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Campaigns, Contributions and Citizenship: The First Amendment Right of Resident Aliens to Finance Federal Elections

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CAMPAIGNS, CONTRIBUTIONS AND CITIZENSHIP: THE FIRST AMENDMENT RIGHT OF RESIDENT ALIENS TO FINANCE FEDERAL ELECTIONS

INTRODUCTION

The 1996 Presidential elections were marred by the specter of scandal. Foreign nationals, who are barred from contributing to American campaigns, allegedly sponsored contributions to the Democratic National Committee ("DNC") totaling nearly one million dollars.[1] Arief and Soraya Wiriadinata, an Indonesian couple living in Virginia, donated $425,000 to the DNC.[2] Although they were legal resident aliens at the time, their contribution attracted attention because of the Wiriadinatas' modest lifestyle.[3] In addition, Mrs. Wiriadinata's father was a partner of an Indonesian billionaire named Mochtar Riady, the leader of an Asian financial and real estate conglomerate.[4] Yogesh Ghandi, an Indian businessman and resident alien living in California, donated $325,000 to the DNC.[5] His donation was also deemed suspect because he owed $10,000 in back taxes and had testified in court that he did not have any U.S. assets.[6] Finally, the DNC raised $140,000 at a

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[1] *See* Michael Isikoff and Mark Hosenball, *Calling All Lawyers*, NEWSWEEK, Nov. 11, 1996, at 46, 46. 2 U.S.C. § 441e (1994) provides:

> (a) It shall be unlawful for a foreign national directly or through any other person to make any contribution of money or other thing of value, or to promise expressly or impliedly to make any such contribution, in connection with an election to any political office or in connection with any primary election, convention, or caucus held to select candidates for any political office . . . .
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> A foreign national is defined as "an individual who is not a citizen of the United States and who is not lawfully admitted for permanent residence. . . ."

2 U.S.C. § 441e(b)(2).

[2] *See* Peter H. Stone, *A Ruckus over "Soft" Money from Foreigners*, NAT'L J., Nov. 9, 1996, at 2413, 2413.

[3] *See id;* Kevin Merida and Serge F. Kovaleski, *Mysteries Arise All Along the Asian Money Trail*, WASH. POST, Nov. 1, 1996, at A1. A resident alien is a person who holds a green card, meaning he or she has been lawfully admitted for permanent residence. *See* 8 U.S.C. § 1101(a)(20) (1994); THOMAS ALEXANDER ALEINIKOFF AND DAVID A. MARTIN, IMMIGRATION PROCESS AND POLICY 393 (2d ed. 1991). To have been lawfully admitted for permanent resident, a resident alien must have been "lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws . . . ." 8 U.S.C. § 1101(a)(20).

[4] *See* Merida and Kovaleski, *supra* note 3; Stone, *supra* note 2.

[5] *See* Merida and Kovaleski, *supra* note 3; Stone, *supra* note 2.

[6] *See* Merida and Kovaleski, *supra* note 3; Stone, *supra* note 2.

luncheon attended by Vice President Gore at a Buddhist temple in California.[7] Many of the resident alien temple members received stipends of only forty dollars a month, yet they donated $5,000 each to the DNC.[8]

These questionable contributions raised two issues. First, were any of the contributions financed by foreign nationals, who are barred from contributing to American campaigns?[9] Second, did any of the resident alien donors, or their alleged foreign backers, receive quid pro quos in exchange for their contributions? For example, the Clinton administration has been accused of changing its policies towards Indonesia because of financial support provided by the Riady family.[10] These accusations stem from the fact that although Clinton admonished Indonesia's human rights record during his 1992 campaign, he has allowed Indonesia to retain special low tariffs and has called for the sale of military aircraft to the Indonesian government.[11] President Clinton has also admitted that members of the Riady family visited the White House to discuss U.S. foreign policy and the Riadys' business interests on about twenty occasions.[12]

Before the presidential election, the controversy prompted both President Clinton and his challenger, Senator Robert Dole, to call for a prohibition on campaign contributions from resident aliens.[13] After the election, President Clinton announced that the Democratic party would no longer accept donations from resident aliens.[14] In addition, five bills have been introduced in Congress that render resident aliens ineligible to spend money in connection with election campaigns.[15]

This note will analyze whether a ban on campaign contributions and independent expenditures by resident aliens violates the First Amendment.[16] Part I reviews the bills that have been introduced in

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[7] *See* Mirada and Kovaleski, *supra* note 3.

[8] *See id.*

[9] *See* 2 U.S.C. § 441e (1994).

[10] *See* Robert A. Manning, *Did Indonesian Campaign Dollars Buy Anything?*, HOUSTON CHRON., Oct. 23, 1996, at A23; *This Week With David Brinkley* (ABC television broadcast, Dec. 1, 1996) [hereinafter *Brinkley*] (comments of Senator John McCain (R-Ariz.)).

[11] *See* Manning, *supra* note 10; *Brinkley*, *supra* note 10.

[12] *See* John Aloysius Farrell, *Clinton Confidante in Hot Water Again*, BOSTON GLOBE, Nov. 24, 1996, at A12.

[13] *See* Jodi Enda and Brigid Schulte, *Clinton Calls for Finance Reform*, TIMES-PICAYUNE (New Orleans), Nov. 2, 1996, at A1.

[14] *See* James Bennet, *President Announces Changes in How Democrats Raise Money*, N.Y. TIMES, Jan. 22, 1997, at A1.

[15] *See infra* Part I.

[16] The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST. amend. I. A ban on contributions and expenditures also

Congress to ban contributions and expenditures by resident aliens.[17] Part II explains the framework used to test campaign finance limitations placed on citizens which was first used by the United States Supreme Court in *Buckley v. Valeo*.[18] Part III reviews the case law concerning resident aliens' speech rights.[19] Part IV argues that the strict scrutiny test used in *Buckley* is applicable to a ban on resident aliens' contributions and expenditures because resident aliens' speech is accorded full First Amendment protection.[20] Finally, Part V applies the *Buckley* test to the proposed bans and finds that they violate resident aliens' right to free political expression and are therefore unconstitutional.[21]

I. Congressional Moves to Ban Resident Alien Contributions and Expenditures

There are two ways that bills introduced in Congress have sought to ban contributions from resident aliens.[22] The first is to ban contributions from all those ineligible to vote in federal elections; the second is to broaden the definition of "foreign national" to include resident aliens.[23] The first method is used in the Bipartisan Campaign Finance Reform Act of 1997, the most widely known of the bills introduced in Congress thus far.[24] Sponsored principally by Senators John McCain and Russell Feingold, the Campaign Finance Reform Act proposes to amend 2 U.S.C. § 441e, which bars contributions from foreign nationals, to also bar contributions from individuals not qualified to vote in

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raises equal protection concerns under the Fifth Amendment because of the disparate treatment of resident aliens and citizens. *See generally* Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) (holding that Civil Service Commission regulation barring noncitizens, including resident aliens, from employment in federal civil service positions was unconstitutional deprivation of liberty without due process is violation of Fifth Amendment); Mathews v. Diaz, 426 U.S. 67 (1976) (holding that Congress may condition alien's eligibility for participation in federal medical insurance program on continuous residence in United States for five-year period and admission for permanent residence without violating Due Process Clause of Fifth Amendment). Equal protection issues will not be addressed in this Note. The Supreme Court has addressed the equal protection rights of non-citizens under the Fifth Amendment Due Process Clause in only two cases. *See generally Hampton*, 426 U.S. 88, *Mathews*, 426 U.S. 67.

[17] *See infra* Part I.

[18] 424 U.S. 1, 12–30, 39–51 (1976) (per curiam); *see infra* Part II.

[19] *See infra* Part III.

[20] *See infra* Part IV.

[21] *See infra* Part V.

[22] *See, e.g.*, Campaign Finance Reform and Disclosure Act of 1997, S. 179, 105th Cong. § 3 (1997); Bipartisan Campaign Reform Act of 1997, S. 25, 105th Cong. § 306 (1997).

[23] *See, e.g.*, S. 179 § 3; S. 25, § 306.

[24] S. 25 § 306.

federal elections.[25] Because only citizens are eligible to vote in federal elections, this measure in effect bars contributions from resident aliens.[26]

The Campaign Finance Reform and Disclosure Act of 1997 seeks to broaden the definition of "foreign national," the second method of banning contributions from resident aliens.[27] Sponsored by Senator Kay Bailey Hutchison, this bill seeks to broaden the definition of "foreign national" to include not only non-citizens who have not been admitted for permanent residence, but also non-citizens who are permanent residents.[28] The ban on contributions from foreign nationals would therefore include resident aliens.[29]

All of the bills that have been introduced in Congress thus far seek to ban both *contributions* and *expenditures* by resident aliens.[30] "Contribution" refers to money donated directly to candidates running for office.[31] "Expenditure," commonly called "soft money," refers to money spent on independent advocacy.[32] Expenditures include everything

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[25] *Id.* The bill, introduced on January 21, 1997, would make it

> unlawful for an individual who is not qualified to register to vote in a Federal election to make a contribution, or to promise expressly or impliedly to make a contribution, in connection with a Federal election; or for any person to solicit, accept, or receive a contribution in connection with a Federal election from an individual who is not qualified to register to vote in a Federal election.

Id.; *see* 2 U.S.C. § 441e (1994). Note that the measure is worded broadly because it also seeks to eliminate contributions from children. The same provision, in a bill of the same name, has been introduced in the House of Representatives by Representative Christopher Shays (R-Conn.). Bipartisan Campaign Reform Act of 1997, H.R. 493, 105th Cong. § 241 (1997). Both bills are currently in committee. 105 Bill Tracking S. 25 and H.R. 493, *available in* LEXIS, LEGIS library, BLTRCK file.

[26] *See* S. 25 § 306; H.R. 493 § 241. The 15th Amendment guarantees that "[t]he right of citizens" to vote will not be abridged because of race. U.S. CONST. amend. XV, § 1. The 19th Amendment provides that "the right of citizens" to vote cannot be denied on the basis of gender. U.S. CONST. amend. XIX. Finally, the 26th Amendment secures the "right of citizens" to vote who are 18 years of age or older. U.S. CONST. amend. XXVI, § 1.

[27] S. 179 § 3.

[28] *Id.* Two bills introduced in the House of Representatives, by Representatives John Dingell (D-Mich.) and William Goodling (R-Pa.), also seek to institute a ban on resident alien contributions by broadening the definition of "foreign national" to include resident aliens. Clean Sweep Act of 1997, H.R. 179, 105th Cong. § 7 (1997); Federal Election Campaign Reform Act of 1997, H.R. 140, 105th Cong. § 5 (1997). All three bills have been referred to committee. 105 Bill Tracking S. 179, H.R. 140 and H.R. 179, *available in* LEXIS, LEGIS library, BLTRCK file.

[29] *See* 2 U.S.C. § 441(e); 8 U.S.C. § 1101(a)(20) (1994).

[30] *See* S. 179 § 3; S. 25 § 306; H.R. 493 § 241; H.R. 179 § 7; H.R. 140 § 5.

[31] *See* 18 U.S.C. § 608(b) (Supp. V 1975); Buckley v. Valeo, 424 U.S. 1, 7 (1976) (per curiam); RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT 9–16 (1994).

[32] *See* 18 U.S.C. § 608(e) (Supp. V 1975); *Buckley*, 424 U.S. at 7, 42; SMOLLA, *supra* note 31, at 9–16.

from donations to the Democratic or Republican National Committees to the independent purchase of a newspaper advertisement.[33]

II. THE *BUCKLEY V. VALEO* FRAMEWORK

Contribution and expenditure limitations, as they apply to citizens, were addressed by the United States Supreme Court in 1976 in *Buckley v. Valeo*.[34] In *Buckley*, the Court considered constitutional challenges to the Federal Election Campaign Act of 1971 (the "Act").[35] The Act limited individual political *contributions* to $1,000 to any single candidate per election, with an overall annual limitation of $25,000 by any contributor.[36] In addition, the Act restricted independent *expenditures* "relative to a clearly identified candidate" by individuals and groups to $1,000 per year.[37]

The Court held that the contribution limitation did not violate the First Amendment, but that the independent expenditure ceiling did unconstitutionally inhibit political speech.[38] After confirming that contributions and expenditures are protected by the First Amendment because they constitute speech,[39] the Court determined that the limitations burdened political expression.[40] The Court next subjected the limitations to a strict scrutiny test, asking whether the burden placed on speech by the limitations was justified by a compelling government interest and, if so, whether the limitations were narrowly tailored.[41] As for the first part of the test, the Court held that the burden on speech by the contribution limitation was justified by a compelling government interest, but that no government interest justified the severe restrictions placed on speech by the expenditure limitation.[42] Reaching the second part of the test only as it pertained to the contribution limitation, the Court held that the contribution limitation was sufficiently narrowly tailored to serve the government's interest.[43]

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[33] *See Buckley*, 424 U.S. at 20 n.20.

[34] *See id.* at 12–30, 39–51.

[35] *See id.* at 6.

[36] *See id.* at 7; *see also* 18 U.S.C. § 608(b).

[37] *See Buckley*, 424 U.S. at 7; *see also* 18 U.S.C. § 608(e). The Court defined an independent expenditure relative to a clearly defined candidate as one which advocates the election or defeat of a candidate. *See Buckley*, 424 U.S. at 42; *infra* Part II.C.

[38] *See Buckley*, 424 U.S. at 29, 51.

[39] *See id.* at 15–17.

[40] *See id.* at 19–21.

[41] *See id.* at 25–30, 44–49.

[42] *See id.* at 26, 45.

[43] *See Buckley*, 424 U.S. at 27–28, 29–30.

A. *Contributions and Expenditures Constitute Political Speech*

The Court's analysis began with the premise that contributions and expenditures constitute political speech, and thus they are subject to strict scrutiny under the First Amendment.[44] The Court reasoned that the discussion of issues and candidates is integral to the functioning of a democracy.[45] The First Amendment protects such political expression "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[46] The Court stressed that it is essential for citizens to be able to cast informed votes.[47] Because communication in mass society costs money, the Court further reasoned that restrictions on contributions and expenditures reduce the quantity of expression by limiting the number of issues discussed, the depth with which they are explored and the size of the audience reached.[48] The Court analogized the limitations to "being free to drive an automobile as far and as often as one desires on a single tank of gasoline."[49]

B. *Limitations on Contributions and Expenditures Burden First Amendment Speech*

After establishing that the contribution and expenditure limitations implicated First Amendment interests, the Court next considered whether the limitations burdened free speech.[50] The Court held that the contribution limitation constituted only a marginal restriction upon the contributor's speech.[51] The Court reasoned that a contribution expresses general support for a candidate, but it does not indicate the basis for that support.[52] According to the Court, the symbolic act of contributing solely constitutes political expression because the quantity of a contributor's communication does not increase in proportion to his contribution.[53] Thus, the contribution limitation presented a

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[44] *See id.* at 14–17.
[45] *See id.* at 14.
[46] *Id.* (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).
[47] *See id.* at 14–15.
[48] *See Buckley*, 424 U.S. at 19.
[49] *See id.* at 19 n.18.
[50] *See id.* at 19–21.
[51] *See id.* at 20–21.
[52] *See id.* at 21.
[53] *See Buckley*, 424 U.S. at 21.

slight burden on speech because it still permitted symbolic expression of support and discussion of the candidates and issues.[54]

As for the expenditure limitation, however, the Court held that it substantially burdened political speech.[55] The Court reasoned that the $1,000 ceiling on independent spending prevented citizens from adequately utilizing the media, the most effective means of communication in a large society.[56] The Court noted, for example, that the expenditure limit of $1,000 would prevent the independent purchase of an advertisement in a newspaper because the cost of advertisement in a metropolitan newspaper at that time was nearly $7,000.[57]

C. *A Preliminary Matter*

Before the *Buckley* Court applied a strict scrutiny analysis to the burden placed on speech by the contribution and limitation expenditures, the Court determined the meaning of the expenditure limitation.[58] The operative language of the provision limited "any expenditure relative to a clearly identified candidate," and there was no definition clarifying exactly what expenditures were "relative to" a candidate.[59] The Court held that, in order to preserve the provision against invalidation on vagueness grounds, "relative to" a candidate was to be read to mean "advocating the election or defeat of" a candidate.[60] Thus, the expenditure limitation applied only to expenditures for communications that expressly advocated the election or defeat of a clearly identified candidate for federal office.[61]

D. *Application of the Strict Scrutiny Test*

Because the contribution and expenditure limitations burdened speech, the Court subjected the limitations to a strict scrutiny test.[62] The Court first analyzed whether the burdens placed on speech by the contribution and expenditure limitations were justified by a compelling government interest.[63] Finding that only the contribution limita-

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[54] *See id.*
[55] *See id.* at 19.
[56] *See id.* at 19–20 & n.20.
[57] *See id.* at 20 n.20.
[58] *See Buckley*, 424 U.S. at 40–44.
[59] *See id.* at 41.
[60] *See id.* at 42, 44.
[61] *See id.* at 44.
[62] *See id.* at 25–30, 44–49.
[63] *See Buckley*, 424 U.S. at 25–26, 44–45.

tion was justified by a compelling government interest, the Court next asked whether this limitation was narrowly tailored, and held that it was.[64]

1. Compelling Government Interest

Addressing the contribution limitation first, the Court held that the government's interest in preventing actual or perceived corruption resulting from large individual contributions was sufficiently compelling to justify the slight burden placed on political expression.[65] The Court reasoned that the integrity of a representative democracy is undermined not only by actual quid pro quo arrangements, but also by the appearance of improper influence.[66]

As for the expenditure ceiling, however, the Court held that the government interest in preventing corruption or the appearance of corruption was inadequate to justify the heavy burden placed on speech by the expenditure limitation.[67] The Court reasoned that, unlike the total ban on large donations achieved by the contribution limitation, the expenditure limitation prevented only some large contributions.[68] Resourceful contributors seeking to buy influence could easily circumvent the restriction on expenditures by expressly advocating the election or defeat of candidates.[69] As long as contributors refrained from expressly advocating the election or defeat of a clearly identified candidate, they could spend as much as they wanted in promoting a candidate and his or her views.[70]

The Court further reasoned that the danger of impropriety posed by independent expenditures was not comparable to that posed by individual contributions.[71] According to the Court, independent expenditures, by definition, are totally independent and are not subject to the control of, or made in concert with, the candidate.[72] Independent expenditures are therefore less valuable to the candidate and less likely to have been offered in exchange for improper influence.[73]

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[64] *See id.* at 27–29, 29–30.
[65] *See id.* at 26.
[66] *See id.* at 26–27.
[67] *See id.* at 45.
[68] *See Buckley*, 424 U.S. at 45.
[69] *See id.*
[70] *See id.*
[71] *See id.* at 46.
[72] *See id.* at 46, 47.
[73] *See Buckley*, 424 U.S. at 47.

Thus, the Court held that the expenditure limitation severely burdened speech even though the expenditures presented little potential for abuse.[74]

The Court further held that the government's asserted interest in equalizing the relative ability of individuals to influence the outcome of elections also failed to justify the Act's limitation on independent expenditures.[75] The Court reasoned that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . ."[76] By restricting the speech of the wealthy, the Act thus violated the First Amendment's goal of promoting the broad discussion of diverse and antagonistic ideas.[77]

2. Narrowly Tailored

The Court held that the Act's contribution limitations were narrowly tailored to serve the government's compelling interest in preventing actual or perceived impropriety.[78] The Court discarded two alternative means of regulation—bribery and disclosure laws.[79] Bribery laws, the Court reasoned, dealt only with the most blatant attempts to influence governmental action, while disclosure provisions were only a partial measure.[80] Thus, the limitations focused narrowly on the problem of large campaign contributions without jeopardizing the ability of citizens to engage in independent political expression.[81]

The Court also addressed two overbreadth challenges.[82] The first challenge was that the contribution ceiling was over-inclusive because most large contributors do not seek improper influence.[83] The Court was not persuaded, however, reasoning that it is difficult to isolate suspect contributors and that safeguarding against even the appear-

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[74] *See id.*

[75] *See id.* at 48–49.

[76] *Id.*

[77] *See id.* at 49.

[78] *See Buckley*, 424 U.S. at 28, 29–30. Because the Court held that the government did not possess enough of a compelling interest in limiting independent expenditures, it did not reach a discussion of whether the provision was narrowly tailored. *See id.* at 45–47. The Court implied, however, that it did not believe the provision could be tailored in such a way as to secure the government's goals. *See id.*

[79] *See id.* at 27–28.

[80] *See id.*

[81] *See id.* at 28–29.

[82] *See id.* at 29–30.

[83] *See Buckley*, 424 U.S. at 29.

ance of impropriety requires the elimination of all opportunities for abuse.[84] The second overbreadth claim was that the $1,000 contribution limit was too low because it would take much more than $1,000 to gain improper influence in statewide or national elections.[85] The Court also rejected this claim, stating that as long as some limitation was constitutional, it was unwilling to fine tune it.[86]

III. The Rights of Resident Aliens Under the First Amendment

A key step in the Supreme Court's analysis of the constitutionality of the Act's limitations in *Buckley v. Valeo* was the finding that contributions and expenditures constitute speech that is protected by the First Amendment.[87] Because contributors' speech, in the form of money, implicated First Amendment interests, restrictions on that speech were subject to strict scrutiny.[88] In contemplating a ban on contributions from resident aliens, who are not citizens and thus ineligible to vote in federal elections, the question that arises is whether the speech of resident aliens is also protected by the First Amendment. If resident aliens' speech is removed from the ambit of the First Amendment, then the *Buckley* strict scrutiny test is inapplicable. Instead, the Court would apply a deferential standard of review consistent with Congress's plenary power over immigration.[89] If, however, the First Amendment equally protects citizens and resident aliens, then the strict scrutiny test outlined in *Buckley* is applicable.[90] This part reviews the case law addressing the extent to which resident aliens' speech is protected by the First Amendment.

A. *The Chinese Exclusion Case*

Although *Chae Chin Ping v. United States*, also known as the *Chinese Exclusion Case*, did not deal expressly with the First Amendment rights of non-citizens, it established the Supreme Court's deference to Congress's plenary power over immigration.[91] In the *Chinese Exclusion Case*,

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[84] *See id.* at 30.

[85] *See id.*

[86] *See id.*

[87] *See* 424 U.S. 1, 15–17 (1976) (per curiam).

[88] *See id.* at 25–30, 44–49.

[89] *See, e.g.*, Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889).

[90] *See infra* Part V.

[91] *See* 130 U.S. at 609. The source of this power is Article I, Section 8 of the Constitution, which states that "[t]he Congress shall have Power . . . To establish an [sic] uniform Rule of Naturalization . . . ." U.S. Const. art. I, § 8, cl. 4.

decided in 1889, the Supreme Court held that Chinese laborers could be excluded from the United States.[92] Chae Chan Ping was a Chinese laborer who lived and worked in California from 1875 to 1887.[93] In 1887, he made a trip to China, bringing with him a certificate that entitled him to reenter the United States.[94] He returned to the United States in 1888, but was not permitted to land because Congress had passed an act a week earlier that annulled all such certificates.[95] Chae Chan Ping sought a writ of habeas corpus, claiming that he had been unlawfully restrained and that he was entitled to enter the United States.[96]

The Court reasoned that the government, through the legislative branch, could exclude non-citizens from the United States.[97] Jurisdiction over its territory, the Court explained, was necessary to the independence of a nation.[98] If the government could not exclude aliens, it would be subject to the control of a foreign power.[99] Protecting the nation's independence and preserving it against foreign encroachment were thus matters of national security.[100] The Court further reasoned that the government's decisions pursuant to the exercise of its power were conclusive upon all departments of the government, including the judiciary.[101] Because the Court reasoned that policies concerning aliens were part of the political domain, it found that deferential judicial review was required.[102] The Court therefore held that Congress's plenary power over immigration allowed the exclusion of Chae Chan Ping.[103]

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[92] *See Chae Chan Ping*, 130 U.S. at 609.

[93] *See id.* at 582.

[94] *See id.*

[95] *See id.* The act provided that "it shall be unlawful for any [C]hinese laborer who shall at any time heretofore have been, or who may now or hereafter be, a resident within the United States, and who shall have departed, or shall depart therefrom, and shall not have returned before the passage of this act, to return to, or remain in, the United States." Act of Oct. 1, 1888, ch. 1064, 25 Stat. 504 (1888). It further provided that "every certificate heretofore issued in pursuance thereof, is hereby declared void and of no effect, and the [C]hinese laborer claiming admission by virtue thereof shall not be permitted to enter the United States." *Id.* The Court did not address whether the act constituted an ex post facto law.

[96] *See Chae Chan Ping*, 130 U.S. at 582–83.

[97] *See id.* at 603.

[98] *See id.*

[99] *See id.* at 604.

[100] *See id.* at 606.

[101] *See Chae Chan Ping*, 130 U.S. at 606.

[102] *See id.* at 609.

[103] *See id.*

The *Chinese Exclusion Case* thus set a deferential standard often reiterated in subsequent cases.[104] That Congress has significant power in the realm of immigration cannot be disputed.[105] The question is how far that power extends.

B. *The Subversive Acts Cases*

The bulk of First Amendment law as it pertains to resident aliens has developed in the subversive acts context.[106] "Subversive acts" refer to acts aimed at the overthrow of the government.[107] Since 1903, Congress has passed a number of measures calling for the exclusion or deportation of aliens whom the government deemed subversive based on their political beliefs and activities.[108] By 1917, aliens could be deported or excluded if they advocated or taught subversion, before or after their entry into the United States.[109] In addition, aliens who were affiliated with organizations that advocated the overthrow of the government or anarchy were deportable.[110] Challenges to these measures established the extent of resident aliens' First Amendment rights because their speech and association rights were directly implicated.[111] The subversive acts cases are also instructive because the subversive acts context is somewhat analogous to the campaign finance context.[112] In both contexts Congress's common purpose is to maintain the integrity of the government by preventing, in the case of the former, subversion and, in the case of the latter, corruption.[113]

The Supreme Court has seldom confronted the issue of resident aliens' First Amendment rights. The first major case was decided in 1945, when the Supreme Court held in *Bridges v. Wixon* that a resident alien who had allegedly been affiliated with the Communist Party (the "Communist Party" or the "Party") could not be deported.[114] In

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[104] *See, e.g.*, Price v. United States Immigration and Naturalization Serv., 962 F.2d 836, 841, 842, 843–44 (9th Cir. 1992), *cert. denied*, 410 U.S. 1040 (1994).

[105] *See* U.S. CONST. art. I, § 8, cl. 4.

[106] *See, e.g.*, Katherine L. Pringle, Note, *Silencing the Speech of Strangers: Constitutional Values and the First Amendment Rights of Resident Aliens*, 81 GEO. L.J. 2073, 2085–90 (1993).

[107] *See* BLACK'S LAW DICTIONARY 1430 (6th ed. 1990).

[108] ALEINIKOFF, *supra* note 3, at 478.

[109] *Id.* at 479.

[110] *Id.*

[111] *See generally* Harisiades v. Shaughnessy, 342 U.S. 580 (1952); Bridges v. Wixon, 326 U.S. 135 (1945).

[112] *See* Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CAL. L. REV. 1045, 1085 (1985).

[113] *See id.* at 1085, 1088.

[114] 326 U.S. at 156.

Bridges, the government instituted deportation proceedings against Harry Bridges, although he had been in the United States for eighteen years, because he had allegedly been affiliated with the Communist Party.[115] The statute invoked provided for the deportation of any alien who at any time had been a member of, or had been affiliated with, any organization, such as the Communist Party, which advocated the overthrow of the government by force.[116] Mr. Bridges was a longshoreman, and was active in several trade unions.[117] For four years, he was responsible for the publication of a paper called the *Waterfront Worker*, which had been launched by the Marine Workers' Industrial Union ("MWIU").[118] The MWIU had been founded by the Trade Unity League, a communist organization.[119]

The Court reasoned that in order to be affiliated with the Communist Party, there must be evidence of a working alliance to bring the party's goals to fruition.[120] The resident alien must adhere to the purposes of the party, not just cooperate with the party in its lawful activities.[121] Applying this definition, the Court concluded that Mr. Bridges was not affiliated with the Communist Party because he only cooperated with the Party to obtain lawful objectives.[122] The Court reasoned that although the *Waterfront Worker* was a militant trade-union journal, there was no evidence that it advocated the overthrow of the government by force nor that Mr. Bridges sought to do anything but promote unionism.[123] The Court therefore held that Mr. Bridges could not be deported.[124]

Although the majority opinion focused on the statutory basis for the Court's decision,[125] Justice Murphy, in his concurring opinion, argued that resident aliens are fully protected by the First Amendment:

> [O]nce an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and the Fifth Amendments and

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[115] *Id.* at 137.
[116] *See id.* at 138; *see also* 8 U.S.C. § 137(c) (1940).
[117] *See Bridges*, 326 U.S. at 140–41.
[118] *See id.* at 145.
[119] *See id.*
[120] *See id.* at 144.
[121] *See id.* at 143–44.
[122] *See Bridges*, 326 U.S. at 145.
[123] *See id.* at 146.
[124] *See id.* at 156.
[125] *See supra* notes 120–24 and accompanying text.

> by the due process clause of the Fourteenth Amendment. None of these provisions acknowledges any distinction between citizens and resident aliens. They extend their inalienable privileges to all "persons" and guard against any encroachment on those rights by federal or state authority. . . . Since resident aliens have constitutional rights, it follows that Congress may not ignore them in the exercise of its "plenary" power of deportation.[126]

Thus, while Justice Murphy acknowledged that Congress retains a plenary power over immigration, he made it clear that that power was not to be exercised in violation of resident aliens' First Amendment rights.[127] Further, Justice Murphy asserted that the protection afforded to resident aliens by the First Amendment was identical to the protection enjoyed by citizens.[128]

Justice Murphy also suggested that, although the majority opinion did not discuss it, the Court had concluded that Mr. Bridges' deportation could not be justified under the "clear and present danger" test, the standard applicable to citizens.[129] The "clear and present danger" test, articulated by the Court in *Schenck v. United States* in 1919, required an inquiry into "whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[130] Justice Murphy explained that the statute was invalid under the test because the statute did not require proof of a clear and present danger.[131] Thus, while the majority opinion's discussion dealt largely with the statutory construction issue, Justice Murphy's concurrence indicates that resident aliens' speech is fully protected by the First Amendment, and that any restrictions on their speech are subject to the same degree of scrutiny applied to limitations on citizens' political expression.[132]

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[126] *Bridges*, 326 U.S. at 161 (Murphy, J., concurring).

[127] *See id.* (Murphy, J., concurring).

[128] *See id.* at 161 (Murphy, J., concurring).

[129] *See id.* at 159, 164–65 (Murphy, J., concurring).

[130] 249 U.S. 47, 52 (1919). In *Schenck*, the Court held that the conviction of a citizen under the Espionage Act, which criminalized intentional interference with the United States' military efforts, did not violate the First Amendment. *See id.* at 48, 51–52. Charles Schenck, a member of the Socialist Party, had mailed leaflets vilifying conscription to men listed in newspapers as having passed their draft board examinations. *See id.* at 49, 50, 51. The Court reasoned that Schenck's speech was not protected by the First Amendment because it presented a "clear and present danger." *See id.* at 51–52. Specifically, Schenck's leaflets sought to influence the men receiving them to obstruct the draft. *See id.* at 51.

[131] *See Bridges*, 326 U.S. at 164 (Murphy, J., concurring).

[132] *See id.* at 156, 161, 164–65 (Murphy, J., concurring).

After *Bridges*, the Supreme Court again addressed resident aliens' First Amendment rights in 1952 in *Harisiades v. Shaughnessy*.[133] In *Harisiades*, the Court held that three resident aliens could be deported under 8 U.S.C. § 137 because of their memberships in the Communist Party, even though the memberships terminated before the enactment of the statute.[134] *Harisiades* combined three cases.[135] In each case, the resident alien had come to the United States as a teenager.[136] Two of the aliens had married citizens, and all had children who were citizens by birth.[137] Each had been a member of the Communist Party at some point in the past.[138] Two of the three disclaimed belief in the use of force to overthrow the government; the third disavowed knowledge of the Party's principles.[139] The aliens claimed that their due process rights had been violated and that their membership in the Communist Party constituted an exercise of their free speech and assembly rights provided by the First Amendment.[140]

The Court first held that the deportation proceedings did not deprive the aliens of due process.[141] The Court reasoned that deportation decisions escape judicial review, and that deference to Congress's plenary power over immigration is appropriate.[142] The Court noted that Congress has the power to terminate the hospitality extended to any resident alien.[143] Although the Court acknowledged that deportation was a severe measure, it asserted that it was a power inherent in sovereignty and confirmed by international law.[144] The country's policy towards aliens, the Court reasoned, is "intricately interwoven" with its foreign relations policies, war power, and maintenance of the republic.[145] The Court concluded that "[s]uch matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."[146] The Court thus held that due process had not been violated because the resident aliens in *Harisiades* were not entitled to judicial relief.[147]

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[133] 342 U.S. 580, 591–92 (1952).
[134] *Id.* at 581, 591, 592, 596; *see* 8 U.S.C. § 137 (1940).
[135] *See* 342 U.S. at 581–83.
[136] *See id.* at 581, 582, 583.
[137] *See id.*
[138] *See id.* at 581–82, 583.
[139] *See id* at 582, 583.
[140] *See Harisiades*, 342 U.S. at 583–84.
[141] *See id.* at 591.
[142] *See id.* at 588–89.
[143] *See id.* at 586–87.
[144] *See id.* at 587–88.
[145] *See Harisiades*, 342 U.S. at 588–89.
[146] *Id.* at 589.
[147] *See id.* at 591.

The Court next addressed the aliens' First Amendment challenge, and found that it also did not bar their deportation.[148] The Court reasoned that the First Amendment did not protect the practice or incitement of violence.[149] The Court distinguished between advocating change through the ballot box, which was protected by the First Amendment, and advocating change by force.[150] Acknowledging that it can be difficult to determine whether speech advocates political methods of change or incites violence, the Court stated that the "clear and present danger" test, enunciated in *Dennis v. United States*, was applicable to First Amendment issues involving the Communist Party.[151] Because *Dennis* was decided less than a year before *Harisiades*, the Court declined to discuss the application of this test any further, simply holding that the First Amendment did not prevent deportation.[152]

The "clear and present danger" test to which the *Harisiades* Court referred evolved from the version introduced by the *Schenck* Court.[153] It had most recently been applied by the Court in 1951 in *Dennis v. United States*.[154] The *Dennis* Court held that the conviction of American citizens for advocating the overthrow of the government did not violate the First Amendment.[155] The petitioners in *Dennis* were leaders of the Communist Party.[156] They challenged the constitutionality of their convictions under the Smith Act, which made it illegal for any person to advocate the overthrow of the government.[157]

The Court upheld the petitioners convictions using the "clear and present danger" test.[158] The Court explained that the "clear and present danger" test required the Court to "ask whether the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[159] Applying the test to the petitioners, the Court concluded that their First Amendment rights had not been violated because there was sufficient danger to warrant the abridgement of free speech.[160] The Court noted that the petitioners

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[148] *See id.* at 591–92.
[149] *See id.* at 592.
[150] *See Harisiades*, 342 U.S. at 592.
[151] *See id.*; Dennis v. United States, 341 U.S. 494, 508, 510 (1951).
[152] *See Harisiades*, 342 U.S. at 580, 592; *Dennis*, 341 U.S. at 494.
[153] *See Schenck*, 249 U.S. at 52.
[154] 341 U.S. at 508–11.
[155] *See id.* at 516–17.
[156] *See id.* at 497.
[157] *See id.* at 495–96; *see also* 18 U.S.C. § 10 (1946).
[158] *See Dennis*, 341 U.S. at 510–11.
[159] *See id.* at 510.
[160] *See id.* at 510–11.

had developed "an apparatus designed and dedicated to the overthrow of the Government" and were prepared to initiate an overthrow "when they thought the time was ripe."[161] Even though an overthrow attempt would likely fail and was not immediate, a finding of no clear and present danger was not required.[162] The Court reasoned that the government did not have to wait until overthrow plans had been made and were about to be executed before the petitioners' First Amendment rights could be abridged.[163] As long as a "clear and present danger" had been created, a citizen's First Amendment rights could be curtailed, and therefore the Court held that the petitioners' convictions in *Dennis* did not violate the First Amendment.[164]

Like the Supreme Court, the lower federal courts appear to have reached contradictory decisions concerning resident aliens' First Amendment rights.[165] In 1992, the United States Court of Appeals for the Ninth Circuit addressed the issue in *Price v. United States INS*, and held that the United States Immigration and Naturalization Service's ("INS") denial of Mr. Price's petition for naturalization did not violate the First Amendment.[166] Mr. Price had been a resident alien for twenty-four years when he applied for naturalization.[167] The application asked him to list all his present and past memberships and affiliations.[168] Instead of answering the question, Mr. Price attached a legal brief asserting that the question violated the First Amendment.[169]

The Ninth Circuit reasoned that, although resident aliens enjoyed the protections of the First Amendment, the protection afforded to them was limited.[170] Resident aliens are accorded an ascending scale of rights, and they achieve parity with citizens only upon their naturalization.[171] In Congress's exercise of its plenary power over immigration, the court further reasoned, Congress is permitted to make rules that would be unacceptable if applied to citizens.[172] Deferring to Congress's

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[161] *See id.* at 510.

[162] *See id.* at 509.

[163] *See Dennis*, 341 U.S. at 509.

[164] *See id.* at 516–17.

[165] *See, e.g.*, American-Arab Anti-Discrimination Comm. v. Reno, 70 F.3d 1045, 1063–64, 1071 (9th Cir. 1995); Price v. United States Immigration and Naturalization Serv., 962 F.2d 836, 842, 843–44 (9th Cir. 1995), *cert. denied*, 510 U.S. 1040 (1994).

[166] 962 F.2d at 842, 843–44.

[167] *See id.* at 837.

[168] *See id.*

[169] *See id.* at 837–38.

[170] *See id.* at 841.

[171] *See Price*, 962 F.2d at 842 n.6.

[172] *See id.* at 841.

power, the court found that only limited judicial scrutiny was appropriate and held that requiring Mr. Price to answer the question about his affiliations did not violate his First Amendment rights.[173]

The Ninth Circuit addressed the issue of resident aliens' speech rights again in 1995 in *American-Arab Anti-Discrimination Committee v. Reno*, and held that resident aliens could not be deported because of their associations with certain disfavored political groups.[174] The case concerned eight aliens whom the government sought to deport because of their membership in the Popular Front for the Liberation of Palestine ("PFLP").[175] The PFLP allegedly advocated world communism, the destruction of property, and the assaulting or killing of government officers.[176]

The court reasoned that the political branches' foreign policy powers permitted great discretion to exclude aliens, but that aliens who reside in the United States are not subject to fundamentally different First Amendment rights than are citizens.[177] According to the court, limitations on First Amendment rights damage the values underlying First Amendment protections.[178] If resident aliens did not have First Amendment rights in the deportation context, their speech rights in all contexts would be jeopardized because of the lingering fear of deportation.[179] Citing *Bridges v. Wixon*, the court specifically found that resident aliens are accorded full freedom of speech.[180]

Because resident aliens and citizens shared the same First Amendment protection, the Ninth Circuit further reasoned, both were free to associate with political organizations, even if those organizations advocated illegal conduct or engaged in illegal acts.[181] Under the standard enunciated in *Brandenburg v. Ohio*, advocacy could be punished only if it was "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[182] Applying the *Bran-*

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[173] *See id.* at 842, 843–44.

[174] 70 F.3d 1045, 1063–64, 1071 (9th Cir. 1995).

[175] *See id.* at 1052–53 & n.2.

[176] *See id.* at 1053. The aliens were charged under the McCarran-Walter Act of 1952, which provided for the deportation of aliens "who advocate the economic, international, and governmental doctrines of world communism," "the unlawful assaulting or killing of any [government] officer," or "the unlawful damage, injury, or destruction of property . . . ." 8 U.S.C. § 1251(a)(6)(D) and (F) (1982); *see American-Arab*, 70 F.3d at 1052 & n.2.

[177] *See American-Arab*, 70 F.3d at 1056.

[178] *See id.* at 1065.

[179] *See id.* at 1065–66.

[180] *See id.* at 1064.

[181] *See id.* at 1063–64.

[182] *See American-Arab*, 70 F.3d at 1063 (quoting Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam)). The *Brandenburg* test used by the *American-Arab* court is a stricter, modern

denburg test, the court determined that if the resident aliens had been citizens, they could not have been arrested for their membership in the PFLP because their advocacy did not rise to the level of inciting imminent lawless action.[183] Because resident aliens enjoy the same First Amendment rights as citizens, the court reasoned that their membership was also protected under the same strict scrutiny analysis.[184] The court thus held that resident aliens who reside in the United States are entitled to the full panoply of First Amendment rights and therefore cannot be deported for their associational activities.[185]

In *American-Arab*, the Ninth Circuit distinguished its decision in *Price v. United States INS*.[186] The court explained that the essential distinction was that *Price* involved a naturalization proceeding while *American-Arab* involved a deportation proceeding.[187] In *Price*, the court held that a resident alien is not fully protected by the First Amendment in the naturalization process.[188] A question on the application regarding his past and present memberships and affiliations therefore did not violate his rights.[189] The *American-Arab* court explained that Mr. Price was not accorded full First Amendment rights because he sought naturalization, not because he was a resident alien.[190] The court reasoned that naturalization resembles exclusion proceedings, not deportation proceedings, and before an alien is admitted to the United States, he is unprotected by the Constitution.[191] The *Price* court specifically noted that "aliens at naturalization are not necessarily entitled to the full protection of the First Amendment arguably afforded in deportation hearings."[192] In a deportation proceeding, on the other

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version of the "clear and present danger" test articulated by the *Dennis* Court. *See Brandenburg*, 395 U.S. at 447; *Dennis*, 341 U.S. at 510; SMOLLA, *supra* note 31, at 4–25, 4–26. In *Brandenburg*, the Supreme Court held that a citizen convicted of criminal syndicalism—the advocacy of the use of violence as a means of political reform—was deprived of his First Amendment rights. *See* 395 U.S. at 444–45, 449. The appellant in *Brandenburg* was the leader of a Klu Klux Klan group who had been convicted under the Ohio Criminal Syndicalism statute. *See id.* at 444. The Court reasoned that the statute violated the First Amendment because the advocacy of the use of force could only be proscribed "where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *See id.* at 447, 448–49.

[183] *See American-Arab*, 70 F.3d at 1063.

[184] *See id.* at 1063–64.

[185] *See id.* at 1063–64, 1071.

[186] *See id.* at 1064–65.

[187] *See id.*

[188] *See* 962 F.2d at 842.

[189] *See id.* at 837, 842, 843–44.

[190] *See American-Arab*, 70 F.3d at 1064–65.

[191] *See id.*

[192] *Price*, 962 F.2d at 843 n.7.

hand, an alien is no longer on the threshold of admission.[193] He or she has been allowed to join the national community and is entitled to the protections conferred by that status.[194] Thus, the *American-Arab* court concluded that its decision was consistent with its decision in *Price*.[195]

In 1992, the United States District Court for the District of Columbia in *Rafeedie v. INS* also held that resident aliens are fully protected by the First Amendment, and therefore restrictions on their speech are subject to the *Brandenburg* test.[196] Mr. Rafeedie had been a resident alien for eleven years when he sought and received from the INS a permit to travel to Cyprus because his mother was to undergo heart surgery there.[197] Instead of traveling to Cyprus, however, Mr. Rafeedie allegedly went to Syria, where he attended a meeting of a group closely associated with the PFLP.[198] The INS moved, pursuant to 8 U.S.C. § 1182(a) (the "statute"), to prevent him from resuming residency because of his association with the PFLP.[199]

In holding the statute unconstitutional, the district court, citing Justice Murphy's concurrence in *Bridges v. Wixon*, reasoned that resident aliens are entitled to the same First Amendment protections as citizens, including the limitations imposed by the overbreadth doctrine.[200] The overbreadth doctrine renders unconstitutional any statute that prohibits a substantial amount of constitutionally protected speech or conduct.[201] The court then found the statute invoked by the INS to be overbroad because it prohibited a substantial amount of expression protected by the First Amendment.[202] According to *Brandenburg*, the First Amendment protects advocacy of the use of force or the violation of laws unless "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[203] According to the court, while *Brandenburg* would uphold the statute if it prohibited only advocacy that incited imminent lawless action, the statute instead prohibited all advocacy or teaching of the

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[193] *See American-Arab*, 70 F.3d at 1065.

[194] *See id.* at 1064–65.

[195] *See id.* at 1064.

[196] 795 F. Supp. 13, 22–23 (D.D.C. 1992).

[197] *See id.* at 16.

[198] *See id.*

[199] *See id.* at 15–17. 8 U.S.C. § 1182(a) provides for the exclusion of aliens who advocate, inter alia, the assaulting or killing of any officer of the government, the destruction of property, or the overthrow of the government by force. *See* 8 U.S.C. § 1182(a)(28)(F) (1988).

[200] *See Rafeedie*, 795 F. Supp. at 22, 23, 24.

[201] *See id.* at 22.

[202] *See id.* at 22–23.

[203] *See id.* at 22 (quoting *Brandenburg*, 395 U.S. at 447).

proscribed doctrines.[204] Thus, the court held that the overbroad statute was an unconstitutional abridgement of First Amendment speech rights.[205]

C. *Cases Outside of the Subversive Acts Arena*

There are a small number of cases which address the First Amendment rights of resident aliens that fall outside of the subversive acts arena.[206] No case has been decided that addresses resident aliens' rights in the campaign finance context, but these cases do hold that resident aliens are fully protected by the First Amendment when they speak at conferences in the United States, when they voice their opinions at work and when they conscientiously object to military service.[207]

These cases are important because the subversive acts context and the campaign finance context are not entirely comparable. While the legislative actions to prevent subversion and corruption share the goal of maintaining the integrity of the government,[208] the subversion cases, which sought to deport resident aliens, evolved from a line of cases dealing with the exclusion of aliens.[209] Congress's plenary power over the exclusion of aliens in turn stems from its gatekeeping function.[210] The Supreme Court, in the *Chinese Exclusion Case*, stressed peace and security concerns.[211] The highest duty of the government was to preserve the nation against foreign aggression and encroachment.[212] Congress's gatekeeping function, however, was not the source of Congress's efforts to prevent campaign finance impropriety in the form of perceived quid pro quos.[213] Congress passed the Federal Election Campaign Act Amendments of 1974, which were challenged in *Buckley v. Valeo*, because of the campaign funding abuses that prompted the Watergate scandal.[214] Congress sought to safeguard the integrity of the

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[204] *See id.* at 22–23.

[205] *See Rafeedie*, 795 F. Supp. at 23, 24.

[206] *See, e.g.*, Underwager v. Channel 9, Austl., 69 F.3d 361, 363–64, 365 (9th Cir. 1995); *In re* Weitzman, 426 F.2d 439, 449 (8th Cir. 1970) (2–1 decision) (opinion of Blackmun, J.); Brunnenkant v. Laird, 360 F. Supp. 1330, 1332 (D.D.C. 1973).

[207] *See Underwager*, 69 F.3d at 363–64, 365 (speaking at conference); *Weitzman*, 426 F.2d at 449 (opinion of Blackmun, J.) (conscientious objection to military service); *Brunnenkant*, 360 F. Supp. at 1332 (voicing opinions at work).

[208] *See* BeVier, *supra* note 112, at 1085, 1088 and accompanying text.

[209] *See, e.g.*, Chae Chan Ping v. United States, 130 U.S. 581, 581–83 (1889).

[210] *See* U.S. CONST. art. I, § 8, cl. 4.

[211] *See Chae Chan Ping*, 130 U.S. at 606.

[212] *See id.*

[213] *See* William J. Connolly, Note, *How Low Can You Go? State Campaign Contribution Limits and the First Amendment*, 76 B.U. L. REV. 483, 487 n.25 (1996).

[214] *See id.*

electoral process by eliminating the influence of large donations.[215] The goal was the defense of the electoral system from takeover by wealthy contributors, not the defense of the nation from foreign aggression.[216]

In 1995, the Court of Appeals for the Ninth Circuit in *Underwager v. Channel 9 Australia* held that the speech protections of the First Amendment apply to all persons who are legally in this country.[217] University of Sydney Professor Kim Oates, who was not a citizen of the United States, traveled to California for the San Diego Conference on Responding to Child Maltreatment.[218] At the conference he replayed part of a documentary aired by *Sixty Minutes Australia*.[219] The subject of the documentary was an American psychologist named Dr. Ralph Underwager, who had served as a witness at a number of trials on the subject of the unreliability of children's testimony alleging sexual abuse.[220] The documentary disputed Dr. Underwager's theories and credentials.[221] Dr. Underwager sued Professor Oates in federal court in California, alleging defamation.[222]

In affirming the district court's grant of summary judgment for Oates,[223] the Ninth Circuit dismissed Dr. Underwager's assertion that Professor Oates was not entitled to First Amendment protection because he was not a citizen.[224] The court framed the issue as whether people who are not citizens or resident aliens, but nonetheless are legally here, enjoy First Amendment rights.[225] This implies that the court considered both citizens and resident aliens protected by the First Amendment.[226] The court then held that legal visitors are also accorded First Amendment rights, citing Justice Murphy's concurring opinion in *Bridges v. Wixon* and reasoning that the text of the First Amendment does not contain any express limitation regarding to whom the right of free speech applies.[227]

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[215] *See Buckley*, 424 U.S. at 58.
[216] *See id.*; *Chae Chan Ping*, 130 U.S. at 606.
[217] *See* 69 F.3d at 365.
[218] *See id.* at 364, 365.
[219] *See id.* at 364.
[220] *See id.* at 363–64.
[221] *See id.* at 364.
[222] *See Underwager*, 69 F.3d at 364.
[223] *See id.* at 368.
[224] *See id.* at 365.
[225] *See id.*
[226] *See id.*
[227] *See Underwager*, 69 F.3d at 365; *see also* U.S. CONST. amend. I.

In 1973, the United States District Court for the District of Columbia came to a similar conclusion in *Brunnenkant v. Laird*, holding that resident aliens have the same right to voice their opinions as American citizens.[228] Mr. Brunnenkant was a resident alien and an engineer employed by Boeing.[229] His security clearance, then at the level of "secret," was withdrawn because his political, social and economic beliefs were deemed contrary to the national interest, indicating that he was unreliable and not trustworthy.[230] The evidence against Mr. Brunnenkant consisted of his criticisms of American foreign policy and capitalism, which he shared with his co-workers, Navy Intelligence officers and company security personnel.[231]

The district court held that the revocation of Mr. Brunnenkant's security clearance violated his First and Fifth Amendment rights.[232] Noting its belief that Mr. Brunnenkant's West German alienage had affected his employer's decision to revoke his clearance, the court stated that resident aliens' expressions of their political, social and economic views, however distasteful or unwise, are fully protected by the First Amendment.[233]

In 1970, the United States Court of Appeals for the Eighth Circuit, in *In Re Weitzman*, voted to reverse the denial of a conscientious objector's naturalization petition.[234] Mrs. Weitzman had applied for naturalization after residing in the United States for three years.[235] In the course of the government's questioning of her, she communicated that she was unwilling to bear arms on behalf of the United States or to perform noncombatant services because of her revulsion against killing another person, not because of any religious belief.[236] The district court denied Mrs. Weitzman's application for naturalization.[237]

The main issue before the Eighth Circuit in this case was whether it was constitutionally offensive to deny naturalization solely because Mrs. Weitzman's conscientious objection was based on a personal moral code rather than on a religious belief.[238] The court voted two-to-one to reverse the district court's denial of Mrs. Weitzman's naturalization

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[228] *See* 360 F. Supp. at 1332.
[229] *See id.* at 1331, 1332.
[230] *See id.* at 1331.
[231] *See id.*
[232] *See id.* at 1331–32.
[233] *See Brunnenkant*, 360 F. Supp. at 1332.
[234] *See* 426 F.2d 439, 440 (8th Cir. 1970) (per curiam); *id.* (opinion of Blackmun, J.).
[235] *See id.* at 441 (opinion of Blackmun, J.).
[236] *See id.* at 441 n.1, 442, 443 (opinion of Blackmun, J.).
[237] *See id.* at 440 (per curiam).
[238] *See id.* at 440–41 (opinion of Blackmun, J.).

petition.[239] Judge Blackmun would have affirmed the denial and argued that it was constitutional to deny naturalization because Mrs. Weitzman's objection was not based on a religious belief.[240] Citing Justice Murphy's concurring opinion in *Bridges v. Wixon*, Judge Blackmun noted as an initial matter that the protection under the free exercise and establishment clauses of the First Amendment extends to resident aliens.[241] Neither of the other two judges who heard the case voiced any disagreement with the idea that resident aliens are protected by the First Amendment and voted to reverse for unrelated reasons.[242]

IV. The *Buckley* Test Should Be Applied to Restrictions on Resident Alien Speech

The strict scrutiny test used by the Supreme Court in *Buckley v. Valeo* should also be applied to a ban on resident aliens' campaign contributions and expenditures.[243] The first section below argues that, in the subversion cases, restrictions on resident aliens' speech are subject to the same protections as are limitations on citizens' speech.[244] Assuming that the subversion cases are comparable to political corruption cases,[245] the *Buckley* strict scrutiny test applied to limitations on citizens' speech should therefore also be applied to limitations on resident aliens' speech.[246] In addition, cases outside of the subversion realm must also be consulted because subversion prevention is not completely analogous to corruption prevention.[247] Although there are few cases outside of the subversion context that address the First Amendment rights of resident aliens, they do show that resident aliens' First Amendment rights are equal to those of citizens, and thus restrictions on each should be subjected to the same test.[248] The second section below asserts that *Buckley* should be read broadly as a case

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[239] *See Weitzman*, 426 F.2d at 440 (per curiam).

[240] *See id.* at 440, 449 (opinion of Blackmun J.). Judge Blackmun is the former Supreme Court justice, participating in this case before his appointment to that Court.

[241] *See id.* at 449 (opinion of Blackmun, J.).

[242] *See id.* at 454 (opinion of Lay, J.), 459–60 (opinion of Heaney, J.). *Weitzman* was a two-to-one decision, and each judge in the majority wrote separately because they disagreed as to the reasoning for the reversal. *See id.* at 440 (per curiam).

[243] *See* 424 U.S. 1, 25–30, 44–49 (1976) (per curiam).

[244] *See infra* Part IV.A.

[245] *See* BeVier, *supra* note 112, at 1085, 1088.

[246] *See Buckley*, 424 U.S. at 25–30, 44–49.

[247] *See supra* Part III.C.

[248] *See infra* Part IV.A.

which recognizes the role of resident aliens in our democracy.[249] Resident aliens contribute to the education of the electorate and in most respects act as citizens in our society.[250] In addition, the speech of other non-voting entities, such as corporations and political action committees, has been protected under the *Buckley* test.[251]

A. *Resident Aliens, Like Citizens, Are Fully Protected by the First Amendment*

The *Chinese Exclusion Case* established the Supreme Court's deference to Congress's plenary power over immigration.[252] The Court viewed immigration as within the realm of the political branches of government because power over immigration decisions was necessary to national sovereignty.[253] Congress's immigration policies were therefore subject only to limited judicial review.[254] Since the *Chinese Exclusion Case,* however, the Supreme Court has limited Congressional power over non-citizens. The subversive acts cases demonstrate that even in deportation proceedings, resident aliens are afforded the same First Amendment protections as are citizens.

The Supreme Court in *Bridges v. Wixon,* for example, implied that resident aliens are protected by the First Amendment in deportation proceedings.[255] In *Bridges,* the Supreme Court held that the government could not deport Harry Bridges for his alleged "affiliation" with the Communist Party.[256] The Court narrowly interpreted the requirement in the statute invoked against Mr. Bridges that he be "affiliated" with the Communist Party, concluding that he was not "affiliated" because he did not have a working alliance with the Party.[257] Mr. Bridges was not "affiliated" because he simply cooperated with the Party in its lawful activities.[258] Statutory, rather than constitutional,

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[249] *See infra* Part IV.B.

[250] *See, e.g.,* 50 U.S.C. App. § 453 (1994) (requiring resident aliens to register for Selective Service); Kenneth A. Gross, *Constitution May Protect Contributions from Aliens,* THE HILL, Dec. 11, 1996, at 5 (noting resident aliens pay income and Social Security taxes).

[251] *See, e.g.,* Federal Election Comm'n v. National Conservative Political Action Comm., 470 U.S. 480, 496 (1985) [hereinafter NCPAC] (holding political action committee speech protected); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978) (holding corporate speech protected).

[252] *See* Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889).

[253] *See id.* at 603–06.

[254] *See id.* at 609.

[255] *See* Bridges v. Wixon, 326 U.S. 135, 137, 148, 149 (1945); Steven J. Burr, Note, *Immigration and the First Amendment,* 73 CAL. L. REV. 1889, 1908 (1985).

[256] *See Bridges,* 326 U.S. at 156.

[257] *See id.* at 143–44, 145.

[258] *See id.* at 145.

interpretation was therefore the stated basis of the Court's holding barring deportation.[259]

The Court implied, however, that the reason for its narrow statutory construction was to avoid conflict with the First Amendment.[260] The Court stated in the course of its discussion that "[f]reedom of speech and of press is accorded aliens residing in this country. . . . [T]he utterances made by [Bridges] were entitled to that protection."[261] Furthermore, Justice Murphy's concurrence noted that the statute failed the "clear and present danger" test, which was the First Amendment standard applicable to citizens at the time.[262] In order to deport Mr. Bridges without violating his First Amendment rights, the "clear and present" danger test required that the Communist Party advocate and be immediately capable of using violence to overthrow the government, and that Mr. Bridges join in such advocacy.[263] If the "clear and present danger" test had been met, the danger to the public welfare would have justified Mr. Bridges' deportation.[264] Regardless of the outcome of the test, what is important is that citizens and resident aliens are equally protected by the First Amendment because the same test was applied to both groups.

At first glance, *Harisiades v. Shaughnessy* appears to defeat the notion that resident aliens are fully protected by the First Amendment.[265] A careful reading of *Harisiades*, however, confirms that the Supreme Court intended for the speech of resident aliens and citizens to be equally protected by the First Amendment.[266] In *Harisiades*, the Court upheld the deportation of three resident aliens because of their past memberships in the Communist Party.[267] The Court reasoned that the government's decision to deport the aliens was largely immune from judicial review because the political branches of government exclusively possessed the power to formulate the country's policy towards aliens.[268] The Court further reasoned that the First Amendment

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[259] *See id.* at 143–44, 145.

[260] *See* Burr, *supra* note 255, at 1909.

[261] *Bridges*, 326 U.S. at 148 (citations omitted).

[262] *See id.* at 164 (Murphy, J., concurring); Schenck v. United States, 249 U.S. 47, 52 (1919); Pringle, *supra* note 106, at 2073, 2087.

[263] *See Bridges*, 326 U.S. at 164.

[264] *See id.*

[265] *See* 342 U.S. 580, 592, 596 (1952).

[266] *See id.* at 592; T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 A.J.I.L. 862, 869 (1989).

[267] *See* 342 U.S. at 581, 591, 592, 596.

[268] *See id.* 588–89.

did not bar the aliens' deportation because the First Amendment did not protect the incitement of violence.[269]

The Court cited the "clear and present danger" standard as articulated by the Supreme Court in *Dennis v. United States* as the standard used to determine whether speech constituted incitement to violence.[270] Declining to discuss its analysis under *Dennis*, however, the Court simply stated that "the test . . . has been stated too recently to make further discussion at this time profitable."[271] The Court's failure to explain its application of *Dennis* is problematic because it raises the possibility that the Court did not apply the test at all, opting instead to defer to Congress's determination.[272] Indeed, it would have been difficult for the Court to find that the three aliens presented a "clear and present danger" under *Dennis*.[273] The resident aliens in the case claimed either not to believe in the use of force to overthrow the government or to lack any knowledge of the aims of the Communist Party.[274]

A better interpretation of the Court's terse reference to *Dennis* is that the outcome of the *Dennis* "clear and present danger" test was influenced by Cold War era fears of foreigners and Communism.[275] The Rosenbergs, accused of passing atomic secrets to the Russians, were tried and convicted in 1951, the same year *Dennis* was decided.[276] The Army-McCarthy hearings commenced only three years later.[277] The Court's decision in *Dennis* not to protect communist citizens under the "clear and present danger" test foreshadowed the Court's decision not to protect resident aliens in *Harisiades*.[278] The evidence against the citizens in *Dennis* appears to be just as tenuous as the evidence used to deport the resident aliens in *Harisiades*.[279] In *Dennis*, the Supreme Court's review was limited to a determination of the constitutionality of the Smith Act, under which the citizens were prosecuted.[280] The

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[269] *See id.* at 592.

[270] *See id.* at 592 & n.18; Dennis v. United States, 341 U.S. 494, 510 (1951).

[271] *Harisiades*, 342 U.S. at 592.

[272] *See* Burr, *supra* note 255, at 1910; Pringle, *supra* note 106, at 2088.

[273] *See* Pringle, *supra* note 106, at 2088.

[274] *See Harisiades*, 342 U.S. at 582, 583.

[275] *See* Aleinikoff, *supra* note 266, at 868–69.

[276] *See Dennis*, 341 U.S. at 494; *see generally* SECRET AGENTS: THE ROSENBERG CASE, MCCARTHYISM AND FIFTIES AMERICA (Marjorie Garber & Rebecca L. Walkowitz, eds. 1995).

[277] *See generally* SECRET AGENTS, *supra* note 276.

[278] *See* George C. Beck, Note, *Deportation on Security Grounds and the First Amendment: Closing the Gap Between Resident Aliens and Citizens*, 6 GEO. IMM. L.J. 803, 807 (1992).

[279] *See Harisiades*, 342 U.S. at 581–83; *Dennis* 341 U.S. at 498.

[280] *See Dennis*, 341 U.S. at 495–96.

Court did not address the sufficiency of the evidence to support the jury's findings that the petitioners conspired to organize the Communist Party and that they advocated the violent overthrow of the government.[281] The Supreme Court noted that the Court of Appeals for the Second Circuit had found that the record supported the jury's findings, but the *Dennis* Court enumerated only the "broad conclusions" of the Second Circuit, not specific findings of fact.[282] These "broad conclusions" do indicate that the petitioners were the leaders of an organization that advocated the violent overthrow of the government, but they hardly support the Supreme Court's finding that the petitioners were prepared to initiate an overthrow whenever the opportunity presented itself.[283]

The view that the *Harisiades* decision is a product of its time appears to be an interpretation shared by the Court of Appeals for the Ninth Circuit. In *American-Arab v. Anti-Discrimination Committee v. Reno*, the court stated that "read properly, *Harisiades* establishes that deportation grounds are to be judged by the same standard applied to other burdens on First Amendment rights."[284] That the *Harisiades* Court cited *Dennis* as the applicable standard, even if the outcome was not favorable to the resident aliens, supports the conclusion that resident aliens, like citizens, are fully protected by the First Amendment.[285]

This interpretation is bolstered by the fact that the lower federal courts have recognized speech rights of resident aliens in the subversive acts cases they have decided.[286] In *Rafeedie v. INS*, the District Court for the District of Columbia held that restrictions on resident aliens' speech are subject to the test enunciated in *Brandenburg v. Ohio*—a current, stricter version of the *Dennis* "clear and present danger" test, and the test applicable to restrictions on citizens' First Amendment rights.[287] More recently, in *American-Arab*, the Ninth Circuit similarly held that efforts to restrict resident aliens' associations with disfavored groups are subject to the *Brandenburg* test.[288] The *American-Arab* decision also clarifies the Ninth Circuit's earlier holding in *Price v. United States INS*, which upheld the requirement that a resident alien seeking

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[281] *See id.* at 497.

[282] *See id.* at 497, 498.

[283] *See id.* at 498, 510.

[284] *See* 70 F.3d 1045, 1064 (9th Cir. 1995) (quoting Aleinikoff, *supra* note 266, at 869).

[285] *See Harisiades*, 342 U.S. at 592 & n.18.

[286] *See supra* Part III.B.

[287] 795 F. Supp. 13, 22 (D.D.C. 1992); *see* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969); SMOLLA, *supra* note 31, at 4–25.

[288] *See* 70 F.3d at 1063.

naturalization disclose all his present and past memberships and affiliations.[289] Although Mr. Price was a resident alien who was denied the protection of the First Amendment, he was not denied protection *because of* his resident alien status.[290] Mr. Price was denied First Amendment protection because the naturalization process is an exclusion proceeding, not a deportation proceeding.[291] The *American-Arab* court explained that in an exclusion proceeding, a non-citizen is unprotected because he is "at the threshold of admission."[292] In a deportation proceeding, however, a non-citizen is protected because he is a member of the "national community;" his "presence within the territorial jurisdiction" entitles him to constitutional protection.[293] The wisdom of denying First Amendment protection to non-citizens whom the government seeks to exclude from the United States, through the denial of initial admission or naturalization, can be debated. The *Rafeedie, Price* and *American-Arab* decisions taken together, however, clearly indicate that resident aliens are fully protected by the First Amendment.[294]

Cases outside of the subversive acts context also support the proposition that resident aliens are entitled to the same speech rights as citizens.[295] The *Underwager v. Channel 9, Australia, Brunnenkant v. Laird* and *In re Weitzman* cases demonstrate that resident aliens' First Amendment rights extend beyond the deportation context.[296] The Constitution protects the speech rights of resident aliens not only when they are faced with deportation, which is tantamount to a criminal punishment,[297] but it also protects resident aliens when they speak at conferences, criticize government policies and practice their relig-

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[289] *See id.* at 1064–65; Price v. United States INS, 962 F.2d 836, 837, 842, 843–44 (9th Cir. 1995), *cert denied*, 510 U.S. 1040 (1994).

[290] *See Price*, 962 F.2d at 837, 842, 843–44.

[291] *See American-Arab*, 70 F.3d at 1064–65.

[292] *See id.* at 1065.

[293] *See id.* at 1064–65.

[294] *See id.*; *Price*, 962 F.2d at 841–42; *Rafeedie*, 795 F. Supp. at 22–23.

[295] *See* Underwager v. Channel 9, Austl., 69 F.3d 361, 363–64, 365 (9th Cir. 1995); *In re* Weitzman, 426 F.2d 439, 449 (8th Cir. 1970) (opinion of Blackmun, J.); Brunnenkant v. Laird, 360 F. Supp. 1330, 1331, 1332 (D.D.C. 1973).

[296] *See Underwager*, 69 F.3d at 363–64, 365; *Weitzman*, 426 F.2d at 449 (opinion of Blackmun, J.); *Brunnenkant*, 360 F. Supp. at 1331, 1332.

[297] Justice Douglas, in *Bridges v. Wixon*, acknowledged the severe consequences of deportation for the first time: "[A]lthough deportation technically is not criminal punishment, it may nevertheless visit as great a hardship as the deprivation of the right to pursue a vocation or calling . . . . [D]eportation may result in the loss of all that makes life worth living." *Bridges*, 326 U.S. at 147 (internal citations and quotations omitted); *see* Pringle, *supra* note 106, at 2086.

ions.[298] If resident aliens' speech is protected in all of these contexts, it is logical that their political speech is also protected.

All of the cases that explore the extent of resident aliens' First Amendment protection thus support the contention that citizens and resident aliens have the same speech rights.[299] In the subversive acts context, efforts to deport resident aliens because of their speech have been subject to the same version of the "clear and present danger" test as restrictions on the rights of citizens.[300] Outside of deportation proceedings, resident aliens are also protected to the same extent as citizens.[301] A ban on campaign contribution and expenditures by resident aliens should therefore also be judged by the same standard by which similar limitations on citizens' rights are evaluated—the standard enunciated in *Buckley*.[302]

B. *The* Buckley *Test Applies to Resident Alien Speech*

Before discussing the application of the *Buckley* test in Part V, it is useful to note that the First Amendment policies in the *Buckley* decision apply equally to both citizens and resident aliens.[303] The *Buckley* Court, in finding that contributions and expenditures constitute First Amendment political expression, did not limit its holding to citizen donors.[304] Since the *Buckley* decision, the Supreme Court has consistently held that the speech, in the form of contributions and expenditures by corporations and groups which themselves cannot vote, is protected by the First Amendment.[305] For example, the *Buckley* test protects corporations, political action committees and chambers of commerce.[306] If *groups* such as these are entitled to full First Amendment protection, surely resident alien *individuals* are also protected.

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[298] *See Underwager*, 69 F.3d at 363–64, 365 (speaking at conference); *Weitzman*, 426 F.2d at 449 (opinion of Blackmun, J.) (conscientious objection to military service); *Brunnenkant*, 360 F. Supp. at 1331, 1332 (voicing opinions at work).

[299] *See supra* Parts III.A and III.B.

[300] *See supra* notes 262–94 and accompanying text.

[301] *See supra* notes 295–98 and accompanying text.

[302] *See Buckley*, 424 U.S. at 25–30, 44–49.

[303] *See id.* at 14–15.

[304] *See id.*

[305] *See* Austin v. Michigan State Chamber of Commerce, 494 U.S. 652, 657 (1990) ("The mere fact that the Chamber is a corporation does not remove its speech from the ambit of the First Amendment."); Federal Election Comm'n v. NCPAC, 470 U.S. 480, 496 (1985) (concluding that the expenditures of political action committees are entitled to First Amendment protection); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978) ("The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.").

[306] *See Austin*, 494 U.S. at 657; *NCPAC* 470 U.S. at 496; *Bellotti*, 435 U.S. at 777.

To be sure, the right of individuals who are citizens to contribute to candidates for whom they are ineligible to vote has not been questioned. Citizens frequently and substantially contribute to candidates for office in states in which they do not reside.[307]

The language used by the *Buckley* Court can be interpreted broadly to include resident aliens' speech.[308] The Court was concerned with having an informed electorate, achievable through "uninhibited, robust, and wide-open" debate on public issues.[309] Contributions and expenditures by resident aliens contribute to this public debate because they help to raise issues of concern to immigrants. Even though resident aliens cannot vote, they educate and inform citizen voters regarding issues of importance to them, particularly foreign policy issues.[310] Finally, the *Buckley* Court also emphasized the role of public debate in the functioning of a democracy: "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution."[311] In other contexts, resident aliens contribute to the functioning of the government. Resident aliens, for example, can be drafted into the armed forces.[312] Resident aliens also pay income and Social Security taxes.[313] Thus, given the role of resident aliens in the functioning of the government and the education of the electorate, the *Buckley* Court's policies indicate that their contributions and expenditures should benefit from full First Amendment protection.[314]

V. APPLYING THE *BUCKLEY* STRICT SCRUTINY TEST

Under *Buckley*, the Supreme Court must first determine whether a ban on contributions and expenditures burdens resident aliens'

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[307] *See Federal Election Commission's 1995–1996 Candidate Receipts Report - Individual Contributions*, Aug. 2, 1996, *available in* LEXIS, LEGIS library, MEMFIN file (indicating contributors who do not reside in New York donated 24% of money raised during 1995–96 election cycle by Senator Alfonse D'Amato (R-N.Y.) for his 1998 campaign); *see also* Ken Moritsugu and Michael Slackman, *State GOP Says $4.4M Raised in 1st Half of '96*, NEWSDAY (N.Y.), July 17, 1996, at A19 (noting Travelers Insurance of Hartford, Conn. contributed $100,000 of $4.4 million raised by New York State Republican Committee).

[308] *See Buckley*, 424 U.S. at 14–15.

[309] *See id.* at 14 (quoting New York Times v. Sullivan, 376 U.S. 254, 270 (1964)).

[310] *See* Miguel Perez, *But Nation is Happy to Let Immigrants Serve in Army*, THE RECORD (Northern N.J.), Oct. 27, 1996, at O04 (noting immigrants have always sought to affect foreign policy, and our intervention in two World Wars was influenced by our Anglo-Saxon roots).

[311] *See Buckley*, 424 U.S. at 14.

[312] *See* 50 U.S.C. App. § 453 (1994).

[313] *See* Gross, *supra* note 250.

[314] *See* 424 U.S. at 14–15.

political expression.[315] If it does, the ban must be subjected to a strict scrutiny test, which first asks whether the burden is justified by a compelling state interest.[316] If it is, the final inquiry is whether the ban is narrowly tailored to serve the government's interest without needlessly inhibiting resident aliens' free speech rights.[317] Both a ban on contributions and a ban on expenditures violate the First Amendment under the *Buckley* test.[318]

A. *Both Bans Burden Resident Alien Speech*

A ban on contributions to particular candidates and a ban on independent expenditures both burden resident aliens' right of political expression.[319] Because the *Buckley* Court found that a $1,000 contribution cap at least marginally burdened the contributor's ability to engage in speech, the Court would certainly find that a complete ban on contributions is also a burden.[320] Applying the Court's reasoning that a contributor's expression consists solely of the symbolic act of contributing, it follows that if a resident alien is prevented from performing even that symbolic act, his or her First Amendment rights have been burdened.[321] An expenditure ban also burdens free speech. The *Buckley* Court held a $1,000 expenditure ceiling to be a severe restriction on the freedom of political expression because it prevented citizens from using the most cost effective means of communications, such as newspaper advertisements, to express their political views.[322] A complete ban on expenditures would also implicate the Court's general concern that limitations on spending result in less campaign speech because of the cost of the mass communication that is important to modern election campaigns.[323] A ban on expenditures would certainly mean that fewer issues would be discussed by fewer people in less depth due to the high cost of mass communication.[324] The Supreme Court should thus hold that bans on resident aliens' contributions and ex-

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[315] *See* 424 U.S. 1, 19–21 (1976) (per curiam).
[316] *See id.* at 25–26, 44–49.
[317] *See id.* at 25, 27–28, 29–30.
[318] *See id.* at 25–30, 44–49.
[319] *See id.* at 19–21.
[320] *See Buckley*, 424 U.S. at 20–21.
[321] *See id.* at 21.
[322] *See id.* at 19–20 & n.20.
[323] *See id.* at 19.
[324] *See id.*

penditures burden political expression. The bans must therefore be subjected to a strict scrutiny analysis.[325]

B. *No Compelling Interest Justifies the Burden Placed on Speech*

As for the first part of the strict scrutiny test, whether a burden on speech is justified by a compelling government interest, the government interest the Court has historically weighed against the burden placed on free speech by contribution and expenditure ceilings is the prevention of corruption, or the appearance of corruption.[326] In *Buckley*, the Court explained that the integrity of our democracy is undermined by even the perception that large donations are given in exchange for political favors.[327] In the case of a resident alien contribution and expenditure ban, the government specifically seeks to avoid even the perception that the United States' foreign policy is for sale.[328] Resident alien donors should not be able to secure changes in our foreign policy in exchange for the contributions, nor should anyone be able to question whether changes in foreign policy were the result of access bought by wealthy non-citizens.

1. Contributions

It is unlikely that the Court would conclude that the government's interest in avoiding the perception or actuality of corruption is compelling enough to uphold a complete ban on contributions by resident aliens. Although the *Buckley* Court held that the government's interest in preventing the appearance of improper influence justified a limit on contributions, a key step in its reasoning was that the $1,000 cap still permitted "the symbolic expression of support evidenced by a contribution . . . ."[329] The Court viewed the $1,000 limit as only a marginal speech restriction, and thus it was easier for the government to justify.[330] A complete ban, however, is much more restrictive because it denies any symbolic show of support whatsoever.

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[325] *See Buckley*, 424 U.S. at 25–30, 44–49.

[326] *See id.* at 26; *see also* Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n, 116 S. Ct. 2309, 2313 (1996).

[327] *See Buckley*, 424 U.S. at 27.

[328] *See, e.g.*, William Safire, *Link Between U.S. Foreign Policy, Indonesian Gift Evident*, FRESNO BEE, Oct. 21, 1996, at B5.

[329] *See Buckley*, 424 U.S. at 20–21, 26.

[330] *See id.* at 20–21.

It may be argued that if resident aliens are permitted to continue to contribute to candidates, they will bundle their contributions to gain influence, thus creating the appearance of impropriety. While this concern is valid, it must be noted that it is equally valid in the case of citizen contributions. The *Buckley* Court did not address the concern that contributions may be bundled to gain influence, but the Supreme Court has implied that this concern does not rise to the level of a compelling government interest because it has protected the speech of political action committees, which are organizations of contributors whose aim is to influence public policy.[331]

The government's interest in preventing improper influence on our foreign policy by resident aliens must also be balanced with the strong need for resident aliens to make their voices heard through contributions and expenditures. Because resident aliens cannot vote, the most effective means available to them to express their opinions on government actions is through contributions and expenditures.[332] The interests of resident aliens are affected by government policies, and donations are the best way for resident aliens to inform candidates and the electorate of their viewpoint.[333] Resident aliens pay taxes and serve in the military, so they should be able to express an interest in policies pertaining to at least those subject matters. Resident aliens should also be able to make contributions and expenditures to voice their concerns regarding congressional measures directed specifically at them. A recent example is welfare reform. The legislation adopted excludes legal immigrants from receiving most welfare benefits, including food stamps and Supplemental Security Income for the elderly and disabled.[334] Other areas affecting resident aliens include antiterrorism measures, immigration statutes and English-only laws.[335] Because resident aliens cannot vote, they need to be able to express their political views on these measures through their contributions and expenditures.

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[331] *See* Federal Election Comm'n v. NCPAC, 470 U.S. 480, 490, 497–98 (1985) (holding limitations on political action committees' expenditures unconstitutional because no indication such expenditures have tendency to corrupt or give appearance of corruption).

[332] *See* Bruce D. Brown, *What the Constitution and Good Policy Require; Politics, Money and Foreigners*, LEGAL TIMES, Nov. 4, 1996, at 25.

[333] *See Buckley*, 424 U.S. at 14; *supra* Part II.A (discussing the *Buckley* Court's recognition that an important function of campaign contributions and expenditures is to inform).

[334] *See* George C. Church, *Ripping Up Welfare with Not a Little Drama*, TIME, Aug. 12, 1996, at 18, 20; Barbara Vobejda, *Clinton Signs Welfare Bill Amid Division*, WASH. POST, Aug. 23, 1996, at A1.

[335] *See* David Simcox, *Chasing Public Opinion on Immigration*, COURIER-JOURNAL (Louisville, Ky.), May 15, 1996, at 15A; Catherine Yang, *Commentary: Let's Stop Beating Up on Legal Immigrants*, BUS. WK., Dec. 16, 1996, at 82, 82.

It would be a much more difficult question if the proposal were for a $100 contribution limit instead of a complete ban. By allowing a resident alien to contribute something to a campaign, he is able to symbolically express his support, and thus satisfy the *Buckley* Court.[336] One concern a $100 contribution limit might raise, however, is that it is too low.[337] The ceiling could be raised while still addressing the government's interest in preventing actual or perceived corruption. The Court in *Buckley* declined to decide what an appropriate contribution limitation would be.[338] As long as it found that some contribution limit was justified, the Court stated that it was not equipped to probe whether a $2,000 limit would serve just as well as a $1,000 ceiling.[339]

Whether contributions from resident aliens are limited to $100 or completely banned, there is a further reason why both are impermissible limitations on First Amendment speech. In *Buckley*, the government sought to justify the expenditure limitation by arguing that it had an ancillary interest in equalizing the relative ability of individuals and groups to influence the outcome of elections.[340] The Court rejected this justification, stating that "the concept that the government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . ."[341] Thus, if the government sought to ban or limit to $100 resident aliens' contributions while maintaining the $1,000 limit on citizens' contributions, the Court should find that the First Amendment does not permit the government to magnify the voice of citizens at the expense of resident aliens' political expression. The First Amendment should also prohibit the government from allowing resident aliens to contribute only towards those issues of special concern to them, such

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[336] *See* 424 U.S. at 21.

[337] If Congress were to limit resident alien contributions to $100 while continuing to allow citizens to contribute $1,000, equal protection concerns would also be implicated. A discussion of these issues, however, is beyond the scope of this Note. For a discussion of resident aliens' Fifth Amendment due process rights, see generally Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) (holding that Civil Service Commission regulation barring noncitizens, including resident aliens, from employment in federal civil service positions was unconstitutional deprivation of liberty without due process in violation of Fifth Amendment) and Mathews v. Diaz, 426 U.S. 67 (1976) (holding that Congress may condition alien's eligibility for participation in federal medical insurance program on continuous residence in United States for five-year period and admission for permanent residence without violating Due Process Clause of Fifth Amendment).

[338] *See* 424 U.S. at 30.

[339] *See id.*

[340] *See id.* at 48.

[341] *Id.* at 48–49.

as immigration policy, because this measure similarly seeks to limit the voices of resident aliens in favor of the voices of citizens.

2. Expenditures

According to the *Buckley* Court, a ban on resident aliens' expenditures would be an even more severe restriction on speech than a ban on contributions, and therefore even more difficult for the government to justify.[342] The *Buckley* Court found the government's interest in limiting citizens' expenditures "relative to a clearly identified candidate" to $1,000 to be insufficient for two reasons.[343] First, the expenditure limitation only banned *some* large expenditures and thus would not eliminate actual or perceived impropriety.[344] In order to avoid unconstitutional vagueness, the Court interpreted the phrase "relative to a clearly identified candidate" to include only those expenditures that, in express terms, advocated the election or defeat of a clearly identified candidate.[345] According to the Court, the limitation did not alleviate the danger of corruption because of the ease with which those seeking to buy influence could circumvent the expenditure limitation.[346] The promotion of a candidate and his views did not violate the statute; only those expenditures that expressly advocated a candidate's election or defeat were limited by the expenditure ceiling considered in *Buckley*.[347] Thus, a contributor could circumvent the limitation by refraining from expressly advocating a candidate's election or defeat in a newspaper advertisement, for example.[348] Under the challenged act, the contributor remained free to purchase advertisements promoting a candidate without advocating his or her election.[349]

It must be noted that a complete ban on *all* expenditures by resident aliens would close the loophole the *Buckley* Court identified and would therefore serve the government's interest in preventing corruption.[350] A complete ban would, however, create two problems. First, a complete ban burdens First Amendment speech more than the ceiling considered by the *Buckley* Court on only those expenditures "relative to a clearly identified candidate." Second, the Court in *Buck-*

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[342] *See id.* at 19–21.
[343] *See* 424 U.S. at 44–47.
[344] *See id.* at 45.
[345] *See id.* at 42, 44.
[346] *See id.* at 45.
[347] *See id.*
[348] *See Buckley*, 424 U.S. at 45.
[349] *See id.*
[350] *See id.* at 45.

ley, without explaining why, stated that no societal interest would be served by a loophole-closing provision.[351]

The best explanation for the *Buckley* Court's comment that no societal interest would be served by a loophole-closing provision is found in the Court's second reason for finding that the government had not shown a sufficiently compelling interest.[352] The Court reasoned that, because independent expenditures by definition are not controlled by or coordinated with a candidate, it is unlikely that expenditures are given for quid pro quos, and therefore expenditures do not pose the danger of real or apparent corruption.[353] According to the Court, independent expenditures are not as valuable to the candidate as contributions made directly to his campaign, and may even prove counterproductive because the candidate lacks any control over the medium or the message.[354]

Given this reasoning, it is unlikely that the Court would uphold a complete ban on resident aliens' expenditures. Although a complete ban on expenditures would close the loophole left open by the statute at issue in *Buckley*, the *Buckley* Court implied that any sort of limitation on expenditures violates the First Amendment because expenditures do not create the reality or appearance of impropriety.[355] The ban would therefore fail to justify the severe burden placed on speech.

The government might attempt to bolster its argument by asserting that the need to prevent impropriety is especially great in the foreign policy realm. Foreign policy, like Congress's plenary power over immigration, involves issues of national sovereignty and international law. If United States foreign policy is viewed as being for sale to the highest contributor, our independence and credibility as a nation

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[351] *See id.*

[352] *See id.* at 45–47.

[353] *See Buckley*, 424 U.S. at 46, 47. Commentators have criticized the Supreme Court's reasoning on this point. As one noted:

> It seems quite fanciful to believe that these expenditures will go unnoticed by candidates, and hence will not exert any corrupting influence, or that these expenditures are totally uncoordinated since often candidates and committees share political consultants. In logical contrast to the *Buckley* Court's conclusion, expenditures of significant sums can not only unduly influence the outcome of elections but can also influence the views of candidates themselves. Otherwise the expenditures would not be made.

Debra Burke, *Twenty Years After the Federal Election Campaign Act Amendments of 1974: Look Who's Running Now*, 99 DICK. L. REV. 357, 369 (1995). Regardless of the validity of this criticism, however, *Buckley* has not been overruled by the Supreme Court, and thus the Court's reasoning stands.

[354] *See Buckley*, 424 U.S. at 47.

[355] *See id.* at 45–47.

are questioned in the international community.[356] The situation is made worse, so the argument goes, because resident aliens are foreigners. Placing the direction of United States foreign policy in the hands of foreign powers, through resident aliens, would be the ultimate blow to national sovereignty.[357]

Foreign policy, however, is no different than any other policy. The integrity of our foreign policy formulation is important, but the integrity of our agricultural policy or economic policy is just as important. The nation's independence and credibility in the international arena is equally called into question when it appears that any domestic policy has been formulated for the benefit of a particular group of contributors. If the government is to curb the influence of resident aliens seeking changes in foreign policy, it must also curb the influence of wealthy citizens seeking changes in domestic policies. In addition, any influence resident aliens are able to exert on foreign policy is hardly tantamount to foreign powers directing United States foreign policy.[358] Although residents aliens are not citizens, because they have been permitted to reside in the United States indefinitely in many respects they function like citizens and are entitled to the protections and privileges this status confers.[359]

3. Narrowly Tailored

The Supreme Court thus should refuse to hold that the government's interest in preventing actual or perceived impropriety justifies a complete ban on resident aliens' contributions and expenditures. If the Court were to so hold, the question of whether the ban is narrowly tailored would not be reached. If, however, the Court were to hold that the government's interest is sufficiently compelling, the Court would likely also find that the ban is narrowly tailored and therefore passes the second part of the *Buckley* strict scrutiny test.[360] This would mean that the contribution and expenditure bans would not violate the First Amendment and would be upheld. The Court would probably reason that the limitations are not over-inclusive.[361] Although most people who expend or contribute large sums of money probably do not seek to

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[356] *See* Chae Chan Ping v. United States, 130 U.S. 581, 602–09 (1889).

[357] *See id.*

[358] *See id.*

[359] *See, e.g.*, 50 U.S.C. App. § 453 (1994) (requiring resident aliens to register for Selective Service); Gross, *supra* note 250 (noting resident aliens pay taxes).

[360] *See Buckley*, 424 U.S. at 25, 27–28, 29–30.

[361] *See id.* at 29–30.

improperly influence a candidate, the Court would reason that the limitations are narrowly tailored because it is too difficult to isolate suspect contributions and expenditures.[362] The Court would further reason that the government's compelling interest in safeguarding against the appearance of impropriety requires the complete removal of any opportunity for abuse.[363]

CONCLUSION

A ban on campaign contributions and expenditures by resident aliens is unconstitutional because resident aliens are fully protected by the First Amendment.[364] Although case law in the subversive acts context would seem to indicate judicial deference to Congress's plenary immigration power,[365] unequal treatment of resident aliens' speech rights was the product of the Cold War era.[366] During the Cold War, the protection accorded to citizens' speech was also curtailed.[367] Cases outside of the subversive acts context confirm that resident aliens are entitled to the same First Amendment protection as citizens.[368] Because resident aliens and citizens enjoy the same speech rights, the strict scrutiny test applied in *Buckley* must be applied to a ban.[369] The determination that the *Buckley* test must be used is in effect the determination of the result. Because the *Buckley* Court considered much less restrictive limitations on speech,[370] the Court would, and should, hold complete bans on contributions and expenditures unconstitutional. This result is consistent with good public policy.[371] Resident aliens are expected to participate in society like citizens in most respects;[372] they should be afforded the same opportunities.

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[362] *See id.*
[363] *See id.* at 30.
[364] *See supra* Part IV.
[365] *See supra* Parts III.A and III.B.
[366] *See supra* Part IV.A.
[367] *See, e.g.*, Dennis v. United States, 341 U.S. 494, 516–17 (1951).
[368] *See supra* Parts III.C and IV.A.
[369] *See* Buckley v. Valeo, 424 U.S. 1, 25–30, 44–49 (1976) (per curiam).
[370] *See id.* at 7.
[371] *See supra* Part V.B.
[372] *See id.*