AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 12: The Contemporary Era – Democratic Rights/Free Speech/Campaign Finance

**Bluman v. Federal Election Commission, 800 F. Supp. 2d 281 (D.D.C. 2011)**

*Benjamin Bluman was Canadian citizen living in the United States on a temporary work visa. He wished to contribute funds to multiple federal electoral campaigns. In 1966, Congress banned agents of foreign governments from contributing to federal campaigns. In 1874, it banned all “foreign nationals” other than lawful permanent residents from contributing to federal campaigns. Bluman filed a complaint with the Federal Election Commission, arguing that the ban violated the First Amendment. The FEC dismissed the complaint, and he appealed to the federal district court for the District of Columbia, which convened a special three-judge panel to hear the suit. The panel granted the FEC’s motion to dismiss the case, concluding that Congress could constitutionally bar aliens from making political donations to federal candidates and campaigns.*

JUDGE [KAVANAUGH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=I215b0bc634f411e9bc5c825c4b9add2e&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I215b0bc634f411e9bc5c825c4b9add2e).

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Political contributions and expenditures are acts of political expression and association protected by the First Amendment. . . . [T]he debate over the level of scrutiny is ultimately not decisive here because we conclude that § 441e(a)passes muster even under strict scrutiny. Therefore, we may assume for the sake of argument that *§ 441e(a)*'s ban on political contributions and expenditures by foreign nationals is subject to strict scrutiny.

In order to pass muster under strict scrutiny, a statute must be narrowly tailored to advance a compelling government interest. . . .

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We know from more than a century of Supreme Court case law that foreign citizens in the United States enjoy many of the same constitutional rights that U.S. citizens do. For example, aliens are generally entitled to the same rights as U.S. citizens in the criminal process, among several other areas. *United States v. Verdugo-Urquidez* (1990); *Plyler v. Doe* (1982). . . . In those many decisions, the Supreme Court has drawn a fairly clear line: The government may exclude foreign citizens from activities "intimately related to the process of democratic self-government." As the Court has written, "a State's historical power to exclude aliens from participation in its democratic political institutions [is] part of the sovereign's obligation to preserve the basic conception of a political community." *Foley v. Connelie* (1978). In other words, the government may reserve "participation in its democratic political institutions" for citizens of this country. When reviewing a statute barring foreign citizens from serving as probation officers, the Court explained that the "exclusion of aliens from basic governmental processes is not a deficiency in the democratic system but *a necessary consequence of the community's process of political* *self-definition.*" . . .

We read these cases to set forth a straightforward principle: It 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. It follows, therefore, that the United States has a compelling interest for purposes of First Amendmentanalysis in limiting the participation of foreign citizens in activities of American democratic self-government, and in thereby preventing foreign influence over the U.S. political process.

Applying the Supreme Court's precedents, the question here is whether political contributions and express-advocacy expenditures — including donations to outside groups that in turn make contributions or express-advocacy expenditures — constitute part of the process of democratic self-government. In our view, the answer to that question is straightforward: Political contributions and express-advocacy expenditures are an integral aspect of the process by which Americans elect officials to federal, state, and local government offices. Political contributions and express-advocacy expenditures finance advertisements, get-out-the-vote drives, rallies, candidate speeches, and the myriad other activities by which candidates appeal to potential voters. We think it evident that those campaign activities are part of the overall process of democratic self-government. Moreover, it is undisputed that the government may bar foreign citizens from voting and serving as elected officers. It follows that the government may bar foreign citizens (at least those who are not lawful permanent residents of the United States) from participating in the campaign process that seeks to influence how voters will cast their ballots in the elections. Those limitations on the activities of foreign citizens are of a piece and are all "part of the sovereign's obligation to preserve the basic conception of a political community."

Our task here is made simpler because the Supreme Court has deemed the activities of democratic self-government to include functions as unrelated to the electoral process as teaching in public schools and serving as police and probation officers. . . . In our view, spending money to influence voters and finance campaigns is at least as (and probably far more) closely related to democratic self-government than serving as a probation officer or public school teacher. . . .

Plaintiffs try in various ways to overcome the relevant Supreme Court precedents. First, they acknowledge that they do not have the right to vote in U.S. elections, but they contend that the right to *speak* about elections is different from the right to *participate* in elections. But in this case, that is not a clear dichotomy. When an expressive act is directly targeted at influencing the outcome of an election, it is both speech and participation in democratic self-government. Spendingmoney to contribute to a candidate or party or to expressly advocate for or against the election of a political candidate is participating in the process of democratic self-government. Notably, § 441e(a) as we interpret it, does not restrain foreign nationals from speaking out about issues or spending money to advocate their views about issues. It restrains them only from a certain form of expressive activity closely tied to the voting process — providing money for a candidate or political party or spending money in order to expressly advocate for or against the election of a candidate.

. . . . The statute does not serve a compelling interest in limiting the participation of *non-voters* in the activities of democratic self-government; it serves the compelling interest of limiting the participation of *non-Americans* in the activities of democratic self-government. A statute that excludes foreign nationals from political spending is therefore tailored to achieve that compelling interest.

Plaintiffs also point out that many groups of people who are not entitled to vote may nonetheless make contributions and expenditures related to elections — for example, minors, American corporations, and citizens of states or municipalities other than the state or municipality of the elective office. But minors, American corporations, and citizens of other states and municipalities are all members of the American political community. By contrast, the Supreme Court has said that "[a]liens are by definition those outside of this community." *Cabell v. Chavez-Salido* (1982). The compelling interest that justifies Congress in restraining foreign nationals' participation in American elections — namely, preventing foreign influence over the U.S. government — does not apply equally to minors, corporations, and citizens of other states and municipalities. It is long established that the government's legislative and regulatory prerogatives are at their apex in matters pertaining to alienage. It is hardly surprising, therefore, that a law that is justified as applied to aliens may not be justified as applied to citizens of the United States, or entities made up of such citizens. Thus, the fact that those other non-voting groups of U.S. citizens are free to contribute and make expenditures does not mean that foreign nationals are similarly entitled.

Plaintiffs argue that the statute, as a measure designed to limit foreign influence over American self-government, is underinclusive and not narrowly tailored because it does not prohibit contributions and expenditures by lawful permanent residents. But as Members of Congress stated when rejecting a proposal to include lawful permanent residents in *§ 441e(a)*'s prohibition, Congress may reasonably conclude that lawful permanent residents of the United States stand in a different relationship to the American political community than other foreign citizens do. Lawful permanent residents have a long-term stake in the flourishing of American society, whereas temporary resident foreign citizens by definition have only a short-term interest in the national community. . . . In those two ways — their indefinite residence in the United States and their eligibility for military service — lawful permanent residents can be viewed as more similar to citizens than they are to temporary visitors, and thus Congress's decision to exclude them from the ban on foreign nationals' contributions and expenditures does not render the statute underinclusive. In fact, one might argue that Congress's carve-out for lawful permanent residents makes the statute more narrowly tailored to the precise interest that it is designed to serve — namely, minimizing *foreign* participation in and influence over American self-government.

Plaintiffs further contend that the statute is underinclusive and not narrowly tailored because it permits foreign nationals to make contributions and expenditures related to ballot initiatives. But as the Supreme Court has stated, Congress may proceed piecemeal in an area such as this involving distinctions between citizens and aliens. . . . Moreover, Congress could reasonably conclude that the risk of undue foreign influence is greater in the context of candidate elections than it is in the case of ballot initiatives. . . .

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