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Outside Influence

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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

By 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.”¹ Candidates with backgrounds from outside their hoped-for constituency face questions like that posed to New York Senate

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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 to 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. WHOM 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. 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,” was

17U.S. Const. art. I, § 9, cl. 8.