

interest to limit foreign participation in campaigns.<sup>70</sup> This formulation of the government's interest quotes *Foley v. Connelie*, which upheld under rational basis review New York's exclusion of aliens from the state police force because the people have a right "to be governed by their citizen peers."<sup>71</sup> There, the Supreme Court distinguished the prior application of strict scrutiny to alienage classifications by explaining that "although we extend to aliens the right to education and public welfare, along with the ability to earn a livelihood and engage in licensed professions, the right to govern is reserved to citizens."<sup>72</sup> The sovereign right of self-governance applies to a classification when "it involves discretionary decisionmaking, or execution of policy, which substantially affects members of the political community."<sup>73</sup>

Although these political function cases involve public employment, the issue is on the periphery of a principle that has at its core political participation. In its most comprehensive discussion of this political participation principle, *Sugarman v. Dougall*, the Supreme Court invalidated New York City's blanket prohibition on alien employment in civil service positions.<sup>74</sup> Aliens as a class, the Court explained, are subject to heightened scrutiny as "a prime example of a discrete and insular minority" under footnote four of *Carolene Products*.<sup>75</sup> Therefore, although the State has a "substantial interest" in retaining a "broad power to define its political community...with discrimination against aliens, the means the State employs must be precisely drawn in light of the acknowledged purpose."<sup>76</sup> At the core of this "power and responsibility" lies election regulation, including setting qualifications for voting and public officers who "perform functions that go to the heart of representative government."<sup>77</sup> In that core of "matters resting firmly within a State's constitutional prerogatives," the *Sugarman* Court noted "alienage itself is a factor that reasonably could be employed in defining 'political community.'"<sup>78</sup>

These constitutional prerogatives are, according to *Sugarman*, "no more than a recognition of a State's historical power to exclude aliens from participation in its democratic political institutions, and a recognition of a State's constitutional responsibility for the establishment and operation of its own government."<sup>79</sup> The constitutional recognition of this responsibility, in turn, is rooted in the Guarantee Clause and the Tenth Amendment.<sup>80</sup> As these provi-

sions suggest, the special status of State power to define its own political community precedes the Constitution and is not merely the residue of a federal power over non-citizens of the national political community. By "aliens," the *Sugarman* Court's supporting citation to *Pope v. Williams* suggests that States hold this power over State outsiders regardless of federal citizenship status. In that case, the Court upheld a Maryland law requiring a United States citizen also to declare his intent to vote as a Maryland citizen, "provided, of course, no discrimination is made between individuals in violation of the Federal Constitution."<sup>81</sup> Emphasizing the point, the *Sugarman* Court also cited *Luther v. Borden*, in which the Court declined to adjudicate the question of which was the legitimate government of Rhode Island after the Dorr rebellion, noting that "the sovereignty in every State resides in the people of the State."<sup>82</sup>

Since *Sugarman*, the courts have honed the "political function" doctrine of alienage classifications in a series of cases that, by the Supreme Court's own acknowledgment, "have not formed an unwavering line over the years."<sup>83</sup> Yet all of them rest on "the general principle that some state functions are so bound up with the operation of the State as a governmental entity as to permit the exclusion from those functions of all persons who have not become part of the process of self-government."<sup>84</sup> The Supreme Court's most recent reliance on the principle came two decades ago in *Gregory v. Ashcroft*, where in upholding Missouri's mandatory retirement age for state judges it noted the Court had "acknowledged the unique nature of state decisions that 'go to the heart of representative government.'"<sup>85</sup> If

<sup>70</sup>*Bluman*, 800 F. Supp. 2d at 287, quoting *Foley v. Connelie*, 435 U.S. 291, 296 (1978).

<sup>71</sup>*Id.* at 296.

<sup>72</sup>*Id.* at 297.

<sup>73</sup>*Id.* at 296.

<sup>74</sup>*Sugarman v. Dougall*, 413 U.S. 634 (1973).

<sup>75</sup>*Id.* at 642, quoting *Graham v. Richardson*, 403 U.S. 365 (1971).

<sup>76</sup>*Sugarman*, 413 U.S. at 643.

<sup>77</sup>*Id.* at 647.

<sup>78</sup>*Id.* at 648-49.

<sup>79</sup>*Id.* at 648 (citations omitted).

<sup>80</sup>*Id.* citing U.S. CONST. art. IV, § 4; U.S. CONST. amend. X.

<sup>81</sup>193 U.S. 621 (1904).

<sup>82</sup>48 U.S. 1, 47 (1849).

<sup>83</sup>*Ambach v. Norwick*, 441 U.S. 68, 72 (1979).

<sup>84</sup>*Id.* at 74-75.

<sup>85</sup>501 U.S. 452, 461 (1991).

this extraordinarily broad self-governance principle can support relatively ill-fitting alienage classifications across a range of public employment at its periphery, it also may support similar outsider classifications across a range of political participation at its core. Yet despite its breadth, courts have not relied on the principle recently, and have not relied on the principle at all in political participation cases, until *Bluman*.

*C. Which Sovereign? What Community? Whose Conception?*

In *Bluman* the court holds that limits on alien campaign activity are part of the sovereign's obligation to preserve the basic conception of a political community. Both the subject and object of this principle are clear only in application to the issue presented in the case. Who is the sovereign? What is the community? And whose conception of that community controls? In the context of the federal law at issue in *Bluman*, the sovereign is We the People of the United States, acting through Congress to preserve the nation's basic conception of our federal republic by excluding aliens from political participation. But the principle itself originated in support of state laws enacted by a subnational popular sovereign, though those laws also excluded (national) aliens from the (subnational) sovereign's basic conception of a (subnational) political community. While *Bluman* aligns the federal sovereign with the federal community's exclusion of aliens, the cases from which it draws this principle support the state sovereign only insofar as the state preserves the federal conception of a political community, as defined by a federal definition of national citizenship.

There is, therefore, a mismatch in the state political function cases that *Bluman* exposes through its own more consistent application of the principle at the federal level. When the federal Supreme Court upholds a state law as "part of the sovereign's obligation to preserve the basic conception of a political community," it could mean several things. The subject of the obligation to preserve (the sovereign), the object of the preservation (the basic conception), and the conception itself (the political community) might all be or belong to the federal or state governments. What supports the foreign campaign expenditure prohibition in *Bluman* is that the federal government has an obligation to preserve a federal conception of a federal community. The strongest

nationalist reading of the principle in the state political function cases is that state government has the obligation to preserve a federal conception of a federal community, and the state law simply serves some federal power. If there is a compelling interest in the law, it is compelling because it is a federal interest. The strongest federalist reading of the principle is that the state government has the obligation to preserve a state conception of a state community, and the state law simply does not conflict with, or overrides, any potentially competing federal powers or rights.<sup>86</sup>

What matters most here is first, who gets to conceive the community, and second, whose obligation it is to preserve that conception. The political function cases suggest two divergent answers to the first question. The Supreme Court has invoked the principle in cases involving alienage classifications. This suggests the Court views the state laws as preserving a federal conception of a political community, namely United States citizenship and the legitimacy of entitlements (such as certain forms of public employment) that may be associated with national citizenship. Yet if this were so, the *Bluman* analysis would not be so novel in terms of analyzing federal law. If the political function cases drew on a federal conception of a political community to support state laws, that federal conception should also appear in cases supporting federal laws, or at least federal laws themselves. It does not.<sup>87</sup> It would be odd if the political function cases rest upon a federal conception of federal political community that is robust enough to trump strict scrutiny under the Equal Protection Clause of state laws, yet not worth mentioning when scrutinizing similar federal laws under the Constitution. *Bluman*, it turns out, is the exception that proves the rule.

State laws that exclude aliens from political functions must be saved, if at all, as states preserving their own basic conceptions of state political communities. In other words, state regulation of outside influence fulfills the (state) sovereign's obligation

---

<sup>86</sup>There are more complicated but familiar intermediate formulations too. The Guarantee Clause, for example, might be read to say that the federal government has the obligation to preserve a federal conception of a state community (the republican form of government), although given the breadth of that conception and its origin in the Constitution itself, it might also be considered the states' conceptions of a state community.

<sup>87</sup>See, e.g., *Arizona v. United States*, 132 S.Ct. 2499 (2012).

to preserve the (state's) basic conception of a (state) political community. On this reading of *Bluman* and the political function cases, the doctrine reinforces the structural constitutional protections of self-government against outside influence. It takes at face value the Court's explanation that "[t]he rationale behind the political-function exception is that within broad boundaries a State may establish its own form of government and limit the right to govern to those who are full-fledged members of the political community."<sup>88</sup> It accepts the Court's insistence that "[s]elf-government, whether direct or through representatives, begins by defining the scope of the community of the governed and thus of the governors as well."<sup>89</sup> Because it is the state's conception of its own political community that governs, one implication of the principle is that a state may expand the right to political participation beyond the federal government's conception. This is consistent with historical practice respecting state policies granting the vote to aliens.<sup>90</sup> Subject to other textual constitutional parameters, the state's basic conception may be more or less inclusive of outside influence than the federal citizenship baseline, so long as it is in fact the state's conception that controls.

If the state as sovereign has not just the power but the obligation to preserve the basic conception of a political community, an obligation owed by the state government to its People, then that basic conception should be of, by, and for those People. A citizen in her State capacity might ask: if a political community is so basic a conception as to provide a constitutionally compelling state interest in preserving it against outsiders, why should *their* (federal) or *our shared* (federal) conception of federal citizenship be any more worthy of preservation than *our own* (state) conception of state citizenship? If this is the case for alienage classifications, how might it support more general distinctions against outsider participation in politics? The court's innovation in *Bluman* is to ground the structural constitutional concerns with outside influence in equal protection doctrine that accommodates the rights claims of outsiders to political participation. The doctrine suggests that beyond a core of office-holding and voting, regulation of political participation is fairly susceptible to distinctions based on who is in, and who is out, of a state's basic conception of its own political community.

### III. REGULATING OUTSIDE INFLUENCE

The constitutional regime governing the law of politics, always dynamic, has shifted. After *Citizens United* reiterated the limited scope of compelling interests in regulating politics, much of the remaining legal structure lies in the constitutional limbo of intermediate scrutiny and balancing tests. Sometimes the courts refer to it with ironic imprecision as "exacting scrutiny."<sup>91</sup> This middle-tier scrutiny is inherently unstable in application, balanced as it is between deference and suspicion.<sup>92</sup> Recent decisions consider under some form of intermediate scrutiny campaign contribution limits,<sup>93</sup> corporate campaign contribution prohibitions,<sup>94</sup> coordinated party expenditures,<sup>95</sup> campaign finance disclosure,<sup>96</sup> and ballot issue petition disclosure.<sup>97</sup> Lower courts apply a similar level of scrutiny, based on important state interests, to contribution prohibitions on contractors and lobbyists,<sup>98</sup> and on corporations.<sup>99</sup> Elsewhere, the

<sup>88</sup>*Bernal v. Fainter*, 467 U.S. 216, 221 (1984).

<sup>89</sup>*Cabell v. Chavez-Salido*, 454 U.S. 432, 439–40 (1982).

<sup>90</sup>See Raskin, Jamin B. *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PENN. L. REV. 1391 (1993) (reviewing the history of alien suffrage and arguing that the Constitution neither forbids nor compels states to grant the vote to aliens).

<sup>91</sup>See *Citizens United*, 130 S.Ct. at 914 ("The Court has subjected [disclosure] these requirements to 'exacting scrutiny,' which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *But see United States v. Alvarez*, 132 S.Ct. 2537, 2543 (2012) (applying strict scrutiny, explaining "[w]hen content-based speech regulation is in question, however, *exacting* scrutiny is required.") (emphasis added); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) ("When a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest.").

<sup>92</sup>See Anthony Johnstone, *A Madisonian Case for Disclosure*, 19 Geo. Mason L. Rev. 413, 419–25 (2012).

<sup>93</sup>*Randall v. Sorrell*, 548 U.S. 230, 247 (2006) (opinion of Breyer, J.), citing *Buckley v. Valeo*, 424 U.S. 1, 25–26 (1976).

<sup>94</sup>*Federal Election Commission v. Beaumont*, 539 U.S. 146, 162 (2003).

<sup>95</sup>*Federal Election Comm'n v. Colorado Republican Federal Campaign Comm.*, 533 U.S. 431, 437 (2001).

<sup>96</sup>See *Citizens United*, 130 S. Ct. at 914.

<sup>97</sup>See *John Doe #1 v. Reed*, 130 S. Ct. 2811, 2818 (2010).

<sup>98</sup>See *Green Party of Connecticut v. Garfield*, 616 F.3d 189 (2d Cir. 2010); see also *Wagner v. Federal Election Comm'n*, 854 F. Supp. 2d 83 (D.D.C. 2012) (applying intermediate scrutiny to federal contractor contribution ban under both the First Amendment and the Equal Protection component of the Fifth Amendment), *vacated*, No. 12-5365 (D.C. Cir. May 31, 2013).

<sup>99</sup>*United States v. Danielczyk*, 683 F. 3d 611, 617 (4th Cir. 2012), *cert denied*, No. 12-579 (Feb. 25, 2013).

Supreme Court approaches something like intermediate scrutiny on the sliding scale introduced by *Anderson v. Celebrezze*<sup>100</sup> and *Burdick v. Takushi*<sup>101</sup> for candidate ballot access, and applied it or suggested its application in some cases to political party association,<sup>102</sup> ballot issue petitioning,<sup>103</sup> and voter identification requirements.<sup>104</sup> While the intermediate standard's fluidity may be a threat to the orderly development of election law doctrine in these critical regulatory areas, it also represents an opportunity for states and their citizens to make a case for a broader universe of "important state interests." The concern about outside influence, potentially compelling as to national outsiders, also qualifies as at least an important interest in regulation of state outsiders in politics.

As policymakers recalibrate the means and ends of political regulation under the post-*Citizens United* regime, outside influence may become a more central subject of discussion for several reasons. Voting qualifications provide the most developed example, and may suggest some considerations for other stages in the political process. In petitioning processes, election administration integrity concerns might draw qualifications for voter registration drives, petitioning, and similar procedures more closely around residency to more effectively deter fraud and remedy mistakes. In campaign finance, corporate expenditures targeted by now-invalidated corrupt practices acts were a kind of proxy for outside influence that states now may attempt to regulate more directly. In lobbying regulation, the nationalization of state politics facilitates the organization and mobilization of outside interest groups around state legislative agendas, renewing ancient suspicions of "adventurers" authoring law from outside the political community.

In each of these spheres and others, the constitutional analysis of outside influence lacks clarity. This article proposes a clarifying rule. Residency should be a non-suspect qualification for non-prohibitory regulations of political participation, the kind that "do not prevent anyone from speaking" and are therefore subject to less-than-strict scrutiny,<sup>105</sup> so long as the residency qualification does not impose other constitutionally relevant burdens. In other words, direct limits on outside influence alone should never amount to a severe burden on political participation sufficient to trigger strict scrutiny. As a matter of fit between means and ends, the basic conception of a political community

is a sufficiently important interest to justify distinctions between insiders and outsiders in political participation, again in the absence of any other constitutionally relevant burden. Therefore, courts should not offer nonresidents, or outsiders, any special protections of political participation beyond those recognized generally for all participants. The constitutionality of voting qualifications are a model: other than the right to move and establish residency as an insider, courts generally do not suspect voting distinctions based on insider status as a resident, or outsider status as a nonresident.

### A. Voting

The modern canon of voting qualification cases demonstrates the inside-outside distinction as a geographical concept, and suggests some of the line-drawing difficulties at the margins. That canon begins with *Carrington v. Rash*,<sup>106</sup> a case involving Texas's definition of resident active duty members of the military as outsiders. Those members, "if they are in fact residents, with the intention of making Texas their home indefinitely, they, as all other qualified residents, have a right to an equal opportunity for political representation."<sup>107</sup> The Court reinforced the residency distinction in *Kramer v. Union Free School Dist. No. 15*,<sup>108</sup> rejecting under strict scrutiny any categorical distinctions

<sup>100</sup>460 U.S. 780, 789 (1983).

<sup>101</sup>504 U.S. 428, 434 (1992) (less than severe burdens "trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions") (quotations omitted).

<sup>102</sup>See *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997).

<sup>103</sup>See *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999) (referring to "State's substantial interests in regulating the ballot-initiative process"); but see *Meyer v. Grant*, 486 U.S. 414, 425 (1988) ("the burden that Colorado must overcome to justify this criminal law [banning paid petition circulators] is well-nigh insurmountable").

<sup>104</sup>See *Crawford v. Marion County Election Bd.*, 128 S.Ct. 1610, 1624 (2008) (weighing interests as "neutral and sufficiently strong to require use to reject petitioners' facial attack on the statute"); see also *id.* at 1624 (Scalia, J., concurring) (*Burdick* "calls for application of a deferential "important regulatory interests" standard for nonsevere, nondiscriminatory restrictions, reserving strict scrutiny for laws that severely restrict the right to vote").

<sup>105</sup>*Citizens United*, 130 S.Ct. 876, 914 (2010), quoting *McConnell v. FEC*, 501 U.S. 93, 201 (2003).

<sup>106</sup>380 U.S. 89 (1965).

<sup>107</sup>*Id.* at 94.

<sup>108</sup>395 U.S. 621 (1969).

among residents based on those who might be “primarily interested” or “primarily affected” by a school election.<sup>109</sup> In *Dunn v. Blumstein*,<sup>110</sup> invalidating a one-year state residency requirement to vote, the Court refined its theory of residents as insiders. Tennessee defended the law in part on the claim that new residents may not yet share a common interest in the community.<sup>111</sup> Again the Court rejected the distinction among residents. “[T]he fact that newly arrived [Tennesseeans] may have a more national outlook than longtime residents, or even may retain a viewpoint characteristic of the region from which they have come, is a constitutionally impermissible reason for depriving them of their chance to influence the electoral vote of their new home State.”<sup>112</sup>

Still, there remains a categorical difference between residents and non-residents. “States have the power to require that voters be bona fide residents of the relevant political subdivision,”<sup>113</sup> the Court explained, because “[a]n appropriately defined and uniformly applied requirement of bona fide residence may be necessary to preserve the basic conception of a political community, and therefore could withstand close constitutional scrutiny.”<sup>114</sup> The constitutional line the Court draws at residency between political insiders and outsiders may be formalistic, but no more so than the lines the Constitution itself draws among the states. Sanford Levinson notes in respect to the similar issue of citizenship, “a conception of citizenship as a surrogate for shared interests is both underinclusive and overinclusive,” because “the universe of people whose interests are vitally affected by any given election is far larger than the universe of those who are allowed to participate,” yet “the set of people sharing the (proper) values may be far smaller than the set of people designated as citizens.”<sup>115</sup>

This critique extends to the logic of outsider electioneering in *Bluman*, too. For example, Zephyr Teachout acknowledges the competing values of outsiders to participate in making policies in other jurisdictions that might impact them more than those of their own government, and of insiders to maintain their sovereignty against dilution by every person who may be touched by extraterritorial application of policies.<sup>116</sup> She also recognizes the interests of both insiders and outsiders are similar: “self-government and free speech.”<sup>117</sup> Yet the lines between inside and outside exist, and some of them are hard-wired into the Constitution. The

Supreme Court has, as it observed in *Holt Civic Club v. Tuscaloosa*, “uniformly recognized that a government unit may legitimately restrict the right to participate in its political processes to those who reside within its borders.”<sup>118</sup> The Court’s general refusal to consider gray areas in scrutinizing residential voting qualifications at least has the virtue of clarifying those lines that are already there, so insiders and outsiders each enter the political process knowing where they stand at its most crucial stage of voting. However, the conflict between the two increases, and becomes more complicated, outside of the voting booth.

### B. Petitioning

The act of petitioning for a ballot issue or candidate ballot access combines the vote-like signature on the petition with the speech-like circulation of the petition. Excluding outsiders from signing petitions is uncontroversial. Regulating outsiders who circulate petitions gives rise to a clash between the outsiders who support the petition issue and state residents who have an interest in “promoting transparency and accountability in the electoral process,” reflected in the state’s conception of “the

<sup>109</sup>*Id.* at 631.

<sup>110</sup>405 U.S. 330 (1972).

<sup>111</sup>*Id.* at 354.

<sup>112</sup>*Id.* at 355–56, quoting *Hall v. Beals*, 396 U.S. 45 53–54 (1969) (Marshall, J., dissenting).

<sup>113</sup>*Id.* at 343.

<sup>114</sup>*Id.* at 343–44.

<sup>115</sup>Sanford Levinson, *Suffrage and Community: Who Should Vote?*, 41 Fla. L. Rev. 545, 557 (1989). See also *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978) (Brennan, J., dissenting) (“The criterion of geographical residency is thus entirely arbitrary when applied to this case” involving a city’s extraterritorial police jurisdiction over neighboring residents who lack the right to vote in city elections). Cf. *Wit v. Berman*, 306 F.3d 1256, 1261–62 (2d Cir. 2002) (Winter, J.) (“Particularly in modern times, domicile is very often a poor proxy for a voter’s stake in electoral outcomes because many of an individual voter’s varied interests are affected by outcomes in elections in which they do not vote.... Domicile as a rule may have its philosophical defects, therefore, but it has enormous practical advantages over the alternatives. It almost always insures that a voter has *some* stake in the electoral outcome in the domiciliary district and almost always does not involve large numbers of disputes over where one may vote.”).

<sup>116</sup>Zephyr Teachout, *Extraterritorial Electioneering and The Globalization of American Elections*, 27 Berkeley J. Int’l L. 162 (2009).

<sup>117</sup>*Id.* at 190.

<sup>118</sup>*Holt Civic Club*, 439 U.S. at 68–69.

proper function of a democracy.”<sup>119</sup> In *Buckley v. American Constitutional Law Foundation, Inc.*,<sup>120</sup> the Supreme Court considered Colorado’s regulation of the ballot issue petitioning process, including a requirement that all petition circulators be registered voters. Under what appears to be intermediate scrutiny, the Court invalidated the registration requirement because it “cuts down the number of message carriers in the ballot-access arena without impelling cause.”<sup>121</sup> Yet it assumed “that a residence requirement would be upheld as a needful integrity-policing matter.”<sup>122</sup> The requirement was not challenged in the case, but all nine members of the Court suggested their support of residency as a means of “policing lawbreakers among petition circulators.”<sup>123</sup> Such residency requirements are common and increasingly important safeguards of the integrity of state petition processes. Nineteen states and the District of Columbia have adopted state residency requirements for petition circulators.<sup>124</sup>

States’ suspicion of outsiders in the petition process arises from a history of circulator fraud and the administrative necessity of identifying, locating, and haling circulators into court on short notice. This interest goes beyond security from fraud, and includes a voter’s—as well as a candidate’s or initiative proponent’s—reasonable expectation that any challenge to the petition process will be resolved based on facts rather than negative inferences drawn from a circulator’s unavailability as a witness. Where circulators cannot be located in response to petition challenges, courts must resort to potentially sweeping petition invalidations even when the extent of fraud may be limited. In one case, the Oklahoma Supreme Court explained that “the integrity of the initiative process in many ways hinges on the trustworthiness and veracity of the circulator” because “the Secretary and this Court have no ability to ascertain whether a particular voter actually signed a petition.”<sup>125</sup> Therefore, “residency requirements ensure that when such issues arise, the circulators will be Oklahoma residents who may be located within state lines and be subject to service for appearance in Oklahoma Courts.”<sup>126</sup> Finding “overwhelming evidence” of “involvement of out-of-state circulators in the signature gathering process establishing a pervasive pattern of wrongdoing and fraud,”<sup>127</sup> the court concluded that “if we do not take the opportunity to address the issue of the effect of out-of-state intru-

sions into a process reserved to bona fide residents of the State of Oklahoma, the problem will only grow and will present itself as a part of essentially every citizen circulation.”<sup>128</sup>

Similarly, in a Montana challenge to more than 64,000 signatures collected by non-resident petition circulators who had used false addresses and “bait and switch” tactics, neither the challengers nor the proponents were able to locate the suspect circulators or present them as witnesses at the challenge hearing.<sup>129</sup> Although the proponents sought more time for discovery, the court explained the need for “rapid action by the parties and the courts between the time an initiative qualifies for the ballot—typically in mid-July—and the date on which voters cast ballots in the first week of November.”<sup>130</sup> Based on the testimony from fewer than a dozen voters, and the proponents’ failure to present a single circulator witness to rebut or limit the fraud allegations, the Montana Supreme Court invalidated more than 64,000 signatures gathered by non-residents, “[a]s it was impossible to

<sup>119</sup>*Doe v. Reed*, 130 S. Ct. 2811, 2819 (2010).

<sup>120</sup>525 U.S. 182 (1999).

<sup>121</sup>*Id.* at 197.

<sup>122</sup>*Id.*

<sup>123</sup>*Id.* at 196. *See see id.* at 230 (Rehnquist, C.J., dissenting) (“I would not quarrel” with a holding “that a State may limit petition circulation to its own residents”); *id.* at 217 (O’Connor, J., joined by Breyer, J., concurring in the judgment in part and dissenting in part) (“I believe that the requirement that initiative petition circulators be registered voters is a permissible regulation of the electoral process.”) (citation omitted); *id.* at 211 (Thomas, J., concurring in the judgment) (assuming “the State has a compelling interest in ensuring that all circulators are residents,” and agreeing that “the State’s asserted interest could be more precisely achieved through a residency requirement.”).

<sup>124</sup>Alaska Stat. § 15.45.105; Ariz. Rev. Stat. §§ 16-321(D), 19-114; Cal. Elections Code §§ 102, 8451, 8066, 9021; Colo. Rev. Stat. §§ 1-4-905, 1-40-112(1); Conn. Gen. Stat. § 9-453e; D.C. Code § 1-1001.16(h)(5); Idaho Code § 34-1807; Kan. Stat. Ann. § 25-303; Me. Const. art. IV, Pt. 3, § 20; Mich. Comp. Laws § 168.544(c); Miss. Const. art. 15, § 273(12); Mo. Rev. Stat. § 115.325(2); Mont. Code Ann. § 13-27-102(2)(a); Neb. Rev. Stat. Ann. § 32-629(2); N.D. Const. art. III, § 2; N.D.C.C. § 16.1-01-09(3), § 3; Ohio Rev. Code § 3503.06; Okla. Stat. tit. 34, § 3.1; Pa. Stat. Ann. tit. 25 § 2911(d); S.D. Cod. L. § 12-1-3 (9); Wyo. Stat. § 22-24-107(a).

<sup>125</sup>*In re Initiative Petition No. 379*, 155 P.3d 32, 42 (Okla. 2006).

<sup>126</sup>*Id.*

<sup>127</sup>*Id.* at 34.

<sup>128</sup>*Id.*

<sup>129</sup>*See Montanans for Justice v. Montana*, 146 P.3d 759, 774 (Mont. 2006).

<sup>130</sup>*Id.* at 767.

precisely identify which certified signatures were untainted by Proponents' signature gatherers' various deceptive practices."<sup>131</sup> The next year, in response to *Montanans for Justice*, the state legislature enacted a residency requirement for petition circulators.<sup>132</sup>

Courts diverge on the constitutionality of excluding outsiders from the petition process, however. In *Initiative & Referendum Institute v. Jaeger*, the Eighth Circuit upheld North Dakota's residency requirement in a challenge brought by initiative petitioners, noting that "[n]on-residents are still free to speak to voters regarding particular measures; they certainly may train residents on the issues involved and may instruct them on the best way to collect signatures; and they may even accompany circulators."<sup>133</sup> In *Nader v. Brewer*, the Ninth Circuit invalidated under strict scrutiny Arizona's residency requirement for candidate petitions, despite its similarity to the residency requirement assumed to be constitutional in *Buckley*, because in a presidential campaign "the residency requirement nevertheless excludes from eligibility all persons who support the candidate but who, like [presidential candidate Ralph] Nader himself, live outside the state of Arizona."<sup>134</sup> *Nader* may be distinguished, implicitly, on the basis of the national federal election implicated by the process. Still, circuit courts continue to invalidate petition circulator residency requirements under strict scrutiny for national candidates as well as state candidates and ballot issues.<sup>135</sup>

If these challenges turned on the remoteness of outsiders' petition circulation from insiders' basic conception of a political community, they might be reconciled with the voting qualification cases. But to the contrary, the successful petition challenges turn on the characterization of petition circulation as core political speech by outsiders in the insiders' political process, even when the outsiders make only a thin case for an actual burden on petitioning. The Supreme Court has not affirmed this political speech characterization since *American Constitutional Law Foundation*. It has, however, held in *Doe v. Reed* that "[p]etition signing remains expressive even when it has legal effect in the electoral process," and therefore is analogous in important ways to the Court's campaign finance doctrine.<sup>136</sup>

### C. Campaigning

The conflict between outside influence and a state's basic conception of a political community

sharpens on the campaign trail. Money is mobile. In the fundraising race, candidates will seek outside contributions in support of, and fear outside expenditures in opposition to, their campaigns; outside contributors will seek candidates to support and oppose. Campaign finance, therefore, is a primary channel of outside influence. This was the argument of 22 states and the District of Columbia, led by New York, in a brief as amici curiae in support of Montana and its Supreme Court's decision upholding the Corrupt Practices Act in *American Tradition Partnership v. Bullock*. As the states explained, "state campaign finance laws present the interest in regulating nonresidents' electoral influence in significantly stronger form than do federal laws."<sup>137</sup> The states cataloged how nonresidents, including but not limited to corporations, "dominated spending in state elections":<sup>138</sup>

In 2010, spending by out-of-state groups far exceeded local spending on communications for and against retention of three Iowa Supreme Court Justices. Foreign spending was heavily one-sided, with the vast majority

<sup>131</sup>*Id.* at 776; see also *Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614, 616 (8th Cir. 2001) (citing an invalidation of over 17,000 signatures when "[t]wo Utah residents who were involved in petition irregularities left the State, and the matter was never fully resolved."); *Initiative Petition No. 379*, 155 P.3d 32, 34, 49 (Okla. 2006) (invalidating 57,000 signatures based on negative inferences because "[t]here is no way to determine with any sort of accuracy exactly how many signatures were collected by these out-of-state residents.").

<sup>132</sup>See 2007 Mont. Laws ch. 481, § 5, *codified at* Mont. Code Ann. § 13-27-102(2).

<sup>133</sup>241 F.3d 614, 617 (8th Cir. 2001).

<sup>134</sup>531 F.3d 1028 (9th Cir. 2008), *cert. denied*, No. 08-648 (Mar. 9, 2009).

<sup>135</sup>See *Libertarian Party of Virginia v. Judd*, 718 F.3d 308 (4th Cir. 2013) (invalidating under strict scrutiny a Virginia law requiring nomination petition circulators to be witnessed by state residents); *Yes on Term Limits v. Savage*, 550 F.3d 1023, 1031 (10th Cir. 2008) (invalidating under strict scrutiny an Oklahoma law requiring ballot issue petition circulators to be state residents); *Nader v. Blackwell*, 545 F.3d 459 (6th Cir. 2008) (invalidating under strict scrutiny an Ohio law requiring nomination petition circulators to be state residents); cf. *Krislov v. Rednour*, 226 F.3d 851, 863 (7th Cir. 2000) (invalidating under strict scrutiny an Illinois law requiring nomination petition circulators to be registered voters within the relevant office's district).

<sup>136</sup>130 S.Ct. 2811, 2818 (2010).

<sup>137</sup>Amicus Curiae Bf. of New York et al. in Support of Respt., *American Tradition Partnership v. Bullock*, 20 (No. 11-1179, 132 S.Ct. 2490 (2012)).

<sup>138</sup>*Id.* at 21–22.

of out-of-state funds spent in opposition to the Justices.<sup>139</sup> And because of independent expenditures made by foreign corporations, overall spending on the retention elections was also heavily one-sided.<sup>140</sup> All three Iowa Justices lost their seats. And in Wisconsin, spending on recall elections for Governor Scott Walker and certain state senators has already exceeded previous records based in large part on out-of-state spending.<sup>141</sup>

In one study that anticipated these developments, Patrick Garry, Derek Nelsen, and Candice Spurlin found that between fifty and eighty percent of the funding for a recent South Dakota referendum campaign came from out-of-state, and concluded that “if the out-of-state money affects the outcome of a referendum in a way that would be different from how South Dakotans alone may have voted, then the whole notion of horizontal federalism and state autonomy may be undermined.”<sup>142</sup>

The Supreme Court’s summary reversal of the state court in *American Tradition Partnership* precluded the consideration of these arguments. Yet the states are moving ahead with new approaches to regulate outside influence in state campaigns.<sup>143</sup> Current and potential policy options for addressing outside influence in campaign finance include distinguishing between insiders and outsiders in contribution limits and disclosure.<sup>144</sup> Other related policies, such as board or shareholder approval for corporate campaign expenditures and matching funds, also implicate the inside-outside distinction. None of these policies exclude outsiders from political participation. Each may regulate outside influence in a way that is substantially related to an important state interest in preserving the basic conception of a political community.

1. Contribution limits. Unlike at the federal level, most contribution limits at the state level are calibrated to the size of the constituency.<sup>145</sup> A one thousand dollar contribution in a small state’s legislative campaign has far different influence on the campaign, and potentially the candidate, than the same contribution in a federal senate campaign. Similarly, a less populous state might calibrate its contribution limits lower than a more populous state, based on the costs of campaigning, relative income, and each state’s balancing of the opportunity to participate against the threat of corruption. Outside influence,

especially when drawn to less populated but resource-rich states, can disrupt this balance when there are a significant number of outside supporters relative to constituents, when the outside supporters have relatively more financial capacity to contribute the maximum than constituents, or when outside supporters can make unlimited expenditures in support of or opposition to a candidate that exceeds the constituency’s financial capacity to respond. In any of these cases, outsiders may have more influence over a campaign, and potentially a candidate, than constituents in campaign finance terms.

Alaska was one of the pioneer states in addressing outside influence. Its differential contribution limits for residents and nonresidents prompted a detailed consideration of nonresident campaign contribution limits. A revision of its campaign finance laws limited the aggregate amount a candidate could raise from nonresidents to a set amount (\$20,000 for governor), and limited the aggregate amount a political party or other committee could raise from nonresidents to ten percent of total contributions.<sup>146</sup> In a challenge to the nonresident

<sup>139</sup>Roy A. Schotland, *Iowa’s 2010 Judicial Election: Appropriate Accountability or Rampant Passion?*, 46 Ct. Rev. 118, 120–21 (2011); Ian Bartrum, *Constitutional Rights and Judicial Independence: Lessons from Iowa*, 88 Wash. U. L. Rev. 1047, 1048 (2011).

<sup>140</sup>*See id.*

<sup>141</sup>*See, e.g.*, Jason Stein, *Recall Cost to Government: \$2.1 Million; Amount Spent: A Record \$44 Million*, Milwaukee Journal Sentinel (Sept. 20, 2011).

<sup>142</sup>Garry et al., *Raising The Question Of Whether Out-Of-State Political Contributions May Affect A Small State’s Political Autonomy: A Case Study Of The South Dakota Voter Referendum On Abortion*, 55 S. D. L. Rev. 35, 46 (2010). Christopher R. Nolen, *Election Law*, 41U. Rich. L. Rev. 121, 139 (2006) (reporting that out-of-state organization contributed \$2.1 million to candidate for attorney general, prompting reforms). The point is made more starkly as to campaign finance regulation of tribal elections, given the economic pressures imposed by Indian gaming operations on relatively small tribal electorates. *See* Paul W. Shagen, *Safeguarding the Integrity of Tribal Elections Through Campaign Finance Regulation*, 8 Cardozo Publ. L. Policy & Ethics J. 103, 177 (2009) (“for many Indian tribes, the threat to political stability and self-governance is far too great to leave this important area unregulated”).

<sup>143</sup>Amicus Curiae Brief of New York et al. *supra* n. 137 at 7.

<sup>144</sup>*See* Anthony Johnstone, *supra* n. 92 at 462–64 (2012) (distinguishing “foreigners,” or outsiders, as factions for disclosure and other campaign finance policy purposes).

<sup>145</sup>*See* Anthony Johnstone, *Recalibrating Campaign Finance*, 32 Yale L. & Pol. Rev. 101, 109–10 (2014).

<sup>146</sup>*See* Alaska Stat. § 15.13.072; *see also* Rev. Code Wash. § 42.17.093 (establishing separate reporting requirements for “out-of-state political committees”).

contribution limits, two former Alaska governors raised fundamental questions about outside influence. One explained that “whenever a candidate has to seek donations from outside the state, the candidate is buying a potential conflict of interest.”<sup>147</sup> The other asked, “How can the average Alaska voter believe that a candidate who has accepted thousands of dollars from non-Alaska resident contributors who have pecuniary interests at stake in the votes the candidate will cast if he or she is elected is not obligated to the contributors as much as he or she is to the voters?”<sup>148</sup> Applying strict scrutiny, the Alaska Supreme Court upheld the nonresident limits:

Alaska has a long history of both support from and exploitation by nonresident interests. Its beauty and resources have long been lightning rods for social, developmental, and environmental interests. More than 100 years of experience, stemming from days when Alaska was only a district and later a territory without an elected governor or voting representation in Congress, have inculcated deep suspicions of the motives and wisdom of those who, from outside its borders, wish to remold Alaska and its internal policies for dealing with social or resource issues. Outside influence plays a legitimate part in Alaska politics, but it is not one that Alaskans embrace without reservation.<sup>149</sup>

The court relied in part on the anti-distortion rationale rejected as a compelling interest sufficient to prohibit expenditures in *Citizens United*.<sup>150</sup> Yet the court also recognized that “[t]he state’s power to preserve the political community by excluding nonresidents from voting” might be extended “to limit the influence of nonresidents over state elections through regulation of their campaign contributions.”<sup>151</sup> Even if the antidistortion interest is insufficiently compelling to support expenditure prohibitions, the interest in preserving the political community may be sufficiently important to support contribution limits.

In *Landell v. Sorrell*,<sup>152</sup> however, the Second Circuit rejected the Alaska Supreme Court’s analysis on grounds that align with the *Citizens United* Court’s deregulatory approach to campaign finance. Invalidating a similar nonresident contribution limit, the court distinguished the sufficiently impor-

tant interest of limiting candidate dependence on large contributors from what it held to be an insufficient interest in limiting “the influence of one set of people—untrustworthy outsiders.”<sup>153</sup> As it characterized the interest, “[e]ven assuming that the Alaska Supreme Court is correct that outsiders have bad motives and little to contribute to its political discourse, the government does not have a permissible interest in disproportionately curtailing the voices of some, while giving others free rein, because it questions the value of what they have to say.”<sup>154</sup> Perhaps, as Bruce Cain argues, “there is no reason to think that disallowing out-of-district contributions is a sensible reform for every democracy,”<sup>155</sup> and there is value to virtual representation through campaign finance and other means. Yet a strict constitutional rule against limiting (not prohibiting) outside influence, under the speaker-neutral freedom of speech according to *Landell* and *Citizens United*, prematurely takes off the table the question of whether it may be a sensible reform for each democracy in the states that may adopt it. In some states, calibrating contribution limits to regulate but not exclude outside influence in campaign contributions may be substantially related to an important state interest in preserving the basic conception of a political community.

2. Disclosure. Disclosure is a less intrusive means of distinguishing and regulating outsider participation in the political process. Due to voters’ suspicion of outside influence—reflected in the carpetbagger epithet—disclosure might be nearly

<sup>147</sup>*State v. Alaska Civil Liberties Union*, 978 P.2d 597, 615 (Alaska 1999), cert. denied, 528 U.S. 1153 (2000) (testimony of Former Governor Walter Hickel).

<sup>148</sup>*Id.* (testimony of Former Governor Jay Hammond).

<sup>149</sup>*Id.* at 617.

<sup>150</sup>*Compare id.* (“These restraints [on nonresident campaign spending] therefore limit ‘the potential for distortion’”) with *Citizens United*, 130 S.Ct. at 913 (“we have found [the antidistortion interest] unconvincing and insufficient”).

<sup>151</sup>*Alaska Civil Liberties Union*, 978 P.2d at 616 n. 123. See also *Vannatta v. Kiesling*, 151 F.3d 1215, 1222–25 (9th Cir. 1998) (Brunetti, J., dissenting) (arguing that a ban on out-of-district campaign contributions meets “a sufficiently important interest in protecting [Oregon’s] republican form of government,” while nonresidents are free to make independent expenditures).

<sup>152</sup>*Landell v. Sorrell*, 382 F.3d 91 (2d Cir. 2004), rev’d on other grounds, 548 U.S. 230 (2006).

<sup>153</sup>*Id.* at 148.

<sup>154</sup>*Id.*

<sup>155</sup>Bruce E. Cain, *Moralism and Realism in Campaign Finance Reform*, 1995 U. Chi. Legal F. 111, 133.

as effective as direct limits by empowering voters themselves to assess the importance of outside influence. In *Protectmarriage.com v. Bowen*,<sup>156</sup> a challenge by contributors to the successful California ballot issue Proposition 8, the district court recognized this suspicion as meaningful. The court rejected those contributors' analogy to the Socialist Workers' Party<sup>157</sup> for purposes of an as-applied exemption to campaign finance disclosure. After an extensive analysis of the role of disclosure in ballot issue campaigns, the district court noted "[o]f particular relevance in this case is the number of out-of-state individuals and corporations contributing to the passage of a California referendum," and held "[s]urely California voters are entitled to information as to whether it is even citizens of their own republic who are supporting or opposing a California ballot measure."<sup>158</sup>

Where there are bright lines between outsiders and constituents drawn by residency, outside influence should be easy to disclose through a contributor's zip codes or other geographic information. In the more complicated case of political committees and parties that raise both inside and outside money, residency information can be aggregated by number of contributors or the amount of contributions. Justin Levitt models disclosure of outside influence on a "Nutrition Facts label for democracy," what he calls a "Democracy Facts" disclaimer.<sup>159</sup> It emphasizes "simple proxies for the quantity and fervor of local support for a particular communication," including the number of contributors within the district and the percentage of large contributors, to "help flag the existence of a false bandwagon."<sup>160</sup> Levitt's goal is modest: "help to mitigate informational miscues provoked by particular frequently repeated communications."<sup>161</sup> But he shows how a focus on outside influence, rather than any influence, might make disclosure more effective with less of a burden on individual participants.

One disconnect between the ends of disclosure recognized in *Protectmarriage.com* and the law's means is that California required disclosure of the name, address, and employer of every contributor of more than \$100 to the campaign committee, which regardless of its constitutionality is ineffective as a policy matter. As Richard Briffault argues, disclosure of names and addresses of small donors means little to the public and media, but can drown out more useful information about large

donors.<sup>162</sup> Disclosure of the magnitude of outside influence itself (either many small outside contributors or few large outside contributors) through Levitt's "Democracy Facts" or other cues, is a form of what Bruce Cain calls "semi-disclosure."<sup>163</sup> Such disclosure might resolve debates over the value of identifying at least small donors in campaigns. Cain imagines the value for a voter "in knowing that candidate Jones gets most of his money from oil companies, doctors, or the [Service Employees International Union]."<sup>164</sup> We might also consider the value in knowing how much support or opposition a campaign receives from outsiders to be a sufficiently important interest to distinguish outsiders in campaign finance disclosure.

3. Public funding. The inside-outside distinction is less litigated in the area of public campaign funding, though it is central to several leading models. One model is the Arizona and Maine Clean Elections Acts offering voluntary public financing for candidates (validated in *Buckley v. Valeo*),<sup>165</sup> supplemented by matching funds in response to opposing expenditures (invalidated in *Arizona Free Enterprise Club v. Bennett*).<sup>166</sup> In both states the original public funding trigger requires a specified number of five-dollar "qualifying contributions" from insiders, voters registered in the candidate's district.<sup>167</sup> Outsiders are irrelevant to a candidate's public support for triggering purposes, and the public funding comes from the state.

<sup>156</sup>830 F. Supp. 2d 914 (E.D. Cal. 2011).

<sup>157</sup>See *Brown v. Socialist Workers, '74 Campaign Committee*, 459 U.S. 87 (1982) (holding campaign finance disclosure unconstitutional as applied when "a minor political party that can show a reasonable probability that the compelled disclosures will subject those identified to threats, harassment, or reprisals.") (quotations omitted).

<sup>158</sup>*Protectmarriage.com*, 830 F. Supp. 2d at 941, quoting *id.*, 599 F. Supp. 2d 1197, 1207–11 (E.D. Cal. 2009).

<sup>159</sup>Justin Levitt, *Confronting the Impact of Citizens United*, 29 *Yale L. & Policy Rev.* 217, 227–28 (2010).

<sup>160</sup>*Id.* at 227–228.

<sup>161</sup>*Id.* at 229 n. 52.

<sup>162</sup>See Richard Briffault, *Campaign Finance Disclosure 2.0*, 9 *Election L. J.* 273 (2010).

<sup>163</sup>Bruce Cain, Lead Essay, *Shade from the Glare: The Case for Semi-Disclosure*, CATO UNBOUND (Nov. 8, 2010, 11:08 AM), <<http://www.cato-unbound.org/2010/11/08/bruce-cain/shade-from-the-glare-the-case-for-semi-disclosure/>>.

<sup>164</sup>*Id.*

<sup>165</sup>424 U.S. 1, 86 (1976).

<sup>166</sup>131 S.Ct. 2806 (2011).

<sup>167</sup>*Ariz. Rev. Stat. Ann.* § 16-946(B)(1); *Maine Rev. Stat.* 21A § 1122(7).

Another model, New York City's matching funds program, similarly triggers public funding for threshold contributions by residents of the district,<sup>168</sup> but also matches only city resident contributions (six-for-one for the first \$175).<sup>169</sup> Beyond the entitlement to matching funds itself, insiders benefit from the program through increased engagement by candidates with a more representative set of constituents.<sup>170</sup> Other than the opposition-matching funds at issue in *Arizona Free Enterprise Club*, the relative lack of constitutional questions raised about these public funding programs suggests residency-based triggers and matching funds may be a benign form of limiting or diluting outside influence.

4. Shareholder protection. Another increasingly important policy after *Citizens United* involves corporate board or shareholder approval of campaign expenditures, and more rigorous disclosure of corporate conduits (like 501(c)(4) and 501(c)(6) organizations). Corporate political participation by national or multinational firms serves as a proxy for outside influence, since large corporations, at least, are unlikely to have purely "inside" shareholders. These policies also implicate the inside-outside distinction through their attempt to regulate the internal affairs of foreign (out-of-state) corporations.

In *Citizens United* the Court rejected the shareholder protection interest for a corporate campaign expenditure prohibition, claiming there is "little evidence of abuse that cannot be corrected by shareholders 'through the procedures of corporate democracy.'"<sup>171</sup> Typically, those procedures are governed as internal affairs by the state of incorporation.<sup>172</sup> While the Supreme Court has hinted that some state corporate regulations with significant extraterritorial effects may raise constitutional issues,<sup>173</sup> the primary issues in state regulation of campaign activity by foreign corporations are practical.<sup>174</sup> Enforcing campaign finance laws against corporations, some of which may have no other connection to a state beyond a money trail that somehow leads to a state campaign, may require treating outsider corporations differently than corporations domiciled within the state. Here, the insider-outsider distinction may help clarify the stakes for such laws.

5. Federal campaigns. Finally, only federal preemption prevents states from considering similar inside-outside distinctions for campaign finance policy governing federal candidates.<sup>175</sup> As William

Marshall argues, devolution of campaign finance policy to the states "will lessen the severity of the risks of federal regulation and will provide opportunities for different ideas and approaches to campaign reform to percolate and emerge."<sup>176</sup> One way, perhaps, of bypassing if not resolving the polarization and paralysis of campaign finance policy at the federal level is to allow the diversity of state campaign finance regimes to be reflected through the elections of federal officials. Each state's approach to outside influence differs within the broad range of possible republican forms of government. Some states, like Alaska and Montana, may have legitimate reasons for a provincial approach to campaign finance given their history of exploitation by outsider economic and political forces, while other states may take a more cosmopolitan or deregulatory approach.<sup>177</sup> Indeed, before federal preemption states did set their own campaign finance regulations for federal campaigns.<sup>178</sup>

Within the current constitutional regime, no one but foreign nationals may be barred from making

<sup>168</sup>N.Y.C. Admin Code § 3-703(2).

<sup>169</sup>N.Y.C. Admin. Code § 3-702(3).

<sup>170</sup>See Michael J. Malbin, Peter W. Brusoe, and Brendan Glavin, *Small Donors, Big Democracy: New York City's Matching Funds as a Model for the Nation and States*, 11 Election L. J. 3, 13 (2012).

<sup>171</sup>130 U.S. at 911, quoting *First Nat. Bank of Boston v. Bellotti*, 435 US 765, 794 (1978).

<sup>172</sup>*Santa Fe Indus. v. Green*, 430 U.S. 462, 479 (1977) ("Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation."), quoting *Cort v. Ash*, 422 U.S. 66, 84 (1975).

<sup>173</sup>See *Edgar v. Mite Corp.*, 457 U.S. 624, 640 (1982) (holding Illinois corporate takeover law unconstitutional under the Commerce Clause).

<sup>174</sup>See *Iowa Right to Life Committee, Inc. v. Tooker*, 795 F. Supp. 2d 852 (S.D. Iowa 2011) (rejecting free speech and equal protection challenges to board-approval requirement for corporate campaign expenditures).

<sup>175</sup>2 U.S.C. § 453 ("the provisions of this Act, and of rules prescribed under this Act, supersede and preempt any provision of State law with respect to election to Federal office"); see also 11 C.F.R. § 108.7 (federal law supersedes state law concerning campaign finance organization, disclosure, and limits on federal candidate and political committees).

<sup>176</sup>See William P. Marshall, *The Last Best Chance for Campaign Finance Reform*, 94 Nw. U. L. Rev. 335, 337 (2000).

<sup>177</sup>See William Marshall, *The Constitutionality of Campaign Finance Regulation: Should Differences in a State's Political History and Culture Matter?* 74 Mont. L. Rev. 79 (2013).

<sup>178</sup>See Johnstone, *supra* n. 145 at 105.

campaign expenditures in any election, so the question of outside influence in state elections for federal officials is clearly a matter of regulation rather than exclusion. If “the basic conception of a political community” reflected in federal elections belongs to the state rather than the federal sovereign, that regulation might differ across different states, reflecting each state’s distinct conception of campaign finance. As long as the regulation remains within broad constitutional boundaries, such as reasonable contribution limits, disclosure, and public funding, each state’s regulation should be recognized to meet an important state interest in limiting, disclosing, and diluting, but not excluding, outside influence in campaign finance.

#### D. Lobbying

Do outsiders matter in lobbying? As Heather Gerken puts it, “legislators will take the prefab option” of a bill, talking points, and research all rolled into one package.<sup>179</sup> Like McDonald’s producing hamburgers, lobbyists enjoy economies of scale in producing bills for multiple states, and also may enjoy economies of scope in producing legislation in their clients’ interests across a variety of policy areas. Given the ongoing nationalization of state politics and policy, state legislators might prefer mass-produced legislative packages from national outsiders, even when it may not perfectly fit their local political and policy needs, over less-developed packages produced by local insiders like small statehouse lobbying shops and budget-constrained legislative services offices.<sup>180</sup> One of the characteristics that makes those outsiders more efficient producers of legislation and political strategy, however, is that they can “cut out the middleman,” the lawyer walking the halls of the statehouse for a diverse mix of clients, and establish more direct and potentially corrupting connections between the national clients and the legislators.

State lobbying regulation of outside influence may be of particular concern because, while lobbying at the national level threatens inefficiency through rent-seeking,<sup>181</sup> state lobbying on behalf of outsiders also threatens wealth transfers from inside to outside the state. What makes these direct connections potentially corrupting is that the national client lacks the relationship the local lobbyist might have with legislators, and in its place the client might offer campaign or other political support. “It is the way in

which individuals, organizations, and interest groups can use campaign finance and lobbying together to advance their private goals at potential cost to the public interest, and not the campaign finance activities of lobbyists per se, that ought to be the primary focus of regulatory efforts.”<sup>182</sup> Whiskey and steaks are nice, but a connection with an interest group willing and able to make a well-timed independent expenditure is hard to beat.

Given this incentive structure, an outside group might lobby most effectively by not “lobbying” at all. It might convene state legislators from across the country around policy interests shared by its clients, and facilitate the development of “prefab options” by legislators and clients largely at its clients’ expense. It might develop a network of state legislators to which it communicates its clients’ legislative priorities during sessions. It might develop political strategy around legislation, and talking points and other research to support or oppose particular bills. And by directing its clients’ legislative strategy out of a national membership organization that includes both clients and legislators, it might avoid lobbying disclosure and regulation entirely. It might, in other words, look like national political organizations such as the American Legislative Exchange Council, or ALEC.<sup>183</sup> This model of outside influence is, as ALEC claims, a “formula for success”: nearly a thousand bills based at least in part on ALEC Model Legislation are introduced in the states, and an average of 20 percent become law.<sup>184</sup>

<sup>179</sup>Heather Gerken, *Lobbying as the New Campaign Finance*, 27 Ga. St. U. L. Rev. 1147 (2011).

<sup>180</sup>See Alexander Hertel-Fernandez, *ALEC Has Tremendous Influence in State Legislatures. Here’s Why*. WASH. POST: THE MONKEY CAGE (Dec. 9, 2013), available at <<http://www.washingtonpost.com/blogs/monkey-cage/wp/2013/12/09/alec-has-tremendous-influence-in-state-legislatures-heres-why/>> (reporting that “states where legislators had smaller budgets, convened for shorter lengths of time, and spent less time crafting policy were all more likely to enact ALEC model bills,” and “[l]ess-experienced legislators were much more likely to rely on ALEC model bills compared to more experienced lawmakers.”).

<sup>181</sup>See Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 Stan. L. Rev. 191 (2012) (proposing an economic efficiency rationale for lobbying regulation).

<sup>182</sup>See Richard Briffault, *Lobbying and Campaign Finance: Separate and Together*, 19 Stan. L. & Policy Rev. 105, 121 (2008).

<sup>183</sup>See Mike McIntire, *Nonprofit Acts as a Stealth Business Lobbyist*, N.Y. Times A1 (Apr. 22, 2012).

<sup>184</sup>American Legislative Exchange Council, *History*, available at <<http://www.alec.org/about-alec/history/>> (visited Mar. 6, 2013).

Outside influence in lobbying poses the same question as outside influence in other areas of political participation. The question is not whether to exclude the outside influence from political participation of any sort, but whether to distinguish it for purposes of general regulation of political participation. Federal law does this at the national level, as it does for campaign finance: foreign lobbying interests are subject to more disclosure than domestic lobbying interests.<sup>185</sup> State lobbying law might do the same, requiring more detailed disclosure of out-of-state lobbying principals to more effectively inform the legislators lobbied, competing interest groups, and the general public of outside influence.<sup>186</sup> In some states, an effort to address outside influence in lobbying might start with repealing exemptions for certain groups, including ALEC, from state lobbying disclosure laws.<sup>187</sup>

Yet at least one state supreme court rejected an attempt to distinguish outsiders, by invalidating a law exempting the state's citizens from the lobbyist reporting law even when they only were lobbying on their own behalf. With little analysis it held, "just as the privileges and immunities clause protects persons who enter other states to earn a living, it must protect persons who enter this state to assert or protect their interests before public officials."<sup>188</sup> This odd analogy to a vague doctrine would benefit from reading past the Privileges and Immunities Clause all the way to the end of Article IV, where in politics there is at least the countervailing principle of "a Republican Form of Government."<sup>189</sup> The interaction of these provisions should begin, rather than end, a discussion of the constitutional interests at issue in the state regulation of outside influence.

## CONCLUSION

Outside influence matters to state and national politics. *Bluman* only begins to grapple with the question of outside influence, and the federal regulation of foreign nationals that is its subject conceals the deeper constitutional roots of republicanism at issue. That republicanism includes state, as well as national, forms of government. As *Citizens United* and subsequent constitutional developments open state politics to more outside influence, states and their citizens will explore old and new laws to regulate it in voting, petitioning, campaigning, lobbying, and other forms of political participation. In considering the constitutionality of these regulations at the state and local level, courts should not read the speaker-based holding of *Citizens United* to the exclusion of its dicta on outside influence. Instead, taking *Bluman* as a guidepost, courts should cautiously avoid scrutinizing inside-outside distinctions as suspect. The sovereign's obligation to preserve the basic conception of a political community is a sufficiently important constitutional interest to sustain state limitations on, but not exclusions of, outside influence. As the Guarantee Clause suggests, the health of the Union depends on some degree of protection for state politics in order to sustain national politics. Given the state of national politics, we might not nationalize state politics.

Address correspondence to:

Anthony Johnstone  
University of Montana School of Law  
32 Campus Drive #6552  
Missoula, MT 59812-6552

E-mail: anthony.johnstone@umontana.edu

<sup>185</sup>See Craig Holman, *Origins, Evolution and Structure of the Lobbying Disclosure Act 11* (Public Citizen May 11, 2006), available at <<http://www.citizen.org/documents/LDAorigins.pdf>> (visited Mar. 6, 2013).

<sup>186</sup>*Cf.* Briffault, *supra* n. 162 at 117 (explaining the three audiences of lobbying disclosure).

<sup>187</sup>See Paul Abowd, *ALEC Gets a Break From State Lobbying Laws*, Mother Jones (May 8, 2012), available at <<http://www.motherjones.com/politics/2012/05/alec-lobbyist-exemption>> (visited Mar. 6, 2013) ("[i]n three states—South Carolina, Indiana, and Colorado—ALEC has quietly, and by name, been specifically exempted from rules for lobbyists.").

<sup>188</sup>*Montana Auto. Ass'n v. Greely*, 632 P. 2d 300, 304 (Mont. 1981).

<sup>189</sup>U.S. CONST. art. IV, § 4.