

WHAT'S AT STAKE?: *BLUMAN V. FEDERAL  
ELECTION COMMISSION* AND THE  
INCOMPATIBILITY OF THE STAKE-BASED  
IMMIGRATION PLENARY POWER AND  
FREEDOM OF SPEECH

*Alyssa Markenson*

**ABSTRACT**—Section 441e of the U.S. Code prohibits “foreign nationals”—all noncitizens except lawful permanent residents—from making any contribution or expenditure in any federal, state, or local election. In *Bluman v. Federal Election Commission*, the Supreme Court summarily affirmed a three-judge district court’s decision to uphold the law based on the government’s compelling interest in preventing foreign influence over U.S. elections. Notably, *Bluman*’s holding was animated by its reasoning that the extent of First Amendment protection should be directly tied to the aliens’ stake in American society—a reflection of the Supreme Court’s jurisprudence since the middle of the twentieth century that seeks to accord constitutional rights to noncitizens based on their stake in society, also known as the “stake theory.” By contrast, during the end of the nineteenth century and early twentieth century, the Supreme Court focused not on an alien’s stake, but on his location—so long as an alien was within the territorial jurisdiction of the United States he was entitled to constitutional protection. This Note argues that the First Amendment’s identity-neutral guarantee of freedom of speech is incompatible with the stake theory. In the context of freedom of speech and independent expenditures, denying First Amendment protection because of the speaker’s inadequate stake grants the government enormous power to restrict speech and conflicts with numerous First Amendment principles. Instead, this Note proposes that the First Amendment’s guarantee of freedom of speech should override the plenary power as applied to aliens located within the territorial jurisdiction of the United States.

**AUTHOR**—Alyssa Markenson, J.D. Candidate, Northwestern University School of Law, 2015; B.A., University of Pennsylvania. Profound thanks to Professor Erin Delaney for her invaluable suggestions and to Daniel Leigh, Andrew Beatty, and Kathleena Kruck for their thoughtful edits. All errors are my own.

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INTRODUCTION

Benjamin Bluman, a Canadian citizen, had been lawfully residing in the United States for nearly five years and wanted to create and distribute flyers in support of President Obama; Asenath Steiman, a dual citizen of Canada and Israel, was living in the United States on a three-year visa (extendable up to seven years) and sought to make expenditures to several conservative political action committees.<sup>1</sup> In 2010, *Citizens United v. Federal Election Commission* struck down a prohibition on corporate independent expenditures, emphasizing that bans based solely on the speaker’s identity violate the First Amendment.<sup>2</sup> Despite *Citizens United’s* reasoning and Bluman and Steiman’s long-term connections to the United States, they were prohibited from making campaign expenditures for one reason: they were admitted to the United States on nonimmigrant visas.<sup>3</sup>

The Immigration and Nationality Act generally divides aliens into two categories: immigrants and nonimmigrants.<sup>4</sup> Immigrants, usually referred to as lawful permanent residents (LPRs), are entitled to reside in the United

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<sup>1</sup> Bluman v. FEC, 800 F. Supp. 2d 281, 285 (D.D.C. 2011), *aff’d*, 132 S. Ct. 1087 (2012).

<sup>2</sup> 558 U.S. 310 (2010).

<sup>3</sup> See 2 U.S.C. § 441e (2012).

<sup>4</sup> An “immigrant” is defined as “every alien except an alien [in one of the enumerated nonimmigrant classes].” 8 U.S.C. § 1101(a)(15) (2012).

States permanently, subject to a few conditions.<sup>5</sup> Conversely, nonimmigrants are aliens admitted on temporary visas.<sup>6</sup> Although these visas are “temporary,” the term may be misleading because many nonimmigrant visas last for several years.<sup>7</sup>

Section 441e of the U.S. Code prohibits “foreign nationals”—defined as all noncitizens except LPRs—from making both campaign contributions and expenditures in any federal, state, or local election (including local elections in which they can vote).<sup>8</sup> A three-judge district court panel upheld the ban in *Bluman v. FEC*, which the Supreme Court summarily affirmed.<sup>9</sup> Applying strict scrutiny, the district court concluded the federal government has a compelling interest in preventing foreign influence over the political process.<sup>10</sup> More interestingly, the court reasoned that § 441e is narrowly tailored to that interest because it does not extend to LPRs.<sup>11</sup>

Specifically, *Bluman* contended that nonimmigrants do not have a sufficient stake in the United States because of their temporary status; LPRs, however, are entitled to the First Amendment right to make expenditures and contributions because of their “long-term stake in the flourishing of American society.”<sup>12</sup> Indeed, the opinion warned that “extend[ing] the current statutory ban to lawful permanent residents who have a more significant attachment to the United States . . . would raise substantial questions not raised by this case.”<sup>13</sup> Thus, the extent of aliens’ First Amendment protection was directly tied to their stake in society, despite their lawful presence within the United States.

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<sup>5</sup> See *id.* § 1101(a)(20). Immigrant visas are allocated through two main channels: the family-based preference categories (certain family members of LPRs or U.S. citizens), *id.* § 1153(a), and the employment-based categories, *id.* § 1153(b). Additionally, 55,000 visas are distributed through the diversity lottery among countries with a low rate of immigration to the United States. *Id.* § 1153(c). Wait times for an immigrant visa can be exorbitant; for example, some categories have an estimated backlog of twenty-four years. See *Visa Bulletin – Immigration Numbers for January 2014*, U.S. DEPT OF STATE, BUREAU OF CONSULAR AFFAIRS 2 (Dec. 11, 2013), [http://travel.state.gov/content/dam/visas/Bulletins/visabulletin\\_january2014.pdf](http://travel.state.gov/content/dam/visas/Bulletins/visabulletin_january2014.pdf) [<http://perma.cc/E7BN-MBBA>].

<sup>6</sup> There are numerous classes of nonimmigrants, including, for example, tourists, students, and certain skilled and unskilled employees. See § 1101(a)(15)(B), (F), (J).

<sup>7</sup> For example, nonimmigrants on H-1B visas can be admitted up to three years and can extend their visa up to six years. *Id.* § 1184(g)(4). Further, the visa can be extended beyond the six-year maximum if an application for labor certification and adjustment of status to LPR has been pending for more than a year. American Competitiveness in the Twenty-First Century Act, Pub. L. No. 106-313, § 106, 114 Stat. 1251, 1253–54 (2000); see also 8 C.F.R. § 214.6(h)(iv) (2014) (noting “no specific limit on the total period of time an alien may be in TN status”); *id.* § 214.1(c)(3) (specifying the classes of nonimmigrants ineligible for extensions of stay).

<sup>8</sup> 2 U.S.C. § 441e (2012).

<sup>9</sup> 800 F. Supp. 2d 281 (D.D.C. 2011), *aff’d*, 132 S. Ct. 1087 (2012).

<sup>10</sup> *Id.* at 285–86, 288.

<sup>11</sup> *Id.* at 291.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 292.

*Bluman*'s emphasis on an alien's stake is not surprising given the Court's shift over the last several decades toward a stake-based theory in immigration cases.<sup>14</sup> Through its plenary power over immigration, the federal government has extensive authority to regulate immigration—including rules regarding admission and deportation of aliens—subject to few constitutional limitations and little judicial intervention.<sup>15</sup> But this authority often leads to harsh results, especially for LPRs. To limit the reach of the plenary power and provide protection for LPRs, the Court has shifted toward granting constitutional rights to aliens based on their stake in the country.

Emphasizing nonimmigrants' stake, however, conflicts with the Court's cases evaluating limits on independent expenditures. Independent expenditures involve money spent “expressly advocating the election or defeat of a clearly identified candidate,” in which no coordination with the candidate was involved.<sup>16</sup> Importantly, independent expenditures are considered the equivalent of political speech; the fact that money must be spent does not affect their nature as political speech or lessen “the exacting scrutiny required by the First Amendment.”<sup>17</sup>

In *Citizens United*, the Court struck down a ban on corporate independent expenditures primarily because Congress cannot restrict political speech based on the speaker's identity.<sup>18</sup> *Citizens United* further emphasized that bans on independent expenditures effectively censor political speech and arbitrarily stymie the free marketplace of ideas.<sup>19</sup> At bottom, the reasoning in *Citizens United* is fundamentally a limit on governmental authority that contradicts the notion that one needs a stake in order to be protected by the First Amendment.

Thus, *Bluman* is significant not because of its holding, but rather because it illustrates how the plenary power's emphasis on stake has

<sup>14</sup> See *infra* Part I.

<sup>15</sup> See *infra* Part I.

<sup>16</sup> 2 U.S.C. § 431(17) (2012). Campaign finance laws distinguish between contributions and expenditures. Contributions are made directly to a candidate or political committee. *Id.* § 431(8). If expenditures are coordinated with the candidate, they are treated as contributions. *Buckley v. Valeo*, 424 U.S. 1, 46 (1976) (per curiam). Expenditures include money given by an individual to an outside group. See § 431(17)(B). This Note focuses on independent expenditures, rather than contributions, because the tension is starker. In particular, limits bear upon slightly different First Amendment values: contributions impinge upon freedom of expression and of association, whereas expenditures are considered speech. See *Buckley*, 424 U.S. at 20–23, 39. Accordingly, limits on contributions are analyzed under heightened scrutiny, but expenditures receive strict scrutiny. *Id.* at 25, 44. *Bluman* seemingly recognized this distinction when the opinion stated that it would be “a wise approach” to “argue . . . that [the plaintiffs] may have a right to make expenditures even if they do not have a right to make contributions.” 800 F. Supp. 2d at 288 n.3.

<sup>17</sup> *Buckley*, 424 U.S. at 16.

<sup>18</sup> 558 U.S. 310, 349 (2010); see *infra* Part II.B.

<sup>19</sup> See *infra* Part II.C.

complicated First Amendment doctrine. *Bluman* effectively permitted the stake-based theory of immigration law to permeate freedom of speech jurisprudence despite the substantial tension between the stake-based immigration plenary power and the identity-neutral reach of the First Amendment. In the context of freedom of speech and independent expenditures, denying First Amendment protection because of the speaker's inadequate stake grants the government enormous power to restrict speech and conflicts with numerous First Amendment principles.

This Note proposes that the First Amendment's guarantee of freedom of speech should override the plenary power as applied to aliens located within the territorial jurisdiction of the United States. Specifically, when confronting issues involving aliens' First Amendment rights, courts should focus on the alien's location, not stake. Moreover, this Note argues that the government should not be able to deport an alien solely for engaging in constitutionally protected speech.

Part I of this Note examines the origins of the federal government's plenary power over immigration, and subsequent attempts to constrain it based on an alien's location (the location theory) or on her stake (the stake theory). It explains the Court's shift in the twentieth century away from the location theory toward the stake theory, and the impact on the Court's plenary power jurisprudence of statutory changes regarding the removal of aliens unlawfully present. Part II discusses the Court's cases on independent expenditures, focusing on its disavowal of the idea that the speaker's identity should determine First Amendment protection, and its emphasis on the marketplace of ideas. Finally, Part III demonstrates how both doctrines collided in *Bluman* and why using stake to determine aliens' First Amendment protection is problematic.

## I. THE PLENARY POWER OVER IMMIGRATION, AND THE STAKE AND LOCATION THEORIES

During the late nineteenth and early twentieth centuries, the Supreme Court primarily employed the location theory, determining the extent of constitutional protection based on whether an alien was inside or outside of the United States. During the mid-twentieth century, however, the Court transitioned to utilizing the stake theory, according greater constitutional rights to aliens—usually LPRs—with a stake in the country. Finally, in 1996, statutory changes to removal procedures provided prudential reasons to use the stake theory.

### A. *Early Developments*

The federal government's power to regulate immigration—the plenary power—stems from two sources: (1) the notion that as a sovereign country the United States has an inherent right to determine which individuals can

and cannot enter<sup>20</sup> and (2) the Constitution's grant of authority "[t]o establish an uniform Rule of Naturalization."<sup>21</sup> The plenary power was first introduced in *Chae Chan Ping v. United States*, which held that the federal government could exclude aliens whenever "the interests of the country require it," and furthermore, that the judiciary would not intervene.<sup>22</sup> To be clear, exclusion means that aliens are prevented from *entering* the country.

Four years later, *Fong Yue Ting v. United States* extended the plenary power to encompass not only exclusion, but also deportation.<sup>23</sup> The Court upheld deportation because "[t]he right of a nation to expel or deport foreigners, who have not been naturalized or taken any steps towards becoming citizens of the country" is "absolute and unqualified."<sup>24</sup> Additionally, the Court held that deportation is not punishment because it is not a criminal sentence but rather a corollary of the sovereign nation's inherent powers to expel aliens.<sup>25</sup>

*Fong Yue Ting* produced three powerful dissents that planted the seeds of the stake theory and the location theory. Although the dissents followed different paths, they were all attempts to place limits on the plenary power, which the dissenters believed was enabling a "despotic" government.<sup>26</sup> Chief Justice Fuller formulated the basis of the stake theory by arguing that the government's power to deport was different from its power to exclude because "limitations exist or are imposed upon the deprivation of that which has been lawfully acquired."<sup>27</sup> Specifically, an alien already lawfully present had a much greater stake than one initially seeking to enter, and therefore the government should not be able to deport him

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<sup>20</sup> *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581, 603–04 (1889).

<sup>21</sup> U.S. CONST. art. I, § 8, cl. 4.

<sup>22</sup> 130 U.S. at 609. *Chae Chan Ping* upheld the Chinese Exclusion Act, which heavily restricted Chinese immigration. *See id.* at 597–600.

<sup>23</sup> 149 U.S. 698 (1893).

<sup>24</sup> *Id.* at 707. The majority did not address the fact that the petitioners, Chinese immigrants, were ineligible for citizenship at the time and thus could not have taken any of these steps. *See id.* at 716.

<sup>25</sup> *Id.* at 709. This distinction has been challenged in numerous subsequent dissents, but the Court has not overruled it. *See generally* Javier Bleichmar, *Deportation as Punishment: A Historical Analysis of the British Practice of Banishment and Its Impact on Modern Constitutional Law*, 14 GEO. IMMIGR. L.J. 115 (1999) (tracing various dissenting opinions and dicta challenging the assertion that deportation is not punishment).

<sup>26</sup> *See Fong Yue Ting*, 149 U.S. at 755–56 (Field, J., dissenting) ("The existence of the power [to deport aliens unconditionally] is only consistent with the admission that the government is one of unlimited and despotic power so far as aliens domiciled in the country are concerned."); *id.* at 737 (Brewer, J., dissenting) (warning that the majority was effectively permitting the government "to declare the limits" on its own power); *id.* at 763 (Fuller, C.J., dissenting) (contending the majority granted "an unlimited and arbitrary power" that was "incompatible with the immutable principles of justice, inconsistent with the nature of our government, and in conflict with the written Constitution by which that government was created and those principles secured").

<sup>27</sup> *Id.* at 762 (Fuller, C.J., dissenting).

unconditionally.<sup>28</sup> Justice Field's dissent highlighted the alien's stake by noting that an alien being deported has already "formed the most tender connections" with the United States, unlike an alien merely being excluded.<sup>29</sup> Justice Field also focused on legality, stressing that the alien in question was here with the country's consent.<sup>30</sup> Thus, the crucial distinction in determining constitutional protection was the alien's stake in the country.

By contrast, Justice Brewer's dissent distinguished the power of exclusion from deportation based on the alien's location. Notably, he emphasized that protection extended to aliens lawfully present:

The Constitution has no extraterritorial effect, and those who have not come lawfully within our territory cannot claim any protection from its provisions. . . . But the Constitution has potency everywhere within the limits of our territory, and the powers which the national government may exercise within such limits are those, and only those, given to it by that instrument.<sup>31</sup>

Put simply, the location theory contends that the Constitution does not apply to aliens who have been excluded because they are not in the country, but once aliens are present lawfully they are entitled to constitutional protection. Curiously, he conceded that aliens "who have become domiciled in a country are entitled to a more distinct and larger measure of protection than those who are simply passing through, or temporarily in it."<sup>32</sup> Thus, while primarily based on an alien's location, the theory still recognizes a role for stake in that an alien unlawfully present—and consequently unable to claim a legal stake—is not necessarily entitled to the same level of protection as an alien lawfully present in the country.

During the late nineteenth and early twentieth centuries, the location theory dominated the Court's jurisprudence. The Court stressed the textual basis for granting constitutional protection based on location: the "provisions [of the Fourteenth Amendment] are universal in their application, to all persons within the territorial jurisdiction."<sup>33</sup> Similarly, *Wong Wing v. United States* held that an alien could not be subjected to hard labor without trial for the sole crime of being in the country unlawfully because the Fifth and Sixth Amendments say "person" not "citizen," meaning "all persons within the territory of the United States"

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<sup>28</sup> *See id.*

<sup>29</sup> *Id.* at 749 (Field, J., dissenting).

<sup>30</sup> *Id.* at 754.

<sup>31</sup> *Id.* at 738 (Brewer, J., dissenting).

<sup>32</sup> *Id.* at 734.

<sup>33</sup> *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

are protected by those Amendments.<sup>34</sup> Notably, *Wong Wing* spoke less of the rights guaranteed to the alien and more of the danger in permitting the government to disregard the restrictions that the Constitution imposes.<sup>35</sup>

In the *Japanese Immigrant Case*, the Court had to confront the importance of legality to the location theory when determining whether an alien who had allegedly entered the country illegally and remained for four days before being apprehended was entitled to due process before being deported.<sup>36</sup> The power to exclude and expel aliens was reaffirmed, but the Court qualified that the government still could not “disregard the fundamental principles that inhere in ‘due process of law’ as understood at the time of the adoption of the Constitution.”<sup>37</sup> Just like *Wong Wing*, the *Japanese Immigrant Case* emphasized the importance of restricting the government from acting with “arbitrary power.”<sup>38</sup>

Focusing on an alien’s location, however, led to harsh results when long-term immigrants left the country and attempted to reenter because aliens outside the jurisdiction were afforded little constitutional protection, a principle known as the reentry doctrine.<sup>39</sup> Building on the reentry doctrine, *Shaughnessy v. United States ex rel. Mezei* rebuffed the relevance of an LPR’s twenty-five-year residence, instead employing the legal fiction that Ellis Island was not within the territorial jurisdiction of the United States to deny due process to an LPR who sought to reenter the country after nineteen months abroad.<sup>40</sup> Because Mezei was outside of the territorial jurisdiction of the United States, he was not entitled to due process.

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<sup>34</sup> 163 U.S. 228, 238 (1896). Justice Field, who had previously focused on stake, wrote separately to chastise the Government for its “contention that persons within the territorial jurisdiction of this republic might be beyond the protection of the law . . . in face of the great constitutional amendment which declares that no State shall deny to any person within its jurisdiction the equal protection of the laws.” *Id.* at 242–43 (Field, J., concurring in part and dissenting in part).

<sup>35</sup> *See id.* at 237 (majority opinion) (“It is not consistent with the theory of our government that the legislature should, after having defined an offence as an infamous crime, find the fact of guilt and adjudge the punishment by one of its own agents.”).

<sup>36</sup> *Yamataya v. Fisher* (Japanese Immigrant Case), 189 U.S. 86, 87, 98 (1903).

<sup>37</sup> *Id.* at 100.

<sup>38</sup> *Id.* at 101.

<sup>39</sup> *See United States ex rel. Volpe v. Smith*, 289 U.S. 422, 423–26 (1933) (holding that an LPR who was reentering the country after a brief visit abroad could be excluded, despite his twenty-four-year LPR status because as long as an alien was at the port of entry, the government could exclude him); *see also Lem Moon Sing v. United States*, 158 U.S. 538, 547–48 (1895).

<sup>40</sup> 345 U.S. 206, 208, 213–15 (1953). For an alien seeking to enter, “[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.” *Id.* at 212 (quoting *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950)).

### B. Mid-Twentieth Century to 1996

As a result of the often cruel effects of denying constitutional rights to long-term residents attempting to reenter, the Court began focusing on an alien's stake in the United States when determining constitutional protection. Just ten years after *Mezei*, the Court redefined reentry in *Rosenberg v. Fleuti*, holding that an LPR who left the country for an "innocent, casual, and brief" trip was entitled to the same constitutional rights upon reentry that he would receive if he were present in the United States.<sup>41</sup> The Court was simply unwilling to overlook the alien's stake, highlighting the reentry doctrine's grievous effects for LPRs.<sup>42</sup> Importantly, the Court decided *Fleuti* on statutory grounds, reasoning that the definition of "entry" in the Immigration and Nationality Act of 1952 was intended "to ameliorate the severe effects of the strict entry doctrine."<sup>43</sup>

By 1982, *Landon v. Plasencia* fully embraced the stake theory to determine the due process rights of an LPR reentering the country.<sup>44</sup> Plasencia was returning from a short trip to Mexico when she was detained at the border for attempting to smuggle six unauthorized aliens into the country.<sup>45</sup> Following an exclusion hearing before an immigration judge, she was ordered "excluded and deported."<sup>46</sup> Rather than relying on statutory interpretation as in *Fleuti*, the Court held that Plasencia was constitutionally entitled to due process because her trip to Mexico was brief and, as an LPR, her stake was "weighty."<sup>47</sup>

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<sup>41</sup> 374 U.S. 449, 460–62 (1963).

<sup>42</sup> See *id.* at 460 ("What we face here is another harsh consequence of the strict 'entry' doctrine . . . . Certainly when an alien like Fleuti who has entered the country lawfully and has acquired a residence here steps across a border and, in effect, steps right back, subjecting him to exclusion for a condition for which he could not have been deported had he remained in the country seems to be placing him at the mercy of the 'sport of chance' and the 'meaningless and irrational hazards' . . . ." (quoting *Di Pasquale v. Karnuth*, 158 F.2d 878, 879 (2d Cir. 1947))); see also Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 577 (1990) ("In large part, the majority's *Fleuti* opinion . . . evinces sympathy for the view that immigration law inadequately recognized a permanent resident's stake in remaining in the United States.").

<sup>43</sup> 374 U.S. at 461–62 (internal quotation marks omitted).

<sup>44</sup> 459 U.S. 21 (1982); see John L. Pollock, Note, *Missing "Persons": Expedited Removal, Fong Yue Ting, and the Fifth Amendment*, 41 ARIZ. L. REV. 1109, 1115 (1999) ("The Court in *Plasencia* endorsed the idea that constitutional status in the immigration context should depend on more than just geographic location."). Under the location theory, she would be an alien entering the country, and thus entitled to almost no due process; under the stake theory, she would be entitled to much greater due process based on her status as an LPR. See *Plasencia*, 459 U.S. at 32–35.

<sup>45</sup> *Plasencia*, 459 U.S. at 23.

<sup>46</sup> *Id.* at 24–25 (internal quotation marks omitted).

<sup>47</sup> *Id.* at 34 (noting she could "lose the right to stay and live and work in this land of freedom," and "the right to rejoin her immediate family" (internal quotation marks omitted)).

Redefining the reentry doctrine is emblematic of the Court's shift toward the stake theory throughout the last half of the twentieth century.<sup>48</sup> In 1950, the Court began describing aliens' constitutional rights in terms of a sliding scale—the deeper the alien's ties to the country, the more rights he is afforded:

The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization.<sup>49</sup>

Consequently, LPRs present for many years and with strong ties to the United States are afforded the most constitutional rights—the core of the stake theory.

The sliding scale underlies the Court's holdings that Congress can treat classes of aliens differently. For example, *Mathews v. Diaz* upheld a statute providing welfare benefits to LPRs but not other aliens.<sup>50</sup> Despite acknowledging that the Due Process Clause protects every person within the country's jurisdiction,<sup>51</sup> the Court reasoned that Congress could treat LPRs differently from other aliens because only LPRs had a sufficient stake.<sup>52</sup> Continuing this theme, *United States v. Verdugo-Urquidez* held that the Fourth Amendment “refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.”<sup>53</sup> The respondent, a Mexican resident and citizen, was imprisoned in the

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<sup>48</sup> See Motomura, *supra* note 42, at 575 (“In the past twenty-five years, one key aspect of the movement away from classical immigration law has been an increasing acceptance of the view that an alien's constitutional status when challenging immigration statutes should depend on more than just her geographic location. A returning permanent resident, even if outside the United States, typically has ties or a ‘stake’ here that merit more exacting constitutional scrutiny than that available to first-time entrants.”); T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENT. 9, 9–10 (1990).

<sup>49</sup> *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950).

<sup>50</sup> 426 U.S. 67 (1976).

<sup>51</sup> *Id.* at 77.

<sup>52</sup> See *id.* at 80 (“The decision to share that bounty with our guests may take into account the character of the relationship between the alien and this country: Congress may decide that as the alien's tie grows stronger, so does the strength of his claim to an equal share of that munificence.”).

<sup>53</sup> 494 U.S. 259, 265 (1990). The majority opinion distinguished the Fourth Amendment based on its text and history, but noted in dicta that the analysis “suggests” the same is true for “the people” in the First Amendment. *Id.* at 265–67. But see *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 497 (1999) (Ginsburg, J., concurring) (“It is well settled that ‘[f]reedom of speech and of press is accorded aliens residing in this country.’” (alteration in original) (quoting *Bridges v. Wixon*, 326 U.S. 135, 148 (1945))).

United States when U.S. officials searched the respondent's house in Mexico.<sup>54</sup> The opinion disregarded that the alien in question was located in the United States, instead emphasizing that because he was imprisoned here involuntarily he had no stake.<sup>55</sup>

### C. From 1996 to Today

The rising number of undocumented aliens presented significant problems for both the stake and location theories.<sup>56</sup> Prior to 1996, undocumented aliens were removed after a deportation hearing, which provided greater due process than an exclusion hearing.<sup>57</sup> Focusing on territoriality meant that aliens who successfully evaded authorities were granted more rights than those who lawfully attempted to enter but were stopped at the border. Opponents of the location theory protested that this effectively rewarded aliens for breaking the law.<sup>58</sup> Meanwhile, the stake theory also contained an awkward tension: even though undocumented aliens had no *lawful* stake in the country, they often had developed substantial ties and connections to society after living here many years.<sup>59</sup>

In September 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA),<sup>60</sup> which effectively overruled the entry doctrine. First, it changed the reentry rule for LPRs so that an LPR returning from abroad would no longer “be regarded as seeking an admission into the United States” unless one of six exceptions applied.<sup>61</sup> This change ensured that LPRs would receive substantially more due process, reflecting the recent emphasis on stake. Second, and more

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<sup>54</sup> See *Verdugo-Urquidez*, 494 U.S. at 262, 271–72.

<sup>55</sup> See *id.* at 273–75 (“[R]espondent had no voluntary connection with this country that might place him among ‘the people’ of the United States.”). The Court was careful to point out that its reasoning did not necessarily apply to aliens residing in the United States voluntarily and unlawfully. See *id.* at 272–73.

<sup>56</sup> See Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 44 (1984) (“The challenge that this development poses to the continued coherence and integrity of classical immigration law can scarcely be exaggerated. Just as the hard facts of hopelessly porous borders demand a new understanding of sovereignty, the reality of undocumented aliens’ humanity and their steady integration into communal life here undermines some of the traditional conceptions that that law reflected. New ‘social contracts’ between these aliens and American society are being negotiated each day, and these cannot easily be nullified with invocations of sovereignty, as classically understood.”).

<sup>57</sup> David M. Grable, Note, *Personhood Under the Due Process Clause: A Constitutional Analysis of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 83 CORNELL L. REV. 820, 821, 823 (1998).

<sup>58</sup> See David A. Martin, *Two Cheers for Expedited Removal in the New Immigration Laws*, 40 VA. J. INT’L L. 673, 689–90 (2000).

<sup>59</sup> See Schuck, *supra* note 56, at 43–44.

<sup>60</sup> Pub L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 U.S.C. §§ 1-1778 (2012)).

<sup>61</sup> See § 1101(a)(13)(C).

importantly, IIRIRA changed the previous categories of excludable aliens (those at the border) and deportable aliens (those present in the country) to two new categories: deportable aliens and inadmissible aliens.<sup>62</sup> The distinction hinges on whether an alien has been inspected and admitted (i.e., has entered legally).<sup>63</sup> If an alien has been inspected and admitted, he is deportable; if he has not, he is effectively considered at the border—regardless of his actual location—and is inadmissible.

Third, IIRIRA created a new procedure called expedited removal, which grants immigration officers the authority to remove an alien from the United States if they “determine[] that an alien . . . is inadmissible.”<sup>64</sup> Expedited removal, rather than deportation, applies to all arriving aliens and to aliens apprehended within the country who have not “affirmatively shown” that they have been physically present in the country for at least two years.<sup>65</sup> The decision that an alien is subject to expedited removal “shall be in the sole and unreviewable discretion of the Attorney General.”<sup>66</sup> Consequently, an alien who has illegally entered the United States within the past two years can be removed without due process.

The shift from entrance to admission plays an important role in the Court’s plenary power jurisprudence.<sup>67</sup> Under the location theory, an alien present in the United States would be entitled to due process regardless of whether he was present lawfully or unlawfully.<sup>68</sup> To be clear, unlawful aliens could still be deported—they just would have to receive due process before being deported. However, IIRIRA created a legal fiction in which aliens present in the United States but who entered illegally are effectively considered as if they are at the border.<sup>69</sup>

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<sup>62</sup> See *id.* § 1229a(e)(2); Pollock, *supra* note 44, at 1110–11. For the list of inadmissible aliens, see 8 U.S.C. § 1182(a). For the list of reasons or actions making aliens deportable, see § 1227(a) (grounds of deportability for LPRs), and § 1227(b) (deportation of certain nonimmigrants).

<sup>63</sup> “Admission” is defined as “the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.” 8 U.S.C. § 1101(a)(13)(A).

<sup>64</sup> *Id.* § 1225(b)(1)(A)(i). Aliens claiming asylum are not subject to expedited removal. *Id.*

<sup>65</sup> *Id.* § 1225(b)(1)(A)(iii)(II). In 2004, the Department of Homeland Security announced that it would subject all inadmissible aliens encountered within 100 miles of a border to expedited removal, unless they could “establish[] to the satisfaction of an immigration officer that they have been physically present in the U.S. continuously” for fourteen days. Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877 (Aug. 11, 2004).

<sup>66</sup> § 1225(b)(1)(A)(iii)(I).

<sup>67</sup> Expedited removal has been criticized by many commentators. See, e.g., Grable, *supra* note 57; Pollock, *supra* note 44. For an analysis of IIRIRA under both the stake and location theories, see Grable, *supra* note 57, at 833–53.

<sup>68</sup> See Grable, *supra* note 57, at 835–36. While Justice Brewer’s dissent in *Fong Yue Ting* left open the question of legality, see *supra* note 31 and accompanying text, the *Japanese Immigrant Case* conclusively held that aliens unlawfully present were still entitled to due process before deportation, see *supra* notes 36–38 and accompanying text.

<sup>69</sup> See Grable, *supra* note 57, at 836.

By emphasizing admission instead of entry, IIRIRA provides prudential reasons for using the stake theory to not grant the full panoply of rights to aliens here unlawfully. Specifically, IIRIRA affords due process depending on the length of an alien's residence and the legality of his entry.<sup>70</sup> In turn, "[t]hese criteria reflect a moral judgment that the United States should not reward illegally entering aliens with a hearing, unless they have lived here long enough to develop the close ties associated with long-term residence."<sup>71</sup>

As a result, when employing the stake theory some commentators have focused on the fact that because an alien is present unlawfully they cannot be entitled to any stake.<sup>72</sup> Others have argued that the stake theory should assess the constitutional protection afforded an unlawful alien by focusing on the strength of their ties to the national community regardless of the illegality of their entry.<sup>73</sup> This discrepancy highlights an initial problem with the stake theory, namely that it is inherently a subjective analysis. Moreover, it is puzzling to grant constitutional protection based on one's stake or certain criteria that evince a connection to the national community, but then ignore those indicia solely because the alien entered illegally.

Two important cases arose in the early 2000s about the due process rights of noncitizens that demonstrate the current tension between the two theories. In *Zadvydas v. Davis*, the Court considered the constitutionality of a statute permitting an alien ordered removed to be detained indefinitely if the government could not secure his removal.<sup>74</sup> The majority opinion stressed that the detained alien was located within the territorial jurisdiction of the country, describing it as "well established" that such aliens were entitled to greater constitutional protection.<sup>75</sup> Therefore, because the alien

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<sup>70</sup> See Dulce Foster, Note, *Judge, Jury and Executioner: INS Summary-Exclusion Power Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 82 MINN. L. REV. 209, 226 (1997).

<sup>71</sup> *Id.* at 237.

<sup>72</sup> See David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 230–34 (1983).

<sup>73</sup> See Martin, *supra* note 58, at 690 ("[Entrants without inspection (EWIs)] as a class are more likely to have established ties to the community during their time in the country. Because those ties were illicitly obtained and must have been known by their holders to carry a deep vulnerability, perhaps they should be discounted somewhat in the due process calculus. But they are not weightless, and it would be unfortunate if the Court were to act as though EWIs have no greater interests than first-time applicants for admission at the border."); Grable, *supra* note 57, at 838–45.

<sup>74</sup> 533 U.S. 678 (2001). Usually, this occurred when the alien's home country refused to accept them back. Ultimately, the Court read into the statute "an implicit 'reasonable time' limitation," such that aliens could be detained only for a reasonable time, not indefinitely. *Id.* at 682.

<sup>75</sup> *Id.* at 693. Despite IIRIRA's emphasis on admission, not entry, the majority opinion contended that "[t]he distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law." *Id.* The key is that "once an alien enters the

was located in the country he was entitled to due process regardless of his stake. Justice Scalia dissented, claiming that the case “is at bottom a claimed right of release into this country by an individual who *concededly* has no legal right to be here.”<sup>76</sup> To Justice Scalia, the focus was not on the alien’s location, but rather on his lack of a lawful stake because he was already ordered deported.<sup>77</sup>

Two years later, the Court upheld a statute subjecting all aliens convicted of a crime to mandatory detention without individualized bond hearings, pending their deportation proceedings.<sup>78</sup> Justice Souter dissented, chastising the majority for ignoring that the respondent was an LPR.<sup>79</sup> He claimed LPRs were entitled to greater constitutional protection than nonimmigrants because “their lives are generally indistinguishable from those of United States citizens.”<sup>80</sup> Ultimately, he contended that LPRs are entitled to greater constitutional protection than nonimmigrants and therefore the government had to provide LPRs an individualized hearing.<sup>81</sup>

The foregoing analysis demonstrates that the currently accepted view is that as an alien’s stake grows larger, she is entitled to more constitutional protection. However, what is unclear is why: perhaps an alien becomes more deserving of protection as she develops stronger ties.<sup>82</sup> Alternatively, as an alien develops ties the Court may simply become increasingly alarmed at permitting Congress to employ methods that would be unconstitutional if applied to citizens.<sup>83</sup> Relying on stake rather than

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country, the legal circumstance changes, for the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.” *Id.*

<sup>76</sup> *Id.* at 703 (Scalia, J., dissenting).

<sup>77</sup> *Id.* (“Insofar as a claimed legal right to release into this country is concerned, an alien under final order of removal stands on an equal footing with an inadmissible alien at the threshold of entry: He has no such right.”).

<sup>78</sup> *Demore v. Kim*, 538 U.S. 510, 527–31 (2003).

<sup>79</sup> *Id.* at 540–41 (Souter, J., concurring in part and dissenting in part).

<sup>80</sup> *Id.* at 544. He did attempt to marry the two theories by pointing out that “all aliens within our territory are ‘persons’ entitled to the protection of the Due Process Clause,” but LPRs have a “particularly strong” claim to “[t]he constitutional protection of . . . person and property.” *Id.* at 543–44.

<sup>81</sup> *Id.* at 547.

<sup>82</sup> Compare *Martin*, *supra* note 72 (proposing that constitutional rights should be based on “membership in the national community”), with T. Alexander Aleinikoff, *Aliens, Due Process, and “Community Ties”: A Response to Martin*, 44 U. PITT. L. REV. 237, 242–44 (1983) (rebuffing membership as a criteria for determining which aliens deserve which rights as “inadequate” and dismissing a theory of reliance to explain membership).

<sup>83</sup> Cf. Aleinikoff, *supra* note 48, at 19 (“Ultimately, it appears that the two lines of cases are not part of a coherent whole, but rather reflect conflicting strands in our constitutionalism: one concerned with affirming the importance of membership in a national community; the other pursuing a notion of fundamental human rights that protects individuals regardless of their status.”).

location to determine First Amendment protection, however, accords the government far-reaching power to limit freedom of speech.

## II. INDEPENDENT EXPENDITURES AND THE FIRST AMENDMENT

The Supreme Court's jurisprudence on independent expenditures has emphasized two interrelated ideas. First, the Court has stressed the irrelevance of the speaker's identity to determine First Amendment protection, maintaining that censorship of disfavored speakers contravenes the First Amendment. Second, the Court has repeatedly evoked the value of the marketplace of ideas. These principles intersect because governmental censorship, whether based on the speech's content or the speaker's identity, interferes with the marketplace by preventing the free flow of ideas.

### A. *Independent Expenditures as Speech*

The landmark case *Buckley v. Valeo* evaluated the campaign finance restrictions in the Federal Election Campaign Act of 1971, as amended in 1974.<sup>84</sup> As a preliminary matter, the Court underscored that the expenditure limits impinged upon an individual's freedom of association and expression.<sup>85</sup> Crucially, the Court declared that independent expenditures are political speech, regardless of the fact that money had to be spent.<sup>86</sup> For that reason, expenditures were just as "entitled to protection under the First Amendment . . . [as] the discussion of political policy generally,"<sup>87</sup> specifically strict scrutiny.

The Court rebuffed all of the government's proffered interests to limit political speech. First, the Court rejected any "interest in preventing corruption and the appearance of corruption"<sup>88</sup> on the grounds that the limits only prevented some types of expenditures and that independent expenditures were not coordinated with the candidate.<sup>89</sup> Second, the Court dismissed the interest "in equalizing the relative ability of individuals and groups to influence the outcome of elections."<sup>90</sup> In particular, the Court reasoned that such an antidistortion justification was improper because the First Amendment was "designed 'to secure the widest possible

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<sup>84</sup> 424 U.S. 1 (1976) (per curiam).

<sup>85</sup> *Id.* at 19, 22.

<sup>86</sup> *See id.* at 15–19 ("[T]his Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment.")

<sup>87</sup> *Id.* at 48.

<sup>88</sup> *Id.* at 45.

<sup>89</sup> *Id.* at 45–48. The interest in preventing corruption was sufficient to justify limits on contributions, but without coordination with the candidate, the Court reasoned independent expenditures simply could not have the same corruptive influence as contributions. *Id.*

<sup>90</sup> *Id.* at 48–49.

dissemination of information from diverse and antagonistic sources,’ and ‘to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’”<sup>91</sup> As a corollary, the Court contended that First Amendment protection could not turn on certain characteristics of the speaker, such as wealth.<sup>92</sup> Ultimately, the limits on independent expenditures were invalidated because the Government had no compelling interest and the limits too heavily burdened political speech.<sup>93</sup>

Almost fifteen years later, the Court considered the constitutionality of a state ban on corporate independent expenditures in *Austin v. Michigan State Chamber of Commerce*.<sup>94</sup> *Austin* reaffirmed that “the use of funds to support a political candidate is ‘speech’” and that independent expenditures “constitute ‘political expression at the core of our electoral process and of the First Amendment freedoms.’”<sup>95</sup> Furthermore, it explained that corporations were entitled to First Amendment protection.<sup>96</sup> The limits were upheld, though based on an antidistortion rationale despite *Buckley*’s rejection of an antidistortion interest for individuals; the Court reasoned that corporations would distort the political process as a result of their “state-conferred,” overwhelming financial resources.<sup>97</sup>

In 2010, *Citizens United* overruled *Austin*, concluding that “[n]o sufficient governmental interest justifies limits on the political speech of . . . corporations.”<sup>98</sup> The Court began by holding as a matter of law that “independent expenditures . . . do not give rise to corruption or the appearance of corruption.”<sup>99</sup> Next, it overruled *Austin*’s antidistortion rationale because “the Government may not suppress political speech on the basis of the speaker’s corporate identity.”<sup>100</sup> As further justification, the Court reasoned that restricting certain speakers “interferes with the ‘open marketplace’ of ideas protected by the First Amendment.”<sup>101</sup> The Court

<sup>91</sup> *Id.* at 49 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266, 269 (1964)) (internal quotation marks omitted).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 48–51.

<sup>94</sup> 494 U.S. 652 (1990).

<sup>95</sup> *Id.* at 657 (quoting *Buckley*, 424 U.S. at 39) (internal quotation marks omitted).

<sup>96</sup> *Id.* (“The mere fact that the Chamber is a corporation does not remove its speech from the ambit of the First Amendment.” (citing *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 777 (1978))).

<sup>97</sup> *Id.* at 658–60.

<sup>98</sup> *Citizens United v. FEC*, 558 U.S. 310, 365 (2010).

<sup>99</sup> *Id.* at 357.

<sup>100</sup> *Id.* at 365. Several commentators have argued that the ban on foreign nationals is based on an antidistortion rationale, and should be invalid based on *Citizens United*’s reasoning. See Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 608 (2011); Toni M. Massaro, *Foreign Nationals, Electoral Spending, and the First Amendment*, 34 HARV. J.L. & PUB. POL’Y 663, 687 (2011).

<sup>101</sup> *Citizens United*, 558 U.S. at 354.

warned that banning corporate independent expenditures—which it equated to “censorship”—would cause “the electorate [to be] deprived of information, knowledge and opinion vital to its function.”<sup>102</sup> Thus, the majority grounded its opinion on two principles: that the speaker’s identity should not determine whether the government can censor the speaker’s speech, and that such censorship impermissibly interferes with the marketplace of ideas.

### B. Bans Based on the Speaker’s Identity

*Citizens United* instructed that the First Amendment prohibits Congress from criminalizing political speech on the basis of a speaker’s identity; put simply, political speech is political speech no matter who is speaking it.<sup>103</sup> Because the First Amendment is “[p]remised on mistrust of governmental power,” the Court rebuffed the idea that the Government could be given an “instrument[] to censor” speech on the basis of the speaker’s identity; such censorship would be antithetical to the First Amendment precisely because “[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content.”<sup>104</sup> Consequently, “[t]he First Amendment protects speech and speaker, and the ideas that flow from each.”<sup>105</sup>

### C. The Marketplace of Ideas

Censoring speech, whether because of content or identity, interferes with the marketplace of ideas.<sup>106</sup> Justice Holmes introduced the marketplace of ideas concept in his dissent in *Abrams v. United States*, a case involving five alien defendants.<sup>107</sup> He argued that disfavored ideas should not be

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<sup>102</sup> *Id.* (quoting *United States v. Cong. of Indus. Orgs.*, 335 U.S. 106, 144 (1948) (Rutledge, J., concurring in result)).

<sup>103</sup> *See id.* at 350 (“[T]he First Amendment generally prohibits the suppression of political speech based on the speaker’s identity.”); *id.* at 341 (rejecting “the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers”); *id.* at 340 (“[T]he First Amendment stands against attempts to disfavor certain subjects or viewpoints. Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others.” (citation omitted)); *id.* at 393 (Scalia, J., concurring) (“[The] nature [of political speech] does not change simply because it was funded by a corporation. Nor does the character of that funding produce any reduction whatever in the ‘inherent worth of the speech’ and ‘its capacity for informing the public.’” (quoting *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 777 (1978))).

<sup>104</sup> *Id.* at 340 (majority opinion).

<sup>105</sup> *Id.* at 341; *accord id.* at 376 (Roberts, C.J., concurring) (“The text and purpose of the First Amendment point in the same direction: Congress may not prohibit political speech, even if the speaker is a corporation or union.”); *id.* at 392–93 (Scalia, J., concurring) (“The Amendment is written in terms of ‘speech,’ not speakers. Its text offers no foothold for excluding any category of speaker . . .”).

<sup>106</sup> *Id.* at 348–56 (majority opinion).

<sup>107</sup> 250 U.S. 616, 617 (1919). As another commentator points out, “Strangely, the Supreme Court’s analysis does not address the relevance, if any, of this fact.” Robert Plotkin, *First Amendment*

prohibited, but instead included in the “free trade in ideas” because “the best test of truth is the power of the thought to get itself accepted in the competition of the market.”<sup>108</sup>

The Court has embraced the marketplace of ideas in its campaign finance jurisprudence. Political debate must be open so that citizens can be fully informed of all views:

[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate. But if there be any danger that the people cannot evaluate the information and arguments advanced by appellants, it is a danger contemplated by the Framers of the First Amendment.<sup>109</sup>

Censorship through expenditure limitations is unnecessary because in the market the best ideas will rise to the top, and the worst will fall into oblivion.

*Citizens United* wholeheartedly endorsed the marketplace of ideas, taking a strong pro-information stance.<sup>110</sup> The Court contended that expenditure limitations are particularly suspect because they directly regulate political speech, “necessarily reduc[ing] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.”<sup>111</sup> In our representative democracy, it is essential that the citizenry can receive information regarding elected officials from a variety of sources.<sup>112</sup>

Moreover, empowering the government to censor and control the speech that voters are allowed to hear is incompatible with the First Amendment.<sup>113</sup> Instead of governmental censorship, the marketplace is best equipped to deal with disfavored speakers’ ideas.<sup>114</sup> Prohibiting speech not

*Challenges to the Membership and Advocacy Provisions of the Antiterrorism and Effective Death Penalty Act of 1996*, 10 GEO. IMMIGR. L.J. 623, 628 n.40 (1996).

<sup>108</sup> *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

<sup>109</sup> *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 791–92 (1978) (footnotes omitted).

<sup>110</sup> Massaro, *supra* note 100, at 684.

<sup>111</sup> *Citizens United*, 558 U.S. at 339 (quoting *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (per curiam)).

<sup>112</sup> *Id.* at 341.

<sup>113</sup> *See id.* at 356; *Kleindienst v. Mandel*, 408 U.S. 753, 772 (1972) (Douglas, J., dissenting).

<sup>114</sup> *See, e.g.*, *Knox v. Serv. Emps. Int’l Union, Local 1000*, 132 S. Ct. 2277, 2288 (2012) (“The First Amendment creates ‘an open marketplace’ in which differing ideas about political, economic, and social issues can compete freely for public acceptance without improper government interference.” (quoting *N.Y. State Bd. of Elections v. López Torres*, 552 U.S. 196, 208 (2008))); *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2826 (2011) (“The First Amendment embodies our choice as a Nation that, when it comes to such speech, the guiding principle is freedom—the ‘unfettered interchange of ideas’—not whatever the State may view as fair.” (quoting *Buckley*, 424 U.S. at 14)); *N.Y. State Bd. of Elections*, 552 U.S. at 208 (“The First Amendment creates an open

only infringes upon an individual's right to political speech but also upon citizens' rights to hear such speech.<sup>115</sup> Citizens' First Amendment rights are abridged because "[t]he First Amendment involves not only the right to speak and publish but also the right to hear, to learn, to know."<sup>116</sup> Thus, censorship of certain foreign speakers affects the First Amendment rights of citizens as well.

### III. RECONCILIATION

The stake-based approach to aliens' constitutional rights and the First Amendment right to independent expenditures regardless of the speaker's identity are incompatible: an alien's stake is a product of his identity, but according to First Amendment principles the identity—or stake—of a speaker cannot determine whether Congress can deny his freedom of speech. Moreover, by granting Congress the power to censor certain aliens present in the United States,<sup>117</sup> the marketplace of ideas is arbitrarily capped and citizens' First Amendment rights risk infringement.

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marketplace where ideas, most especially political ideas, may compete without governmental interference."); *McConnell v. FEC*, 540 U.S. 93, 274 (2003) (opinion of Thomas, J.).

<sup>115</sup> See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50–51 (1988) ("At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern. The freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole." (internal quotation marks omitted)); *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776 (1978) ("The Constitution often protects interests broader than those of the party seeking their vindication. The First Amendment, in particular, serves significant societal interests. The proper question therefore is not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the statute] abridges expression that the First Amendment was meant to protect.").

<sup>116</sup> *Mandel*, 408 U.S. at 771 (Douglas, J., dissenting); *accord id.* at 775 (Marshall, J., dissenting); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("It is now well established that the Constitution protects the right to receive information and ideas. 'This freedom . . . necessarily protects the right to receive . . .' This right to receive information and ideas, regardless of their social worth, is fundamental to our free society." (second alteration in original) (citations omitted) (quoting *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943))).

<sup>117</sup> This Note focuses solely on the limits for individuals, or natural persons. The ban on foreign corporations presents intriguing questions but falls outside the scope of this Note. In particular, one would need to analyze the extent to which the plenary power permits the government to regulate corporations, and the extent to which a corporation's presence in the United States is sufficient. For example, if a foreign corporation has a subsidiary in the United States, can it make independent expenditures, or is only the subsidiary permitted to make them? Many commentators have already analyzed the issue of foreign corporations' rights to make independent expenditures post-*Citizens United*, reaching different conclusions. Compare Scott L. Friedman, Note, *First Amendment and "Foreign-Controlled" U.S. Corporations: Why Congress Ought to Affirm Domestic Subsidiaries' Corporate Political-Speech Rights*, 46 VAND. J. TRANSNAT'L L. 613 (2013) (arguing that following confusion stemming from *Citizens United*'s treatment of foreign corporations, Congress should accord domestic subsidiaries campaign finance rights), with Matt A. Vega, *The First Amendment Lost in Translation: Preventing Foreign Influence in U.S. Elections After Citizens United v. FEC*, 44 LOY. L.A.

These conflicting ideals collided in *Bluman v. FEC*, which upheld § 441e, the ban prohibiting lawful nonimmigrants from making independent expenditures.<sup>118</sup> The remainder of this Note explains § 441e in more detail and then demonstrate how *Bluman* effectively permitted the stake theory to override First Amendment principles. This Note concludes by proposing that the implied plenary power should not supersede the First Amendment freedom of speech guarantee. Consequently, when confronting an alien's First Amendment rights, the alien's location, and not stake, should be determinative because this approach is more faithful to the Amendment's text and underlying ideals.

*A. Section 441e, Bluman, and the Importance of Stake*

Section 441e<sup>119</sup> can trace its roots back to the Foreign Agents Registration Act of 1938, which required “agent[s] of a foreign principal” to register and disclose their identities if they were “engaging in propaganda activities.”<sup>120</sup> Campaign contributions by “an agent of a foreign principal” were first banned in 1966.<sup>121</sup> In 1974, Congress broadened the prohibition to cover all foreign nationals.<sup>122</sup>

Allegations of improper campaign contributions in the 1996 presidential election prompted Congress to conduct an investigation. The resulting Senate Report revealed that foreign officials had impermissibly donated money through straw men (i.e., U.S. citizens or LPRs).<sup>123</sup> The Senate Report recommended strengthening the ban because foreign contributions could lead to “an implicit *quid pro quo* arrangement.”<sup>124</sup>

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L. REV. 951 (2011) (contending that foreign corporations' campaign contributions and expenditures are not covered under the First Amendment and should be banned by Congress).

<sup>118</sup> 800 F. Supp. 2d 281 (D.D.C. 2011), *aff'd*, 132 S. Ct. 1087 (2012).

<sup>119</sup> 2 U.S.C. § 441e (2012).

<sup>120</sup> Pub L. No. 77-532, 56 Stat. 248, 248–49 (1942) (codified as amended at 22 U.S.C. §§ 611–616 (2012)). An “agent of a foreign principal” was defined as “any person who acts or agrees to act, within the United States, as, or who is or holds himself out to be . . . a public-relations counsel, publicity agent, information-service employee, servant, agent, representative, or attorney for a foreign principal.” *Id.* at 249.

<sup>121</sup> Pub L. No. 89-486, 80 Stat. 244, 248 (1966) (codified as amended at 22 U.S.C. §§ 611–621). Agents were prohibited from contributing either directly or through straw men. *Id.*

<sup>122</sup> Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified as amended in relevant part at 2 U.S.C. §§ 431–455 (2012)).

<sup>123</sup> 1 Investigation of Illegal or Improper Activities in Connection with 1996 Federal Election Campaigns, S. REP. NO. 105-167, at 20–21 (1998).

<sup>124</sup> *Id.* at 22; *see also id.* at 33 (“[T]he danger [of foreign contributions is] that powerful foreign nationals, or even governments, would attempt to buy influence through campaign contributions.”). However, the Court has held not only that preventing corruption is not a sufficient governmental interest to prohibit campaign expenditures (as opposed to contributions), but also that, as a matter of law, independent expenditures do not give rise to corruption. *See supra* notes 98–99 and accompanying text. It is worth emphasizing that *Citizens United* did not hold that *corporate* independent expenditures

Congress did so when it enacted the Bipartisan Campaign Reform Act<sup>125</sup> a few years later: § 441e now prohibits all noncitizens, except LPRs, from contributing to any federal, state, or local election, and from making any expenditure in support of or in opposition to any candidate.<sup>126</sup>

Section 441e was upheld in *Bluman v. FEC*.<sup>127</sup> Judge Kavanaugh, writing for the three-judge district court panel, claimed the “First Amendment issues raised” in *Citizens United* and *Buckley* were not “implicate[d]” by § 441e;<sup>128</sup> instead, § 441e centered on the “preliminary and foundational question about the definition of the American political community.”<sup>129</sup> Because contributions and express advocacy expenditures “are part of the overall process of democratic self-government,”<sup>130</sup> Congress could ban aliens from making them.<sup>131</sup> Put simply, the court determined the extent of the speaker’s First Amendment protection based on whether the speaker is part of the community. Consequently, the speaker’s identity, a result of his insufficient stake, justifies a ban on political speech—the antithesis of the reasoning in *Citizens United*.

Curiously, *Citizens United* mentioned § 441e briefly to state that the Court “need not reach the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation’s political process.”<sup>132</sup> Directly tying it to the ban on corporate expenditures suggests that § 441e *does* in fact raise those First Amendment issues. Moreover, whereas bans on independent expenditures are analyzed under strict scrutiny, federal laws regulating immigration are analyzed under rational basis because of the plenary power.<sup>133</sup> However,

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do not lead to corruption, but rather that *no* independent expenditures do. Thus, to hold that foreign independent expenditures are somehow corruptive would require overturning *Citizens United*.

<sup>125</sup> Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified at 2 U.S.C. §§ 431–455).

<sup>126</sup> 2 U.S.C. § 441e(a). One of the reasons LPRs were specifically excluded from the prohibition was that “[l]egal permanent residents have a stake in the future of America, and should be allowed to voice their support for candidates and be assured a part in the political process.” 144 Cong. Rec. 5158 (Mar. 30, 1998) (statement of Rep. Mink).

<sup>127</sup> 800 F. Supp. 2d 281 (D.D.C. 2011), *aff’d*, 132 S. Ct. 1087 (2012).

<sup>128</sup> *Id.* at 286 (citing *Citizens United v. FEC*, 558 U.S. 310 (2010); *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam)).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 288. The court’s reference to the overall process of democratic self-government stems from the Supreme Court’s line of equal protection cases carving out an exception to its strict scrutiny analysis of state laws distinguishing between citizens and aliens for classifications that “deal with matters resting firmly within a State’s constitutional prerogatives.” See *Sugarman v. Dougall*, 413 U.S. 634, 648 (1973). Thus, “a State may deny aliens the right to vote, or to run for elective office, for these lie at the heart of our political institutions.” *Foley v. Connelie*, 435 U.S. 291, 296 (1978).

<sup>131</sup> *Bluman*, 800 F. Supp. 2d at 288.

<sup>132</sup> 558 U.S. at 362.

<sup>133</sup> See *Mathews v. Diaz*, 426 U.S. 67, 86–87 (1976).

*Citizens United* hinted that § 441e should be analyzed under strict scrutiny by referring to a “compelling interest,” further suggesting that § 441e raises the same First Amendment issues.<sup>134</sup>

*Bluman* also rejected the plaintiffs’ argument that “the right to *speak* about elections is different from the right to *participate* in elections” because this expressive act, namely making contributions or expenditures, “is both speech and participation in democratic self-government.”<sup>135</sup> But, the opinion conflated speaking about elections (i.e., independent expenditures) with participating in elections (i.e., voting or running for office). It did not adequately explain why it deviated from prior holdings that independent expenditures are the equivalent of political speech and fully protected by the First Amendment *regardless* of their potential participation element.<sup>136</sup> To be sure, the Constitution expressly prohibits aliens from serving in many federal offices;<sup>137</sup> however, the right to speak in favor of candidates that will be creating and enforcing the laws that nonimmigrants are obligated to follow is far different. In fact, without a vote, independent expenditures are the only way aliens can reasonably hope to have “a meaningful voice in the political bargains that govern their everyday lives.”<sup>138</sup>

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<sup>134</sup> See 558 U.S. at 362.

<sup>135</sup> 800 F. Supp. 2d at 289. As proof, the court cited a footnote in *Bellotti* supporting a ban on corporate independent expenditures because they could lead to corruption. *Id.* at 290 (citing First Nat’l Bank of Bos. v. Bellotti, 435 U.S. 765, 788 n.26 (1978)). But that footnote was expressly overruled in *Citizens United*. See 558 U.S. at 356–60. Moreover, *Bellotti* held that independent expenditures *were* political speech and that spending money in order to effect speech does not change the fundamental nature of political speech. See 435 U.S. at 777.

<sup>136</sup> See 144 Cong. Rec. 5159 (Mar. 30, 1998) (Law Professors’ Letter on Campaign Finance Reform and the Rights of Legal Permanent Residents) (“The right to vote and the right to speak on political matters are, for constitutional purposes, distinct. . . . The right to speak is not limited to those who have the right to vote. Everybody can participate in the marketplace of ideas regardless of whether they can vote, and the voices of LPRs, like those of the members of every segment of our society, only contribute to the variety that marketplace has offer.”); Eugene Volokh, *Supreme Court Upholds Ban on Candidate Campaign Contributions and Expenditures by Non-permanent-resident Foreign Citizens*, THE VOLOKH CONSPIRACY (Jan. 10, 2012, 6:57 PM), <http://www.volokh.com/2012/01/10/supreme-court-upholds-ban-on-candidate-campaign-contributions-and-expenditures-by-non-permanent-resident-foreign-citizens/> [http://perma.cc/ANS2-RMDM] (“[T]he right to speak about any subject—including about candidates—using one’s own money (or the money that one’s organization has put at one’s disposal) is indeed the exercise of free speech, and can’t be limited on the grounds that it constitutes participation in elections. That one can’t participate in an election by voting shouldn’t stop one from participating in public debate (including debate about who should be elected) by speaking.”); *supra* notes 86–88.

<sup>137</sup> See U.S. CONST. art. I, § 2, cl. 2 (Representatives must have been a citizen for at least seven years); U.S. CONST. art. I, § 3, cl. 3 (Senators must have been a citizen for at least nine years); U.S. CONST. art. II, § 1, cl. 5 (President must be a “natural born Citizen”).

<sup>138</sup> David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?*, 25 T. JEFFERSON L. REV. 367, 375–76 (2003).

Most importantly, *Bluman*'s sweeping embrace of stake's importance allowed the stake analysis to permeate First Amendment jurisprudence. The court claimed the plaintiff's concession that "the government may bar foreign citizens *abroad* from making contributions or express-advocacy expenditures in U.S. elections" proved the government could make distinctions based on the speakers' identity.<sup>139</sup> But rather than confront the issue about territoriality—and whether there was a constitutional difference in restraining First Amendment rights based on the location of the speaker—the court instead assumed that stake should determine First Amendment protection.

*Bluman* further contended that § 441e's exception permitting LPRs to make expenditures was warranted because they have "a different relationship to the American political community" than nonimmigrants do.<sup>140</sup> Specifically, LPRs "have a long-term stake in the flourishing of American society, whereas temporary resident foreign citizens by definition have only a short-term interest in the national community."<sup>141</sup> Because LPRs have a weightier stake, the court warned that extending the ban to LPRs would "raise substantial questions" about its constitutionality that were not present when only applied to nonimmigrants.<sup>142</sup> Finally, the court claimed that nonimmigrants have less of a stake because they "by definition have primary loyalty to other national political communities."<sup>143</sup>

### B. *The First Amendment and Stake Theory*

Focusing on stake to determine an alien's First Amendment protection raises numerous problems, which *Bluman* glossed over: the stake theory ignores the realities of an alien's stake; applying the stake theory to determine whether an alien is entitled to freedom of speech is incompatible with the text and underlying values of the First Amendment; and finally, it permits the government to restrict what information the citizenry can hear from aliens present in the United States, thereby interfering with the marketplace of ideas. This Section examines those problems.

*I. Stake Analysis Versus Actual Stake.*—First, because the stake theory does not adequately assess an individual's stake, constitutional protection is provided based solely on the statutory classification that Congress provides—not on the alien's actual stake. As a consequence, while aliens and citizens are obligated to follow the laws to the same

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<sup>139</sup> 800 F. Supp. 2d at 289.

<sup>140</sup> *Id.* at 290–91.

<sup>141</sup> *Id.* at 291.

<sup>142</sup> *Id.* at 292.

<sup>143</sup> *Id.* at 291. The court did not address the fact that LPRs and nonimmigrants *all* have primary loyalty to their country of citizenship.

extent, nonimmigrants are not entitled to full constitutional protection.<sup>144</sup> Moreover, “temporary” nonimmigrants are not really so temporary—and although LPRs are entitled to stay here indefinitely, nothing requires that they do.<sup>145</sup>

Additionally, many nonimmigrants are expressly permitted to have dual intent, meaning they can come on a nonimmigrant visa while fully intending to apply to become an LPR.<sup>146</sup> Dual intent raises doubts about the LPR–nonimmigrant distinction because it demonstrates that at least some nonimmigrants intend to stay here permanently or at least long enough to develop a sufficient stake and loyalty to the United States. Additionally, aliens granted asylum are statutorily classified as nonimmigrants despite being permitted to stay here indefinitely.<sup>147</sup> Thus, nonimmigrants can be here for many years and develop substantial connections to the United States while on temporary visas. Under the stake theory it could be argued that although a nonimmigrant may intend to become an LPR he has not really put down sufficient roots to have a weighty stake. But under this conception, an LPR who has just arrived is considered to have a weightier

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<sup>144</sup> James Madison pointed this out while arguing against the Alien and Sedition Acts, and his argument is just as true today as it was then:

Again, it is said, that aliens not being parties to the Constitution, the rights and privileges which it secures cannot be at all claimed by them. . . .

. . . .

[I]t does not follow, because aliens are not parties to the Constitution, as citizens are parties to it, that, whilst they actually conform to it, they have no right to its protection. Aliens are not more parties to the laws than they are parties to the Constitution; yet it will not be disputed that, as they owe, on one hand, a temporary obedience, they are entitled, in return, to their protection and advantage.

JAMES MADISON, *Report on the Resolutions*, in 6 THE WRITINGS OF JAMES MADISON 341, 363 (Gaillard Hunt ed., 1906). Of course, there are other examples of limited constitutional protections for people who must follow the law fully, such as convicted felons. However, nonimmigrants are denied full constitutional protection not because of something they did but because of who they are—or more accurately, because Congress classified them a certain way. This permits Congress to accord constitutional protection based on the categories it creates, a proposition that is simply antithetical to a democratic society. See *infra* notes 156–57 and accompanying text.

<sup>145</sup> See *supra* notes 5–7 and accompanying text. The two plaintiffs in *Bluman* exemplify why the term “temporary” can be misleading: at the time of litigation, Bluman had been in the United States first on a student visa and then on a three-year work visa that he planned on renewing for an additional three years; Steiman had been here since 2009 on a three-year visa, which could be extended for up to seven years. 800 F. Supp. 2d at 285. This also raises doubts about the court’s assertion that nonimmigrants, but not LPRs, owe “primary loyalty” to other countries. See *supra* note 143 and accompanying text.

<sup>146</sup> See Brief of Amici Curiae the Ill. Coal. for Immigrant & Refugee Rights & the Nat’l Immigrant Justice Ctr. in Support of Appellants at 14, *Bluman v. FEC*, 132 S. Ct. 1087 (2012) (No. 11-275) (citing 8 C.F.R. §§ 214.2(e)(5), (h)(16)(i), (l)(16), (o)(13), (p)(15), (r)(15) (2011)). Dual intent may explain why a 1996 audit of the labor certification program found that 99% of employment-based immigrant visas were filled by aliens *already* in the United States. See U.S. DEP’T OF LABOR, OFFICE OF THE INSPECTOR GEN., REP. NO. 06-96-002-03-321, THE DEPARTMENT OF LABOR’S FOREIGN LABOR CERTIFICATION PROGRAMS: THE SYSTEM IS BROKEN AND NEEDS TO BE FIXED 13 (1996).

<sup>147</sup> 8 C.F.R. § 208.14 (2014).

stake than an alien on a nonimmigrant visa that has been present for six years and fully intends to apply to become an LPR and stay permanently. This only lends further credence to the criticism that the stake theory in fact assesses statutory classification, not actual stake.<sup>148</sup>

It could be argued that instead of moving to a location-based approach to aliens' First Amendment rights, the stake analysis should be improved. Instead of looking at statutory classification, courts could look at factors such as the length of time an individual has been here, whether the individual intends to reapply for a visa (or adjustment of status), and other ties the individual has to the national community. Such an analysis, however, would be extremely burdensome, fact-intensive, and subjective. More importantly, even if an accurate stake analysis were developed the stake theory is still ill-suited to the First Amendment.

These examples demonstrate that the stake analysis is not really an assessment of an alien's stake in the community, but rather an assessment of his statutory classification. Thus, it is highly probable that this ban unconstitutionally burdens the First Amendment rights of many nonimmigrants, especially those on renewable visas that last many years, and consequently have developed a weighty stake. This directly contradicts the principle that "[t]he Government may not suppress lawful speech as the means to suppress unlawful speech"<sup>149</sup>: "Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse."<sup>150</sup>

2. *The First Amendment's Text and Underlying Purpose.*—Another problem is that applying the stake theory to determine an alien's First Amendment rights is simply incompatible with the text and underlying values of the First Amendment. The text of the First Amendment does not support the view that only citizens—or even resident aliens—should be entitled to its protection. Instead, it states "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."<sup>151</sup> In fact, the Amendment only mentions "the people" in the context of the right to assemble and petition; thus it specifically grants "the people" the rights of assembly and petition, but commands Congress to not "abridg[e] the

<sup>148</sup> Cf. Foster, *supra* note 70, at 237–38.

<sup>149</sup> *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 475 (2007) (opinion of Roberts, C.J.) (quoting *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255 (2002)).

<sup>150</sup> *Id.* (quoting *Free Speech Coal.*, 535 U.S. at 255); see also *id.* ("[The Court has] rejected the argument that 'protected speech may be banned as a means to ban unprotected speech,' concluding that it 'turns the First Amendment upside down.'" (quoting *Free Speech Coal.*, 535 U.S. at 255)).

<sup>151</sup> U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

freedom of speech.<sup>152</sup> Consequently, the First Amendment should not be interpreted as distinguishing between groups of people who should receive freedom of speech.<sup>153</sup>

*Bluman*'s emphasis on stake further insinuates that freedom of speech is not an inalienable right, but a mere privilege to be granted or denied by the government, based on the alien's statutory classification.<sup>154</sup> In cases regarding aliens' rights, however, the Court has already "rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'"<sup>155</sup> Moreover, *Bluman*'s stake-oriented analysis permits Congress to grant or deny First Amendment protection based on statutory classifications, while at the same time being granted the power to delineate those statutory classes.<sup>156</sup> When freedom of speech is determined by stake it means that Congress is permitted to deny First Amendment rights to certain categories of people—by reference to the

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<sup>152</sup> *Id.* Of course, the First Amendment does not explicitly state that it only applies in the United States either. However, the essence of the location theory is that only aliens within the jurisdiction are entitled to the Constitution's protection. By submitting to the authority of the jurisdiction when the alien enters, he in turn is entitled to its protection. An alien outside the jurisdiction has not yet done so. The Court has routinely held aliens outside the jurisdiction are not protected by the Constitution. See *infra* note 177 and accompanying text.

<sup>153</sup> See *Underwager v. Channel 9 Austl.*, 69 F.3d 361, 365 (9th Cir. 1995) ("[T]here is no expressed limitation as to whom the right of free speech applies."); cf. *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (Murphy, J., concurring) ("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."). This argument is even stronger when applied to the First Amendment than it is to, for example, the Fifth and Sixth Amendments, in which the Court has interpreted the word "persons" to not be restricted to citizens. See *supra* note 34 and accompanying text.

<sup>154</sup> See *Cole*, *supra* note 138, at 386–87 ("[Aliens'] admission and continuing presence may be conditioned on whatever constraints the government chooses to impose. . . . If you don't like it, the argument goes, either don't come, or get out. This argument seeks to transform what we generally think of as inalienable rights into discretionary privileges that can be granted or denied at will. It uses the fact that a foreign national's entry is a privilege to recast restrictions on his or her rights here as conditions on the privilege of entry.")

<sup>155</sup> *Graham v. Richardson*, 403 U.S. 365, 374 (1971); cf. *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2328 (2013) ("[W]e have held that the Government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit.'" (second alteration in original) (quoting *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 59 (2006))).

<sup>156</sup> Thus the stake-based theory is implicitly premised on not just the idea that people get certain constitutional rights based on their stake, but consequently, it also assumes that the Constitution does not bind the government when it acts toward certain people within the jurisdiction. This is a dangerous precedent—especially because Congress itself decides who can develop sufficient stakes. Cf. *Fong Yue Ting v. United States*, 149 U.S. 698, 737 (1893) (Brewer, J., dissenting) (suggesting "despotism exists" when Congress can declare the limits of its own power).

categories Congress created.<sup>157</sup> This grant of power to determine constitutional rights is simply antithetical to our democratic system.

Turning freedom of speech into a privilege also does not comport with the understanding when the First Amendment was ratified that freedom of speech was an inalienable right.<sup>158</sup> The Framers “designed the Bill of Rights to prohibit our Government from infringing rights and liberties presumed to be pre-existing.”<sup>159</sup> Thus, the First Amendment should be viewed “as a limitation on the Government’s conduct with respect to all whom it seeks to govern,” not a designation of the classes of people entitled to its protection.<sup>160</sup>

By judicially limiting freedom of speech to citizens and LPRs, the government has been granted far-reaching powers. Moreover, permitting the *implied* plenary power to override the *express* prohibition on Congress from abridging freedom of speech is simply illogical. As Justice Murphy argued in *Bridges v. Wixon*:

[T]he First Amendment . . . make[s] no exception in favor of deportation laws or laws enacted pursuant to a ‘plenary’ power of the Government. Hence the very provisions of the Constitution negative the proposition that Congress, in the exercise of a ‘plenary’ power, may override the rights of those who are numbered among the beneficiaries of the Bill of Rights.<sup>161</sup>

Similarly, in *Fong Yue Ting*, Justice Brewer stressed that Congress was still limited by the restrictions imposed in the Bill of Rights when employing the express powers granted to it in the Constitution.<sup>162</sup> To him, the

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<sup>157</sup> Professor David Cole advances another problem that arises when fundamental and inalienable rights are limited instead of being granted to all persons. Specifically, he references Chief Justice Taney’s reasoning in *Dred Scott* that because African-Americans were not considered citizens when the Constitution was ratified they therefore “had no rights or privileges but such as those who held the power and the Government might choose to grant them.” Cole, *supra* note 138, at 375 (quoting *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 405 (1856)). Underscoring this, Professor Cole points to Alexander Bickel’s warning that “*Dred Scott* teaches that ‘[a] relationship between government and the governed that turns on citizenship can always be dissolved or denied [because] [c]itizenship is a legal construct, an abstraction, a theory.’” *Id.* (alterations in original) (quoting ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 53 (1975)).

<sup>158</sup> See *id.* at 372 (“[W]hen adopted, the rights enumerated in the Bill of Rights were viewed not as a set of optional contractual provisions enforceable because they were agreed upon by a group of states and extending only to the contracting parties, but as inalienable natural rights that found their provenance in God.”). To be clear, the argument is not that the Framers thought freedom of speech was absolute, but rather that it was not a privilege.

<sup>159</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 288 (1990) (Brennan, J., dissenting).

<sup>160</sup> *Id.*

<sup>161</sup> 326 U.S. 135, 162 (1945) (Murphy, J., concurring).

<sup>162</sup> 149 U.S. 698, 738 (1893) (Brewer, J., dissenting) (“Congress has supreme control over the regulation of commerce, but if, in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this Fifth Amendment, and can take only on payment of just compensation.” (quoting *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 336 (1893))).

comparison led to the conclusion that “if that be true of the powers expressly granted, it must as certainly be true of those that are only granted by implication.”<sup>163</sup>

3. *Impact on Citizens’ First Amendment Rights.*—One of the most unfortunate consequences of the plenary power is that the Court ignores how immigration laws implicate the rights of citizens.<sup>164</sup> Stake analysis compounds this in the context of the First Amendment: by making stake necessary to enter the marketplace of ideas the government may now determine who can enter it, in turn affecting the First Amendment rights of citizens by determining what speech they are allowed to hear.<sup>165</sup> An open marketplace is essential because of our “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”<sup>166</sup> Section 441e and *Bluman’s* stake-based support, however, suggest that the government, through its plenary power, may abridge nonimmigrants’ right to freedom of speech, and citizens’ right to hear such political speech from people present in the territorial jurisdiction of the United States.

Finally, harming a citizen’s right to hear certain speech has even broader implications. When the Court condones the fact that “Congress regularly makes rules that would be unacceptable if applied to citizens,”<sup>167</sup>

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<sup>163</sup> *Id.* at 738; *see also id.* (“Even if it be among the powers implied, yet still it can be exercised only in subordination to the limitations and restrictions imposed by the Constitution.”).

<sup>164</sup> For example, in *Fiallo v. Bell*, the Court held that a statute permitting American citizens the right to petition to bring their alien children to the United States, but which excluded fathers from petitioning for illegitimate children, was constitutional despite the fact that “it infringes upon the constitutional rights of citizens.” 430 U.S. 787, 798 (1977). The Court realized this was “admittedly the consequence[.]” of the provision, “but the decision nonetheless remains one ‘solely for the responsibility of the Congress and wholly outside the power of this Court to control.’” *Id.* at 798–99 (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 597 (1952) (Frankfurter, J., concurring)). Justice Marshall explained why he dissented:

Today, however, the Court appears to hold that discrimination among citizens, however invidious and irrational, must be tolerated if it occurs in the context of the immigration laws. Since I cannot agree that Congress has license to deny fundamental rights to citizens according to the most disfavored criteria simply because the Immigration and Nationality Act is involved, I dissent.

*Id.* at 800 (Marshall, J., dissenting); *see also* *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 550–52 (1950) (Jackson, J., dissenting) (pointing out that the Court’s decision upholding the exclusion of an American citizen’s wife because of the plenary power ignored the rights of the citizen).

<sup>165</sup> *See supra* notes 111–16 and accompanying text; *see also* *Citizens United v. FEC*, 558 U.S. 310, 356 (2010) (“When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves.”).

<sup>166</sup> *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). To be sure, even the location theory caps the marketplace at the border; the difference is that the Constitution does not apply to aliens outside of the territorial jurisdiction. *See infra* note 177.

<sup>167</sup> *Mathews v. Diaz*, 426 U.S. 67, 80 (1976).

it sends an implicit message back to the citizenry and raises fears about citizens' constitutional rights.<sup>168</sup> It is far from implausible that American citizens' actions could be chilled when they see the government punishing people for engaging in what would be constitutionally protected conduct, with the Court's blessing.<sup>169</sup> In the First Amendment context, this is especially true. The First Amendment protects unpopular speech just as much as popular speech; if the government is granted the power to deport for unpopular speech—rather than leaving that speech to fail in the marketplace of ideas—citizens holding those same unpopular views may be chilled from speaking.<sup>170</sup>

### *C. Effects of Eliminating Stake Analysis in First Amendment Jurisprudence*

The foregoing analysis demonstrates the problems with requiring an alien to show a stake in national society to receive First Amendment protection. As a result, this Note proposes that all persons within the territorial jurisdiction should be protected by the First Amendment. Ultimately, this proposal extends not only to the right to make independent expenditures, but also to freedom of speech in general and the government's deportation power when it is the result of speech protected by the First Amendment.<sup>171</sup>

All aliens lawfully within the territorial jurisdiction of the United States should be entitled to First Amendment protection, including the right to make independent expenditures and freedom of speech in general. The independent expenditure ban “draws a highly questionable distinction between political speech in a public forum and independent expenditures on behalf of an electoral candidate.”<sup>172</sup> The Court should not permit the

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<sup>168</sup> See *Fong Yue Ting v. United States*, 149 U.S. 698, 761 (1893) (Field, J., dissenting) (“How far will its legislation go? The unnaturalized resident feels it to-day, but if Congress can disregard the guaranties with respect to any one domiciled in this country with its consent, it may disregard the guaranties with respect to naturalized citizens.”).

<sup>169</sup> James Madison made this argument when opposing the Alien and Sedition Acts. See MADISON, *supra* note 144, at 331, 337 (“If a suspicion that aliens are dangerous constitute[s] the justification of that power exercised over them by Congress, then a similar suspicion will justify the exercise of a similar power over natives; because there is nothing in the Constitution distinguishing between the power of a State to permit the residence of natives and of aliens.”). His argument is especially true today because of the rise in immigration and the lightning speed with which knowledge spreads.

<sup>170</sup> Cf. Stephen J. Burr, *Immigration and the First Amendment*, 73 CALIF. L. REV. 1889, 1926 (1985).

<sup>171</sup> It is important to emphasize that because speech protected by the First Amendment would be protected to the same extent regardless of the speaker, speech *not* protected by the First Amendment would *not* be protected regardless of the speaker. For a list of categories of unprotected speech, see *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012) (opinion of Kennedy, J.).

<sup>172</sup> Massaro, *supra* note 100, at 684; see also *id.* at 681–82 (“[I]f the theoretical premises of *Citizens United* hold, no sound or sufficient reason exists to distinguish between a sidewalk speech

government to criminally penalize speech based on the speaker's identity when that speaker is lawfully within the territorial jurisdiction of the United States.

Until *Bluman*, the Court had never held that the speech of aliens lawfully in the United States could be criminalized where it could not be if spoken by citizens. However, it has held that aliens can be excluded for speech—even where Congress could not criminally punish them—because of the plenary power.<sup>173</sup> For example, *Kleindienst v. Mandel* held that not only can Congress categorically deny aliens the right to enter because of speech,<sup>174</sup> but also the Executive can deny a waiver to an alien forbidden to enter by only providing a “facially legitimate and bona fide reason,”<sup>175</sup> akin to rational basis review despite the fundamental rights involved.<sup>176</sup>

Exclusion because of speech, though, was a consequence of the premise that aliens not within the territorial jurisdiction are not protected by the Constitution.<sup>177</sup> The changes in IIRIRA to deportability and inadmissibility mean that inadmissible aliens are within the jurisdiction; whether an alien is subject to expedited removal or deportation, the

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promoting or condemning an electoral candidate and an independent expenditure of funds to promote or condemn the same candidate.”); Randy Boswell, *Canadians Lose Fight to Spend Money on U.S. Election Campaigns*, NAT'L POST (Jan. 19, 2012, 7:17 PM), <http://news.nationalpost.com/2012/01/19/canadians-lose-fight-to-spend-money-on-u-s-election-campaigns/> [<http://perma.cc/ACK4-HZMQ>] (asserting § 441e leads to the conclusion that, “I could, theoretically, be breaking the law if I buy and wear a T-shirt with Obama’s face on it if the authorities interpret that to mean I am attempting [to] influence how Americans vote. All this in the land that invented free speech.” (quoting Benjamin Bluman)).

<sup>173</sup> See Katherine L. Pringle, Note, *Silencing the Speech of Strangers: Constitutional Values and the First Amendment Rights of Resident Aliens*, 81 GEO L.J. 2073, 2086 (1993) (“The Supreme Court has subordinated aliens’ speech and association rights to the federal plenary power over immigration. As a result, activities that the government cannot criminally punish by even a small fine, may be punishable by immigration denials and ultimately by deportation.”).

<sup>174</sup> See 408 U.S. 753, 766–67 (1972).

<sup>175</sup> *Id.* at 770.

<sup>176</sup> See Burr, *supra* note 170, at 1906 (“The *Mandel* facially legitimate and bona fide reason standard might itself be better expressed as a rational basis test. The two standards are equivalent.”). Burr later stated that this “deference standard . . . does not provide the protection for [F]irst [A]mendment values in immigration cases that they receive in all other cases.” *Id.* at 1908.

<sup>177</sup> See *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (“[A]n alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative.”); *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (Murphy, J., concurring) (“The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people without our borders.”); *cf.* *Boumediene v. Bush*, 553 U.S. 723, 841–42 (2008) (Scalia, J., dissenting) (“There is simply no support for the Court’s assertion that constitutional rights extend to aliens held outside U.S. sovereign territory . . . . [A]liens abroad have no substantive rights under our Constitution.”).

consequences are the same—removal from the country that the alien has made a home.<sup>178</sup>

The major case regarding deportation for speech, *Harisiades v. Shaughnessy*, held that an alien could be deported for being a member of the Communist Party.<sup>179</sup> As Professor Aleinikoff points out, however, the case did not state that aliens were not protected by the First Amendment but rather that the First Amendment did not protect advocacy inciting violence.<sup>180</sup>

Indeed, the proposition that one has First Amendment rights while in the country, except in deportation, is simply illogical because “[i]f a foreign national has no First Amendment rights in the deportation setting, he has no First Amendment rights anywhere; the fear of deportation will always and everywhere restrict what he says.”<sup>181</sup> Without the right to not be deported for constitutionally protected speech, freedom of speech is meaningless. The right to make independent expenditures, for example, would be a Pyrrhic victory. Under current law, the courts would be powerless to stop a newly elected President from deporting every nonimmigrant who made an independent expenditure in support of his opponent, even if the nonimmigrants could not be criminally prosecuted.<sup>182</sup>

The fact that deportation is not criminal punishment should not leave the courts powerless.<sup>183</sup> Because the effects of deportation are so harsh,

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<sup>178</sup> See *supra* notes 60–66 and accompanying text.

<sup>179</sup> 342 U.S. 580, 591–92 (1952).

<sup>180</sup> See T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT’L L. 862, 869 (1989) (“But read carefully, *Harisiades* does not support the claim that the First Amendment does not limit the deportation power. Nowhere does Justice Jackson’s majority opinion suggest that the deportation of an alien for membership in the Communist Party raises no First Amendment issue. Rather, the opinion sustains the statutory provision by relying, in summary fashion, upon the Court’s decision a year before in *Dennis v. United States*. . . . [R]ead properly, *Harisiades* establishes that deportation grounds are to be judged by the same standard applied to other burdens on First Amendment rights.”).

<sup>181</sup> Cole, *supra* note 138, at 377.

<sup>182</sup> Cf. *Bridges*, 326 U.S. at 162 (Murphy, J., concurring) (“The alien would be fully clothed with his constitutional rights when defending himself in a court of law, but he would be stripped of those rights when deportation officials encircle him.”); Aleinikoff, *supra* note 180, at 868 (“The legacies of *Fong Yue Ting* and *Wong Wing* seem to have produced a curious paradox in constitutional law: an alien can be deported for conduct for which, by dint of the First Amendment, he or she could not be imprisoned. The impact of this anomaly is not restricted to the immigration context. Because deportation is usually seen as a drastic penalty (at times, perhaps, more harsh than imprisonment), aliens are likely to forgo speech condemned by the deportation provisions. The immigration statute therefore chills the exercise of First Amendment rights outside the immigration context.”).

<sup>183</sup> See *Bridges*, 326 U.S. at 163–64 (“It is no answer that a deportation proceeding is technically non-criminal in nature and that a deportable alien is not adjudged guilty of a ‘crime.’ Those are over-subtle niceties that shed their significance when we are concerned with safeguarding the ideals of the Bill of Rights. The impact of deportation upon the life of an alien is often as great if not greater than the imposition of a criminal sentence. A deported alien may lose his family, his friends and his livelihood

permitting the government to deport an alien for constitutionally protected speech effectively reverses the normal rule that Congress may not do indirectly what it cannot do directly.<sup>184</sup> As Justice Murphy contended, the Framers did not “mean[] to make such an empty mockery of human freedom.”<sup>185</sup> Ultimately, by chilling the speech of aliens within our borders—whether out of fear of criminal punishment or deportation—the rights of all Americans are curtailed.<sup>186</sup> Therefore, the plenary power should not be able to override an alien’s First Amendment rights in the context of deportation when the sole reason for deportation is constitutionally protected speech.<sup>187</sup>

The prohibition on foreign nationals’ ability to make independent expenditures is emblematic of the government’s actions toward aliens, namely restricting their rights, and the Court’s reluctance to step in, instead deferring to the plenary power. But the Court should not continue sanctioning these actions and allowing an implied power to override express restrictions.

For the first time, the Court affirmed the right of the federal government to criminalize speech based solely on the speaker’s identity. This is the complete opposite of its logic in *Citizens United*, in which the Court quite forcefully stated:

By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker’s voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each.<sup>188</sup>

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forever. Return to his native land may result in poverty, persecution and even death. There is thus no justifiable reason for discarding the democratic and humane tenants of our legal system and descending to the practices of despotism in dealing with deportation.”).

<sup>184</sup> See *id.* at 162 (“Thus the Government would be precluded from enjoining or imprisoning an alien for exercising his freedom of speech. But the Government at the same time would be free, from a constitutional standpoint, to deport him for exercising that very same freedom.”).

<sup>185</sup> *Id.*

<sup>186</sup> See *id.* at 166 (Stone, C.J., dissenting) (“The Bill of Rights belongs to [aliens] as well as to all citizens. It protects them as long as they reside within the boundaries of our land. It protects them in the exercise of the great individual rights necessary to a sound political and economic democracy. Neither injunction, fine, imprisonment nor deportation can be utilized to restrict or prevent the exercise of intellectual freedom. Only by zealously guarding the rights of the most humble, the most unorthodox and the most despised among us can freedom flourish and endure in our land.”).

<sup>187</sup> The Supreme Court has held that selective deportation based on activity protected by the First Amendment is permissible if the alien is in violation of the immigration laws. See *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491–92 (1999). For a critique of this holding, see John A. Scanlan, *American-Arab—Getting the Balance Wrong—Again!*, 52 ADMIN. L. REV. 347 (2000).

<sup>188</sup> 558 U.S. 310, 340–41 (2010).

Many commentators have suggested that the Court reversed its logic as a result of the reaction following *Citizens United*, fearful of provoking another backlash.<sup>189</sup> But the Court is the only resource for nonimmigrants: they cannot vote and they are statutorily prohibited from making any expenditure in elections that affect them just as much as citizens. Without recourse to the political system—from which they are denied the right to participate *and* speak about—the Court is the only branch that can protect them.<sup>190</sup>

#### CONCLUSION

By requiring a stake to make independent expenditures, a right protected by the First Amendment, the Court endorsed the view that the only way to protect the Constitution and the ideals we cherish as Americans is to systematically deny its protection to people lawfully present in this country for the sole reason that they are statutorily classified as one type of alien or another. However, this is a dangerous precedent to set. As Thomas Jefferson argued, “[T]he friendless alien has indeed been selected as the safest subject of a first experiment; but the citizen will soon follow . . . .”<sup>191</sup>

Instead of requiring a certain level of stake to receive First Amendment protection, a requirement that has no basis in the First Amendment’s text or purpose, the Court should jealously guard the inalienable rights enshrined in the Constitution. Ultimately, the Court should analyze an alien’s First Amendment protections by location, not stake, because it better reflects the text and underlying values of the First Amendment and more fully protects the rights of both aliens and citizens.

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<sup>189</sup> See, e.g., Hasen, *supra* note 100, at 609–10 (“[A]t least some of the Justices appear to care about public opinion, and the public outcry over *Citizens United* could well pale compared to a Court decision allowing unlimited foreign funds in our elections. Indeed, it was probably to forestall such an attack after *Citizens United* itself that the majority added those three sentences keeping the issue open.”)

<sup>190</sup> See Cole, *supra* note 138, at 377–78.

<sup>191</sup> Thomas Jefferson, *Drafts of the Kentucky Resolutions – October 1798*, AVALON PROJECT, [http://avalon.law.yale.edu/18th\\_century/jeffken.asp](http://avalon.law.yale.edu/18th_century/jeffken.asp) [<http://perma.cc/74DW-TV64>].

