First Amendment (Un)Exceptionalism: A Comparative Taxonomy of Campaign Finance Reform Proposals in the United States and United Kingdom

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ABSTRACT

There is an urgent conversation happening among the world's democracies about how to respond to the combined threat of online electioneering and foreign interference in domestic elections. Despite the shadow such activities cast over the 2016 presidential election in the United States, the United States has been largely absent from comparative discussions about how to tackle the problem. This is not just because of a recalcitrant president. The assumption that America's "First Amendment Exceptionalism"—the idea that American freedom of expression law is simply too much of an outlier to warrant useful comparative consideration—is strong on both sides of the Atlantic. This is especially true in regard to the regulation of political campaigns.

This Article challenges that assumption, and argues that America's more libertarian approach to the legal regulation of political speech does not pose a barrier to fruitful comparative work in this area. It does so by comparing the law of the United States to that of the United Kingdom. Specifically, it organizes reform proposals being considered in the United States and United Kingdom into a common taxonomy, and sets out the legal standard governing each type of proposal in each country. Considering each country's law through this organizational structure allows us to see that the legal differences between the United States and United Kingdom, while significant, rarely bar the types of changes being considered in either nation. Indeed, the two countries have much to learn from each other's efforts in this area, and

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lawmakers, regulators, and scholars should not hesitate to engage with the experiences of their transatlantic peers.

In reaching this conclusion, the Article makes three distinct contributions. First, by clustering reform proposals into a taxonomy, it provides a structure for comparative work that will be useful not just in the United States and United Kingdom, but in all countries working to bring their election laws fully into the internet era. Second, by providing an in-depth yet accessible guide to the legal structures undergirding election law in the United States and United Kingdom, it provides a useful tool for scholars attempting to understand these systems. The U.S. system in particular is often quickly dismissed by other nations, but without a deeper understanding of how and why U.S. law has ended up as it has, those nations risk inadvertently following in its footsteps. Finally, it identifies several concrete areas where the United States and United Kingdom can benefit from each other's expertise, thereby providing a roadmap for regulators, lawmakers, and reform advocates in both countries.

TABLE OF CONTENTS

I. INTRODUCTION

The 2016 presidential election in the United States and referendum on European Union membership (Brexit) that same year in the United Kingdom were a wake-up call to those nations about the extent to which disinformation, propaganda, and "fake news" spread online can amplify extremism and undermine democratic elections. Regulators, lawmakers, and reform advocates have responded by recommending a wide array of legal reforms, including changes to the rules governing political campaigns. In both the United States and the United Kingdom, this process has generated dozens of proposals to more effectively counter online and foreign efforts to influence voters and destabilize democratic institutions.

Despite this, there has been little cross-country analysis comparing those proposals. This is not surprising. The assumption that America's "First Amendment Exceptionalism"—the idea that American freedom of expression law is simply too much of an outlier to warrant comparative consideration—is widely held on both sides of the Atlantic.[1] This is especially true in regard to the regulation of political campaigns, where the United States is most commonly held up in the United Kingdom (and elsewhere) as a negative example to be avoided at all costs.[2] In this Article, I challenge that assumption by demonstrating that the legal differences between the United States and the United Kingdom rarely bar the types of reform proposals being considered in either country, and that the two countries can in fact gain considerable insight from each other's efforts to bring their election laws fully into the internet era.

The Article has four parts. Part II illustrates the challenges faced in both nations by briefly recapping what we know now about online and foreign interference in the 2016 elections.[3] Part III contextualizes those challenges by

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[1] *See* Ronald J. Krotoszynski, Jr., *Free Speech Paternalism and Free Speech Exceptionalism: Pervasive Distrust of Government and the Contemporary First Amendment*, 76 OHIO ST. L.J. 659, 659 (2015) ("[W]hen viewed from a global perspective, the American position of affording near-absolute protection to speech is strongly exceptionalist.").

[2] *See* R (Animal Defenders International) v. Secretary of State for Culture, Media and Sport [2008] UKHL 15, [47]–[48], [2008] 1 AC 1312 (Baroness Hale of Richmond) (appeal taken from Eng.); COMM. ON STANDARDS IN PUB. LIFE, STANDARDS IN PUBLIC LIFE: THE FUNDING OF POLITICAL PARTIES IN THE UNITED KINGDOM, 1998, Cm. 4047-I, ¶ 1.16, at 18 (UK) [hereinafter NEILL REPORT]; Jacob Rowbottom, Animal Defenders International*: Speech, Spending, and a Change of Direction in Strasbourg*, 5 J. MEDIA L. 1, 5–6 (2013); ELECTORAL REFORM SOC'Y, REINING IN THE POLITICAL "WILD WEST": CAMPAIGN RULES FOR THE 21ST CENTURY 35 (Michela Palese & Josiah Mortimer eds., Feb. 2019), https://www.electoral-reform.org.uk/latest-news-and-research/publications/reining-in-the-political-wild-west-campaign-rules-for-the-21st-century/#sub-section-7 [https://perma.cc/B3UA-82AN].

[3] Referendum campaigns like the Brexit vote in the United Kingdom are not "elections" (since no candidate is elected). Unless otherwise specified, this Article nonetheless uses the terms "elections" and "election laws" to refer to the full set of primary and secondary legislation, court decisions, regulations, and rules governing both candidate and referendum campaigns.

introducing readers to the foundational rules governing campaign finance and political party funding in the United States and United Kingdom. Part IV, which is the heart of the Article, considers the most significant reform proposals being discussed in each country and organizes them into a taxonomy. As Part IV demonstrates, once the reform proposals are analyzed through this structure, it becomes clear that the two countries have much to learn from each other, despite their different legal rules. The Article concludes by highlighting several areas where further comparative consideration would be the most valuable, and encouraging regulators, lawmakers, and reform advocates in both countries to more fully engage with each other's efforts in those areas.

II. THE 2016 ELECTIONS

The 2016 presidential election in the United States and the Brexit referendum in the United Kingdom have been extensively studied. In the United States, the Special Counsel to the U.S. Department of Justice, the intelligence community, and select committees of the Senate and the House of Representatives have all investigated the presidential election.[4] In the United Kingdom, the Information Commissioner's Office, the Election Commission, the Digital, Sports, Media and Culture Committee, and the Committee on Standards in Public Life have examined the Brexit referendum, which also was the subject of investigations by the Cabinet Office and the National Crime Agency.[5]

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[4] *See, e.g.*, ROBERT S. MUELLER, III, U.S. DEP'T OF JUSTICE, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 1 (Mar. 2019), https://www.justice.gov/storage/report.pdf [https://perma.cc/EBQ8-DU5W] [hereinafter MUELLER REPORT] (redacted); OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, ASSESSING RUSSIAN ACTIVITIES AND INTENTIONS IN RECENT U.S. ELECTIONS i (Jan. 2017), https://www.dni.gov/files/documents/ICA_2017_01.pdf [https://perma.cc/PZA8-Q8VX]; SENATE SELECT COMM. ON INTELLIGENCE, RUSSIAN ACTIVE MEASURES CAMPAIGNS AND INTERFERENCE IN THE 2016 U.S. ELECTION 3 (2019), https://www.intelligence.senate.gov/sites/default/files/documents/Report_Volume1.pdf [https://perma.cc/RW3K-Q2NQ]; SENATE SELECT COMM. ON INTELLIGENCE, 116TH CONG., THE INTELLIGENCE COMMUNITY ASSESSMENT: ASSESSING RUSSIAN INTENTIONS IN RECENT U.S. ELECTIONS 1 (Comm. Print 2018), https://www.burr.senate.gov/imo/media/doc/SSCI%20ICA%20ASSESSMENT_FINALJULY3.pdf [https://perma.cc/DJ3A-WDC3] (redacted); U.S. DEP'T OF JUSTICE, REPORT OF THE ATTORNEY GENERAL'S CYBER DIGITAL TASK FORCE 1–2 (July 2018), https://www.justice.gov/ag/page/file/1076696/download [https://perma.cc/J96P-X9T5].

[5] CABINET OFFICE, PROTECTING THE DEBATE: INTIMIDATION, INFLUENCE AND INFORMATION GOVERNMENT RESPONSE 10, 20–21 (May 2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/799873/Protecting-the-Debate-Government-Response-2019.05.01.pdf [https://perma.cc/T2L9-W5GV] [hereinafter PROTECTING THE DEBATE]; DIGITAL, CULTURE, MEDIA & SPORT COMM., DISINFORMATION AND "FAKE NEWS": FINAL REPORT, 2017–2019, HC 1791, ¶¶ 148–92 (UK), https://publications.parliament.uk/pa/cm201719/cmselect/cmcumeds/1791/1791.pdf [https://perma.cc/3ADC-N6SY] [hereinafter DCMS REPORT]; INFO. COMM'R'S OFFICE, INVESTIGATION INTO THE USE OF DATA ANALYTICS IN POLITICAL CAMPAIGNS: A

The two countries have focused their efforts somewhat differently. The United States has focused mainly on foreign interference, while the United Kingdom has looked more at data breaches, micro-targeted advertising, and campaign funding improprieties.[6] But their work reveals the same thing: changes in how paid and unpaid communications are purchased, targeted, and shared online have created an unprecedented ability for outside actors to influence domestic politics in ways our election rules did not fully anticipate and have not effectively responded to.[7]

In the United States, the report released in May 2019 by Special Counsel Robert Mueller (the Mueller Report) details how Russian-affiliated actors engaged in an extensive online campaign to influence the 2016 presidential election.[8] In the months before the election, this campaign was supported by a budget of more than $1,250,000 per month and included stealing online identities and information, training foreign actors to create and disseminate inflammatory messages about socially divisive issues, and using interconnected

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REPORT TO PARLIAMENT 7 (Nov. 2018), https://ico.org.uk/media/action-weve-taken/2260271/investigation-into-the-use-of-data-analytics-in-political-campaigns-final-20181105.pdf [https://perma.cc/P3NG-YERQ]; THE ELECTORAL COMM'N, THE 2016 EU REFERENDUM: REPORT ON THE JUNE 2016 REFERENDUM ON THE UK'S MEMBERSHIP OF THE EUROPEAN UNION 5 (Sept. 2016), https://www.electoralcommission.org.uk/sites/default/files/pdf_file/2016-EU-referendum-report.pdf [https://perma.cc/HU8M-N63V] [hereinafter 2016 EU REFERENDUM]; *Investigation into Payments Made to Better for the Country and Leave.EU*, ELECTORAL COMM'N, https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/our-enforcement-work/investigations/investigation-payments-made-better-country-and-leaveeu [https://perma.cc/4DUE-NYJP] (last updated Oct. 11, 2019) [hereinafter *Investigation into Payments*]; *Public Statement on NCA Investigation into Suspected EU Referendum Offenses*, NAT'L CRIME AGENCY (Sept. 24, 2019), https://nationalcrimeagency.gov.uk/news/public-statement-on-nca-investigation-into-suspected-eu-referendum-offences [https://perma.cc/C6NF-UJHB] (discussing the findings of the NCA's investigation).

[6] *Compare* MUELLER REPORT, *supra* note 4, at 2–3, *with* INFO. COMM'R'S OFFICE, *supra* note 5, at 7.

[7] For a discussion of the 2016 presidential election and subsequent reform proposals in the United States, see generally STANFORD CYBER POLICY CTR., SECURING AMERICAN ELECTIONS: PRESCRIPTIONS FOR ENHANCING THE INTEGRITY AND INDEPENDENCE OF THE 2020 U.S. PRESIDENTIAL ELECTION AND BEYOND (Michael McFaul ed., 2019); DCMS REPORT, *supra* note 5, ¶¶ 240–49 (discussing findings related to Kremlin-aligned media messaging in the United Kingdom).

[8] According to an indictment filed February 16, 2018 by Special Counsel Robert Mueller, Russian intelligence worked through a Russian corporation—the Internet Research Agency (IRA)—to engage in online "information warfare against the United States." Indictment ¶ (10)(c), United States v. Internet Research Agency LLC, No. 18-cr-00032-DLF (D.D.C. Feb. 16, 2018). The IRA employed hundreds of people to pose as Americans and comment on social media about U.S. politics. *Id.* ¶¶ (10)(a), 32–34. The IRA also engaged in data analytics to target Americans with political messages, and to create and spread "distrust towards the candidates and the political system in general" in the lead-up to the 2016 presidential election. *Id.* ¶ (10)(e). The foreign origin of these activities was masked, both online and in the underlying financial transactions. *Id.* ¶ 58.

and often automated networks to spread those messages to targeted audiences across social media platforms.[9] There appears to have been less overt interference in the United Kingdom, but investigations since the Brexit vote have disclosed the prevalence and coordinated distribution of Kremlin-aligned media messaging online,[10] a "Brexit Botnet" active during the referendum campaign,[11] misleading and inflammatory online advertising campaigns targeted to select audiences,[12] and concerns that existing law enabled foreign sources to fund certain online campaign activities.[13]

These events revealed just how ill-equipped existing campaign laws are to deal with this type of activity. Political advertising has been migrating online for decades, but the regulatory systems in both the United States and United Kingdom lag well behind.[14] The problems in each country are similar. Online election communications are subject to few or no transparency requirements, existing reporting rules make it difficult to trace online ads to their underlying funding source, expenditure thresholds triggering regulation do not capture either the low cost of online advertising or the organic way information travels online, microtargeted online advertising diminishes the effectiveness of both regulations and "counter-speech" responses, and rules intended to limit foreign influence in domestic elections are riddled with gaps and unresolved definitional issues.

Understanding how the United States and United Kingdom can learn from each other's efforts to fix these problems requires first understanding the basic rules currently in place in each country. The following Part provides this, by explaining the foundations of the U.S. and U.K. campaign finance and political party funding laws.

III. FOUNDATIONS

A. *Campaign Finance Law in the United States*

The backbone of the United States campaign finance system is the Federal Election Campaign Act (FECA), as amended in 1974 in the wake of the Watergate scandal.[15] Congress intended the new law to govern virtually all

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[9] *Id.* ¶¶ 11(b), 32–41.

[10] DCMS REPORT, *supra* note 5, ¶¶ 240–49.

[11] Marco T. Bastos & Dan Mercea, *The Brexit Botnet and User-Generated Hyperpartisan News*, 37 SOC. SCI. COMPUTER REV. 38, 38 (2019).

[12] DCMS REPORT, *supra* note 5, ¶¶ 218–21.

[13] *Id.* ¶¶ 31–40.

[14] *See id.* ¶¶ 11–52.

[15] Federal Election Campaign Act, 52 U.S.C. §§ 30101–30146 (2012 & Supp. IV 2017); *see* ROBERT E. MUTCH, CAMPAIGN FINANCE: WHAT EVERYONE NEEDS TO KNOW 10 (2016). Watergate revealed loopholes in campaign finance rules that had allowed candidate campaign committees to collect large and often undisclosed donations, some of which came from foreign sources and many of which were routed through intermediaries to mask their true origins. *See id.* at 10–14.

aspects of how campaigns for federal office are regulated.[16] It imposed contribution and expenditure limits on candidates, political parties, and third-party campaigners,[17] bolstered regulatory reporting requirements, tightened rules against the solicitation and use of foreign funds, and created a federal regulatory body—the Federal Elections Commission (FEC)—to administer the new rules.[18] The law was immediately challenged in court.[19] The main argument made by the challengers was that virtually all the new rules infringed on political speech protected by the First Amendment.[20]

The resulting Supreme Court decision, *Buckley v. Valeo*, remains the constitutional cornerstone of campaign finance regulation in the United States. To understand *Buckley*, it is useful to keep in mind three things: (1) the difference between contributions (money given to others to spend) and expenditures (money an individual or group spends itself); (2) the difference between candidates and political parties on the one hand, and third-party campaigners (groups other than candidates or political parties) on the other; and (3) the difference between what came to be known as "express advocacy" (which directly calls for the election or defeat of a candidate for federal office) and "issue advocacy" (which does not).[21] The *Buckley* Court treated each of these differences as important, and the constitutionality of a given rule today often hinges on how these categories are defined.

Buckley is a complex opinion. The Court first addressed the difference between contributions and expenditures.[22] It viewed contribution limits as only indirectly restricting speech.[23] While such limits restrict the amount of money a

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[16] In the United States, Congress has full authority to legislate in relation to elections for federal offices and limited authority to regulate in relation to elections for state offices. U.S. CONST. art. I, § 4, cl. 1; *see also* U.S. GEN. ACCOUNTING OFFICE, GAO-01-470, THE SCOPE OF CONGRESSIONAL AUTHORITY IN ELECTION ADMINISTRATION 3–11 (2001), https://www.gao.gov/assets/240/230112.pdf [https://perma.cc/F7G2-ADJ3]. This Article addresses only federal law, but decisions of the U.S. Supreme Court interpreting the First Amendment limit both federal and state laws and regulations. U.S. CONST. amend. XIV, § 1; *see, e.g.*, Gitlow v. New York, 268 U.S. 652, 666 (1925).

[17] Federal Election Campaign Act § 30116. The term "third-party campaigners" is used in both the United States and the United Kingdom to refer to groups (such as interest or pressure groups) other than political parties and candidates. *See generally* Andrew C. Geddis, *Confronting the "Problem" of Third Party Expenditures in United Kingdom Election Law*, 27 BROOK. J. INT'L L. 103, 107 (2001) (examining how U.K. legislation regulates "third party" expenditures on public messages).

[18] Federal Election Campaign Act §§ 30104, 30106, 30121.

[19] Buckley v. Valeo, 424 U.S. 1, 6 (1976).

[20] *Id.* at 11. *See generally* Brief of the Appellants, Buckley v. Valeo, 424 U.S. 1 (1976) (Nos. 75-436, 75-437), 1975 WL 441595, at *29.

[21] Federal Election Campaign Act §§ 30101(2), (8)–(9), (16)–(17); *see Buckley*, 424 U.S. at 42–44; Frank Askin, *Issue Advocacy*, FIRST AMEND. ENCYCLOPEDIA, https://www.mtsu.edu/first-amendment/article/996/issue-advocacy [https://perma.cc/KS27-25XF] (defining "issue advocacy").

[22] *Buckley*, 424 U.S. at 19–23.

[23] *Id.* at 20–21.

donor can give to political parties, candidates, and third-party groups, they do not directly restrict the donor's speech itself.[24] As such, contribution limits need not be subject to the most robust judicial scrutiny and should be upheld as long as they are "closely drawn" to achieve a "sufficiently important interest."[25] The Court accepted that preventing corruption or the appearance of corruption was such an interest, and that contribution limits were sufficiently related to that interest.[26] So the contribution limits imposed by FECA survived this relatively relaxed level of review.[27]

The Court viewed expenditure limits differently. Unlike contributions limits, the *Buckley* Court saw expenditure limits as directly limiting the ability of a speaker to communicate his or her own ideas.[28] Limits on expenditures, therefore, are subject to strict judicial scrutiny, and any regulation of them needs to be narrowly drawn to advance a compelling interest.[29] The expenditure limits in FECA failed this test.[30] The government had defended the law's comprehensive expenditure limits as necessary to promote political equality and to reduce the overall amount of money spent in political campaigns.[31] The Court found both of these reasons constitutionally insufficient.[32] Limiting the speech of some in order to enhance that of others was "wholly foreign" to the First Amendment, the Court said, and it was not up to Congress to determine whether the amount of money spent on political speech was wasteful or excessive.[33] The Court also held that the anti-corruption interest, while compelling, could not justify expenditure limits: as long as political parties and candidates were spending money they had raised in compliance with the contribution limits, expenditure limits served no additional anti-corruption purpose.[34] Third-party spending likewise posed no risk of quid pro quo corruption, the Court found, as long as done independently of candidates and parties.[35] All of FECA's

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[24] *Id.* at 21.

[25] *Id.* at 25.

[26] *Id.* at 27–29.

[27] *Id.* at 143–44. *Buckley* itself was somewhat opaque about the exact standard of review it was applying to contributions limits, which has been clarified by subsequent decisions. *See* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 386 (2000) ("Precision about the relative rigor of the standard to review contribution limits was not a pretense of the *Buckley per curiam* opinion.").

[28] *Buckley*, 424 U.S. at 19–21.

[29] *See id.* at 44–45. The "exacting" or strict scrutiny applied by the Court in *Buckley* requires the regulation to be "narrowly tailored" to advance a "compelling" interest. *See* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 786 (1978) (internal citations omitted); NAACP v. Button, 371 U.S. 415, 438 (1963).

[30] *Buckley*, 424 U.S. at 58–59.

[31] *Id.* at 48–49, 57.

[32] *Id.*

[33] *Id.* For a comparative treatment of the concept of equality in U.S. campaign finance law, see generally Daniel P. Tokaji, *The Obliteration of Equality in American Campaign Finance Law: A Trans-Border Comparison*, 5 J. PARLIAMENTARY & POL. L. 381 (2011).

[34] *Buckley*, 424 U.S. at 45–48, 53, 55.

[35] *See id*. at 45.

expenditure limits therefore were deemed unconstitutional infringements on political speech and struck down.[36]

The Court did uphold FECA's transparency rules.[37] The law included two types of transparency requirements. Disclosure rules requiring candidates, political parties, and some groups to publicly disclose most of their contributions and expenditures through mandatory reporting to the FEC,[38] and disclaimer rules (called "imprint" rules in the United Kingdom) requiring certain spenders to identify on the face of a communication who had authorized and paid for it.[39] These transparency regulations, the *Buckley* Court held, only indirectly affected speech.[40] Like contribution limits, they therefore would be subject to less rigorous judicial scrutiny and were sufficiently supported by both the interest in preventing corruption or the appearance thereof, and the interest in avoiding circumvention of the contribution limits the Court had just upheld.[41]

The Court's decision upholding disclosure and disclaimer requirements included an important caveat, however, involving the second and third distinctions set out above: the difference between candidates and political parties, and third-party campaigners; and the difference between express and issue advocacy. Under FECA, candidates and political parties are by definition entities whose primary purpose is to influence federal elections.[42] The *Buckley* Court therefore saw no difficultly in requiring them to regularly report their contributions and expenditures to the FEC. But third-party campaigners engage in many different types of activities, only some of which will influence federal elections.[43] The Court therefore insisted that any scheme regulating the independent activity of third-party groups distinguish between "express advocacy" to influence federal elections and "issue advocacy" which the Court saw as the type of everyday advocacy around public policy issues that citizens should be able to engage in without becoming entangled in a complex regulatory

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[36] *Id.* at 58–59.

[37] *Id.* at 84.

[38] Federal Election Campaign Act, 52 U.S.C. § 30104 (Supp. IV 2017).

[39] *See* Press Release, Cabinet Office & Kevin Foster MP, Government Safeguards UK Elections (May 5, 2019), https://www.gov.uk/government/news/government-safeguards-uk-elections [https://perma.cc/24YH-NYYW] ("Candidates, political parties and non-party campaigners will also be required to brand or 'imprint' their digital election materials, so the public is clear who is targeting them."); Federal Election Campaign Act § 30120(a). For a discussion of disclosure and disclaimer rules, see R. SAM GARRETT, CONG. RESEARCH SERV., IF10758, ONLINE POLITICAL ADVERTISING: DISCLAIMERS AND POLICY ISSUES (2019), https://fas.org/sgp/crs/misc/IF10758.pdf [https://perma.cc/W66X-M2UB]. The term "disclaimer" appears to have been coined because of the requirement imposed by some of these rules that the communication clearly state that it is has not been endorsed by a candidate. *See id.*

[40] *Buckley*, 424 U.S. at 65.

[41] *Id.* at 66–68.

[42] *See* Federal Election Campaign Act §§ 30101(2), (16).

[43] *Buckley*, 424 U.S. at 67–68.

regime.[44] Moreover, in order to avoid "chilling" pure issue advocacy, the distinction between these two types of speech had to be clearly delineated.[45]

The Court acknowledged that creating a bright-line test of this sort would be challenging, but went ahead and did so anyway. In a footnote, it limited the relevant provisions of the law to communications including what came to be known as the "magic words."[46] Under this test, only communications including words such as "vote for," "vote against," "defeat," or "reject" could be regulated.[47] Consequently, under *Buckley*, third-party advocacy meeting the magic words test was subject to disclaimer and disclosure rules, but that which did not was not.[48] As discussed below, subsequent legislation and court decisions have tweaked this dividing line, but its fundamental importance continues to drive U.S. law.

The practical effect of *Buckley* was to create a campaign finance regulatory system that no one intentionally designed and very few people actually like.[49] A law calibrated to restrict both the ability to raise money (through contribution limits) and the need for it (through expenditure limits) became a system in which candidates have an escalating need for money but a tightly restricted ability to access it. Later decisions further held that while all money raised by candidates and political parties was subject to contribution limits, third-party "expenditure-only" groups eschewing express advocacy could raise money in unlimited and often undisclosed amounts.[50] This had the predictable effect of channeling money away from candidates and political parties, and toward less publicly accountable third-party groups.[51] It doing so, it also created a system in which much election-related activity operates outside the federal regulatory scheme.

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[44] *See id.* at 80.

[45] *Id*. at 39–51.

[46] *Id.* at 44 n.52; *see also* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 439–40 (2010) (Stevens, J., concurring); McConnell v. Fed. Election Comm'n, 540 U.S. 93, 126–27 (2003).

[47] *Buckley*, 424 U.S. at 44 n.52.

[48] *See, e.g.*, *Citizens United*, 58 U.S. at 439–40 (Stevens, J., concurring); *McConnell*, 540 U.S. at 126.

[49] *See* Daniel P. Tokaji, *Campaign Finance Regulation in North America: An Institutional Perspective*, 17 ELECTION L.J. 188, 190–94 (2018); *see also* Richard L. Hasen, Buckley *Is Dead, Long Live* Buckley*: The New Campaign Finance Incoherence of* McConnell v. Fed. Election Comm'n, 153 U. PA. L. REV. 31, 35–41 (2004).

[50] "Expenditure-only" groups are third-party campaign groups that spend money but do not make contributions to candidates, political parties, or other groups that do make such donations. *See* SpeechNow.org v. Fed. Election Comm'n, 599 F.3d 686, 694–96 (D.C. Cir. 2010).

[51] In the 2016 U.S. election cycle, outside groups spent nearly $1.4 billon, surpassing the spending of both major parties (whose combined spending totaled only $290 million). Young Mie Kim et al., *The Stealth Media? Groups and Targets Behind Divisive Issue Campaigns on Facebook*, 35 POL. COMM. 515, 518 (2018).

B. *Political Party Funding and Campaign Finance Law in the United Kingdom*

Campaign finance regulation in the United Kingdom is in some ways the diametric opposite of that in the United States. Rather than control the availability of funds through limits on contributions to candidates and political parties, the U.K. system controls the need for them by restricting expenditures through spending limits and a ban on expensive broadcast advertising. It also tightly restricts third-party spending and imposes similar transparency rules on third-party campaigners as it does on candidates and political parties. This is very different than the United States system, which strictly limits contributions to candidates, political parties, and some third-party groups; restricts candidate and political party financing more tightly than that of third-party campaigners; and is constitutionally prohibited from limiting expenditures at all.

Three pieces of primary legislation structure the U.K. system. The Representation of the People Act 1983 (RPA) governs constituency-level spending; the Political Parties, Elections and Referendums Act 2000 (PPERA) governs national spending; and the Communications Act 2003 regulates political communications on broadcast television and radio.[52] Most of the restrictions imposed under these statutes apply only during the "regulated period," which is set by the U.K. Electoral Commission (EC) and usually covers a year prior to a general election or four months prior to a referendum or other election.[53]

The RPA is the oldest of these laws, and many of its provisions have been in place in some form for decades. It focuses on the spending that happens for or against individual candidates within constituency districts.[54] The law sets a

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[52] *See* Representation of the People Act 1983, c. 2 §§ 71A, 73 (UK), http://www.legislation.gov.uk/ukpga/1983/2/contents [https://perma.cc/MD3J-RXSE]; Political Parties, Elections and Referendums Act 2000, c. 41 (UK), http://www.legislation.gov.uk/ukpga/2000/41/contents [https://perma.cc/MNB4-S9HC]; Communications Act 2003, c. 21 (UK), http://www.legislation.gov.uk/ukpga/2003/21/contents [https://perma.cc/2RED-WWYZ].

[53] THE ELECTORAL COMM'N, OVERVIEW OF PARTY CAMPAIGN SPENDING 5 (2016), https://www.electoralcommission.org.uk/sites/default/files/pdf_file/to-campaign-spend-rp.pdf [https://perma.cc/8KSN-W9GD] [hereinafter OVERVIEW OF PARTY CAMPAIGN SPENDING]. Constituency spending is, generally speaking, spending for or against a particular candidate in a particular district. *See id.* at 4. National level spending is spending for or against a political party or national referendum. *See id.* The regulated period for a general election can apply retroactively after an election is called. *Non-Party Campaigners: Where to Start*, ELECTORAL COMM'N, https://www.electoralcommission.org.uk/non-party-campaigners-where-start/does-your-campaign-activity-meet-purpose-test/purpose-test-regulated-period-early-uk-parliamentary-general-election [https://perma.cc/YNY6-2FN3] (last updated Sept. 23, 2019).

[54] *See* Representation of the People Act 1983, c. 2, §§ 71A–90D (UK), http://www.legislation.gov.uk/ukpga/1983/2/contents [https://perma.cc/MD3J-RXSE]. Members of the Westminster Parliament (the legislative body of the United Kingdom) are elected by a first-past-the-post system in single member constituency districts. *Id.* c. 2, sch. 1. Separate

base level of permitted spending that is the same for all candidates in all districts, with additional spending permitted on a per-elector basis, allowing candidates in more heavily populated districts to spend more.[55] It also tightly restricts third-party spending for or against specific constituency-level candidates.[56]

When the RPA was enacted, its focus on constituency-level spending made sense. Historically, the national expenditures of the two main political parties were small compared to the spending done by candidates in individual districts.[57] But by the 1990s, political parties had grown in importance and spending had shifted away from constituency districts and to the national, party-driven campaigns. Advocates of reform began arguing that the RPA's focus solely on constituency-level spending did not adequately address the reality of how U.K. campaigns were funded.[58] There also was concern about the influence on elected officials of large and undisclosed donations, and what was increasingly seen as excessive spending on campaigns.[59] PPERA responded to those concerns.

PPERA grew out of the Standing Committee on Standards in Public Life (the Neill Committee), which Parliament had tasked with recommending changes to the United Kingdom's campaign finance laws.[60] The Neill Committee made more than 100 recommendations, most of which were adopted by Parliament in PPERA.[61] Despite the hopes of some reform advocates, these changes did not include imposing caps on contributions. Political contributions in the United Kingdom remain uncapped, and the major parties are funded by membership dues plus a relatively small number of very large donations.[62]

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elections are held to elect the U.K. members of the European Parliament, and the members of the national parliaments of Scotland, Wales, and Northern Ireland. *See Guide to May 2016 Elections in Scotland, Wales, England and Northern Ireland*, BBC NEWS (May 5, 2016), https://www.bbc.com/news/uk-politics-35813119 [https://perma.cc/KDW7-X4QY].

[55] Representation of the People Act 1983, c. 2, § 76(2) (UK), http://www.legislation.gov.uk/ukpga/1983/2/contents [https://perma.cc/MD3J-RXSE]. Constituency districts in the United Kingdom vary in population size. *See* FEARGAL MCGUINNESS, HOUSE OF COMMONS LIBRARY, SIZES OF CONSTITUENCY ELECTORATES 7–22 (2011).

[56] Jacob Eisler, *Formalism and Realism in Campaign Finance Law*, 78 CAMBRIDGE L.J. 257, 257–58 (2019).

[57] NEILL REPORT, *supra* note 2, ¶ 10.16, at 114.

[58] *See* Geddis, *supra* note 17, at 110–15.

[59] NEILL REPORT, *supra* note 2, ¶10.2, at 110.

[60] *Terms of Reference*, COMMITTEE STANDARDS PUB. LIFE, https://www.gov.uk/government/organisations/the-committee-on-standards-in-public-life/about/terms-of-reference [https://perma.cc/M2LK-C2KN]; *see also* 12 Nov. 1997, Parl Deb HC (1997) col. 899 (UK), https://publications.parliament.uk/pa/cm199798/cmhansrd/vo971112/debtext/71112-20.htm#71112-20_sbhd0 [https://perma.cc/2S5M-F69F].

[61] NEILL REPORT, *supra* note 2, ¶¶ 1–100, at 4–14 (outlining the recommendations offered by the committee).

[62] The Committee tried again in 2011 after all three main British political parties made a commitment in principle to support contribution caps, but was unable to come up with a proposal all parties would agree to. COMM. ON STANDARDS IN PUB. LIFE, POLITICAL PARTY

PPERA did, however, require for the first time that contributions exceeding £5000 (later raised to £7500[63]) be publicly disclosed.[64]

PPERA also imposed nationwide expenditure limits on political parties and third-party campaigners (the RPA continues to govern the expenditure limits imposed on individual candidates and third-party constituency-level spending).[65] Different limits apply to different spenders in different elections. Calculating the applicable limit turns on things like when in the Parliamentary cycle the spending occurs, how many constituency districts are being contested, and in which part of the United Kingdom the spending takes place.[66] Political parties have higher limits than third-party campaigners, and also have separate limits for general party advocacy versus candidate-specific advocacy.[67] The applicable limits for referendums (like the Brexit vote) are set by the EC.[68] As in the United States, to avoid circumvention of these limits, coordinated spending is treated differently. Spending done in coordination with a political party (or "lead campaign group" in a referendum) is counted toward the spending cap of the party or lead group.[69] If other registered campaigners coordinate with each other, their spending is considered that of one group, and their combined total must stay within the applicable limit as such.[70]

The third significant statute in the U.K. regulatory scheme is the Communications Act 2003. The 2003 law updated and continued the long-standing ban in the United Kingdom prohibiting political advertising on

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FINANCE: ENDING THE BIG DONOR CULTURE, 2011, Cm. 8208, at 8–9 (UK) [hereinafter POLITICAL PARTY FINANCE].

[63] STUART WILKS-HEEG & STEPHEN CRONE, FUNDING POLITICAL PARTIES IN GREAT BRITAIN: A PATHWAY TO REFORM 13 (2010).

[64] Political Parties, Elections and Referendums Act 2000, c. 41, § 62 (UK), http://www.legislation.gov.uk/ukpga/2000/41/contents [https://perma.cc/MNB4-S9HC].

[65] *Id.* c. 41, §§ 79, 94, schs. 9, 10.

[66] *Id.* These limits were tied to the proportion of the vote the party received at the most recent general election, which was the 2015 general Westminster Parliament election.

[67] For example, in 2011 in a general election for the Westminster Parliament in which all constituency districts were being contested, the spending cap on each of the political parties was £19.5 million. POLITICAL PARTY FINANCE, *supra* note 62, at 30. The national spending cap for registered third parties (interest groups intending to spend more than £10,000 to attempt to influence an election) was just under £800,000 in England, and the third-party limit for candidate-specific spending in the constituency districts was £500. *Id.* at 31–32.

[68] For referendum campaigns, the EC uses a statutorily defined process to identify a "lead campaign group" for each side of the debate. *See* THE ELECTORAL COMM'N, THE DESIGNATION PROCESS 4 (Mar. 2016), https://www.electoralcommission.org.uk/sites/default/files/pdf_file/Designation-process-for-the-EU-referendum.pdf [https://perma.cc/E73H-TRXV] [hereinafter DESIGNATION PROCESS]. The lead campaign group has a significantly higher spending limit than other registered groups. For Brexit, the lead campaigns had a limit of £7 million while the limit for other registered campaign groups was £700,000. 2016 EU REFERENDUM, *supra* note 5, at 91.

[69] *See* DESIGNATION PROCESS, *supra* note 68, at 6.

[70] *See id.*

broadcast media.[71] Unlike the RPA and PPERA, this restriction is in effect at all times, not just during the regulated election period. Under the Act, recognized political parties contesting seats in a requisite number of constituency districts are given free broadcast time during the lead up to an election, but no other political ads can be legally broadcast on public or private television or radio at any time.[72] The ban is far-reaching, and applies not only to political party ads, but also to third-party ads "directed towards a political end."[73]

The combined effect of RPA, PPERA, and the Communications Act 2003 is a regulatory system very different from that in the United States. Those differences are significant—the Communications Act 2003, for example, would be plainly unconstitutional under United States law. As shown below, however, the reform proposals being considered in each nation only rarely implicate these differences, allowing ample room for constructive comparative work.

IV. TAXONOMY OF REFORM PROPOSALS

Regulators, lawmakers, and reform advocates in the United States and United Kingdom have generated numerous proposals to more effectively regulate online campaigning and foreign interference in domestic elections. Some of these proposals—such as tightening data privacy rules and imposing antitrust restraints on social media companies—do not directly engage campaign laws and are not discussed here. Others, however, touch on controversies central to those laws, such as how to define campaign-related speech, how to balance personal privacy with public accountability, and how to ensure fair elections without infringing on the freedom of expression essential to a functioning democracy.

This Part addresses those proposals. In doing so, it organizes them into a common taxonomy, and examines the legal rules governing each class of proposal in each nation. Grouping the proposals into this organizational scheme brings a systemic coherence to comparative work in this area by contextualizing similar proposals within the specific legal rules under which they will be evaluated. This enables more of an "apples-to-apples" evaluation of the legal challenges each type of reform will face in each nation, allowing us to see more clearly which proposals are worthy of additional comparative study, and which are not.

The taxonomy classifies reform proposals according to their underlying goals. There are four principle goals: better educating the public about digital literacy (public education); enhancing the transparency of online campaigning (transparency); reducing the influence of foreign interests over voters' choices

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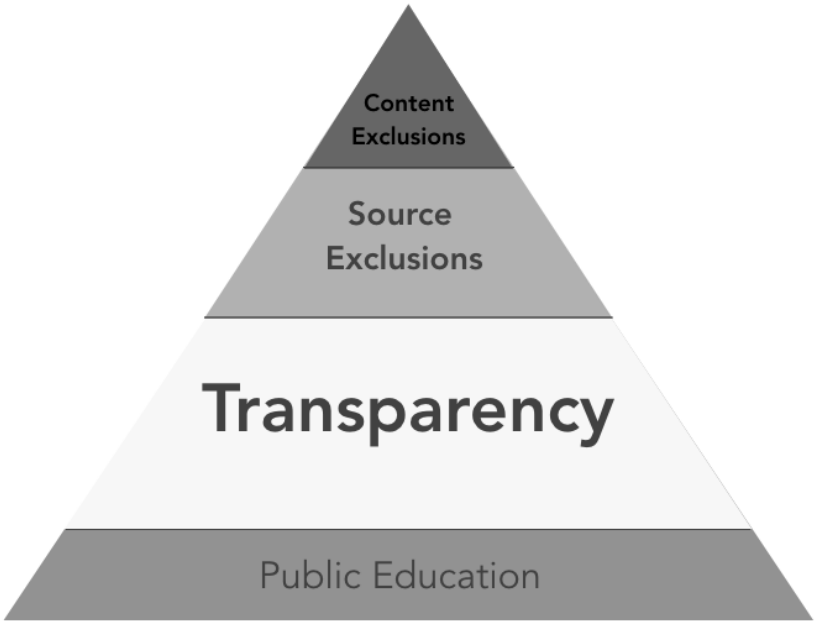
[71] Communications Act 2003, c. 21, § 321 (UK), http://www.legislation.gov.uk/ukpga/2003/21/contents [https://perma.cc/2RED-WWYZ].

[72] *Id.* §§ 319, 321, 333.

[73] *Id.* § 321(2)(a)–(c).

(source exclusions); and excluding deceptive or otherwise harmful content from online distribution (content exclusions). Not all reform proposals, of course, fit neatly into this taxonomy, nor does the analysis that follows discuss every proposal made within each category; the taxonomy is exemplary, not comprehensive. But organizing the most common proposals this way efficiently facilitates comparative consideration.

As shown below, these four types of reform proposals can be visualized as a pyramid. The reforms at the base of the pyramid (public education) face few system-specific legal challenges and therefore are the most comparable across systems; reforms at the peak (content exclusions) face the most such challenges, and therefore offer fewer opportunities for productive comparative analysis (although even here there are areas in which the two nations can learn from each other's experiences).



Public education proposals, at the base of the pyramid, do not directly involve campaign laws but are included because their goal is to make voters more critical consumers of political messages they see online. In the United States, these proposals include federal efforts such as the expansion of the State Department's counterterrorism mission to include combating disinformation, and efforts such as those in California, Massachusetts, and Washington to teach digital media literacy in schools.[74] In the United Kingdom, this category includes things like proposals to use a social media tax to fund online literacy

[74] Alex Stamos et al., *Combatting State-Sponsored Disinformation Campaigns from State-Aligned Actors*, *in* STANFORD CYBER POLICY CTR., *supra* note 7, at 44 (internal citations omitted).

programs, and efforts to promote awareness of the standards of professional journalism.[75] Public education proposals like these are unlikely to face significant legal challenges in either country and are only briefly discussed below.

Transparency proposals aim to help voters make more informed choices by ensuring they understand who is promoting or paying for the political messages they see. Transparency proposals are plentiful in both the United States and the United Kingdom, and include recommendations to require disclaimers (imprints) on online ads, require more detailed reporting of online expenditures, and change the type and nature of online spending disclosed to regulatory bodies.[76] The laws governing transparency rules in the United States and United Kingdom are different, and these differences mean reforms in this category will face distinct legal challenges in each nation. Examining these proposals through the structure provided by the taxonomy allows us to see that these legal differences are not as relevant to the reforms being proposed as is frequently assumed. This category therefore provides extensive opportunity for genuinely valuable comparative consideration.

Source exclusions regulate political communications based on who is speaking, promoting, or paying for the communication. The goal of reform proposals in this class is to limit the influence of foreign interests on domestic elections by precluding foreign funding of election-related communications. Analyzing each nation's law through the taxonomy reveals that source exclusions will face significantly different legal challenges in the United States and United Kingdom, but that there is sufficient common ground even here to make comparative study useful.

Content exclusions are designed to exclude or reduce harmful communications online. What is considered "harmful" varies in these proposals, and ranges from things already regulated if done offline (such as defamation, harassment, fraud, or abuse) to more controversial efforts to limit the online spread of propaganda, disinformation, and other content considered detrimental to democratic discourse. Context exclusions, at the apex of the pyramid, will face the most system-specific legal barriers, many of which are likely to be insurmountable in the United States.

The remainder of this Part will discuss in detail the current rules governing each of these categories in the United States and United Kingdom, and the legal

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[75] Damian Tambini, *Three Ways the Government Can Supercharge Media Literacy Policy in the UK*, LONDON SCH. ECON. & POL. SCI. (Jan. 30, 2019), https://blogs.lse.ac.uk/medialse/2019/01/30/3-ways-the-government-can-supercharge-media-literacy-policy-in-the-uk [https://perma.cc/7WZG-72L2].

[76] *See, e.g.*, *Advertising and Disclaimers*, FED. ELECTION COMMISSION, https://www.fec.gov/help-candidates-and-committees/making-disbursements/advertising/ [https://perma.cc/76WL-ESSZ] (outlining online disclosure); *Campaign Finance: United Kingdom*, LIBR. CONGRESS, https://www.loc.gov/law/help/campaign-finance/uk.php [https://perma.cc/8GHG-FL6M] (last updated July 1, 2015) (outlining U.K. online expenditure requirements).

challenges reforms in each category of proposal are likely to face in each country. In doing so, it also will identify the specific areas where further comparative study will be most beneficial.

A. *Public Education*

Rather than directly regulate campaign speech, public education proposals seek to make voters more critical consumers of the political messages they see. This type of public education effort is unlikely to encounter significant legal barriers in either the United States or the United Kingdom. It nonetheless is included here because of its fundamental importance in combatting online and foreign election interference. Effective regulation of election-related speech is devilishly difficult, and will be so even if campaign laws are fully updated and regulators fully engaged. Increasing awareness of the problem through public education efforts is therefore critical.

Both the United States and the United Kingdom have taken small steps in this area. In the United States, the mission of the State Department's Global Engagement Center has been expanded to include countering foreign disinformation more broadly.[77] The U.S. Intelligence Community also has made efforts to increase public awareness of the problem. The former Director of National Intelligence,[78] the Director of the Federal Bureau of Investigation,[79] the former Homeland Security Secretary,[80] and the former Special Counsel to the U.S. Attorney General all have made public statements warning Americans of ongoing efforts by foreign actors to use social media platforms to inflame political tensions and influence U.S. elections.[81] In the United Kingdom, former

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[77] Countering Foreign Propaganda and Disinformation Act, S. 3274, 114th Cong. (2016). This Act was incorporated into the National Defense Authorization Act for Fiscal Year 2017. *Compare id.*, *with* National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 1287, 130 Stat. 2000, 2546–48 (2016) (directing the establishment of a Global Engagement Center to "recognize, understand, expose, and counter foreign state and non-state propaganda and disinformation efforts").

[78] *See* Martin Matishak, *Intelligence Heads Warn of More Aggressive Election Meddling in 2020*, POLITICO (Jan. 29, 2019), https://www.politico.com/story/2019/01/29/dan-coats-2020-election-foreign-interference-1126077 [https://perma.cc/GY2K-RX4J].

[79] Julian E. Barnes & Adam Goldman, *F.B.I. Warns of Russian Interference in 2020 Race and Boosts Counterintelligence Operations*, N.Y. TIMES (Apr. 26, 2019), https://www.nytimes.com/2019/04/26/us/politics/fbi-russian-election-interference.html [https://perma.cc/TZB4-7LPA].

[80] Eric Schmitt et al., *In Push for 2020 Election Security, Top Official Was Warned: Don't Tell Trump*, N.Y. TIMES (Apr. 24, 2019), https://www.nytimes.com/2019/04/24/us/politics/russia-2020-election-trump.html [https://perma.cc/BZ6S-78KX].

[81] *Full Transcript of Mueller's Statement on Russia Investigation*, N.Y. TIMES (May 29, 2019), https://www.nytimes.com/2019/05/29/us/politics/mueller-transcript.html [https://perma.cc/SJS6-7C4E].

Prime Minister Theresa May has done so as well.[82] Public education efforts also have been endorsed by most of the commissions and committees examining the issue in the United Kingdom, including the Electoral Commission,[83] the Information Commission, the Committee on Standards in Public Life,[84] and the House of Commons Digital, Culture, Media and Sports Committee.[85]

While these efforts have varying degrees of political support, they raise few serious legal issues in either the United States or the United Kingdom. Within broad limits, governments in both countries are free to engage in public information campaigns. In the United Kingdom, this type of effort would encounter no discernable legal challenges.[86] In the United States, public information campaigns are governed by the "government speech" doctrine. The core tenet of this doctrine is that when the government itself is speaking, it is allowed to advocate for its preferred position. So, for example, the government can fund an anti-smoking campaign without also having to fund pro-smoking messages. The doctrine is underdeveloped in several ways,[87] but as long as it is clear the government is the entity speaking, a public information campaign designed to increase digital literacy among voters would be unlikely to encounter significant legal challenge even in the United States. The remainder of this Article therefore will focus on the other three classes in the taxonomy: transparency, source exclusions, and content exclusions.

B. *Transparency*

Transparency is the largest and most diverse class in the taxonomy. When considering transparency proposals and the rules governing them, it is helpful to remember the distinction mentioned above between disclosure and disclaimer (imprint) rules. Disclosure rules require candidates, political parties, and some

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[82] Prime Minister Theresa May, Speech to the Lord Mayor's Banquet (Nov. 13, 2017), https://www.gov.uk/government/speeches/pm-speech-to-the-lord-mayors-banquet-2017 [https://perma.cc/S95H-WZ9P].

[83] THE ELECTORAL COMM'N, DIGITAL CAMPAIGNING: INCREASING TRANSPARENCY FOR VOTERS ¶¶ 32–34 (2018), https://www.electoralcommission.org.uk/sites/default/files/pdf_file/Digital-campaigning-improving-transparency-for-voters.pdf [https://perma.cc/W3FP-QFMU] [hereinafter DIGITAL CAMPAIGNING].

[84] COMM. ON STANDARDS IN PUB. LIFE, INTIMIDATION IN PUBLIC LIFE 18 (Dec. 2017), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/666927/6.3637_CO_v6_061217_Web3.1__2_.pdf [https://perma.cc/XQ79-MCYP].

[85] The DCSM Report identifies digital literacy as a "fourth pillar" of education, along with reading, writing, and math. DCSM REPORT, *supra* note 5, at 87.

[86] DIGITAL CAMPAIGNING, *supra* note 83, ¶¶ 104–25, at 20–23. There are limits in the United Kingdom on governmental spending to promote particular outcomes in referendums. *See generally* 2016 EU REFERENDUM, *supra* note 5, at 90.

[87] There are unresolved questions about how to distinguish the government's own speech from governmental funding for the speech of others, and whether it is legally relevant that the recipients of the message understand they are hearing a government-provided communication. There also are tangentially related prohibitions and norms against using federal funds to distribute propaganda directed at U.S. citizens.

groups to report their income and expenditures to a regulatory body. Disclaimer rules require certain communications to carry on their face information about who authorized or paid for the communication. Disclosure rules advance transparency by informing the public about who supports candidates for public office and who those candidates may be indebted to if elected; disclaimer rules advance transparency by informing the public about the source of the political messages they are seeing.[88] The most prominent reform proposals in this class involve strengthening disclosure rules by requiring more detailed reporting about the financing of such communications, and expanding disclaimer rules to cover more online communications.

The breadth and variety of online communications potentially covered by disclosure and disclaimer rules is what creates the legal challenges in this category. Any transparency rule, whether it be about disclaimers or disclosures, must define the communications it covers. This is challenging even when targeting traditional campaign communications, and becomes more so in the fluid world of online social media. Relatedly, lawmakers also must decide if online transparency rules should mirror offline rules, or if the differences between formats warrant distinct regulatory approaches. As shown below, while the United States and United Kingdom regulate disclosures and disclaimers quite differently, each country struggles with these same questions.

1. *Transparency in the United States*

The federal statutory law governing disclosure and disclaimer in the United States is found in two statutes: the Federal Elections Campaign Act (FECA, discussed above), and the Bipartisan Campaign Reform Act (BCRA, which amended FECA in 2002).[89] FECA requires political parties, candidates, and certain third-party campaigners to register and file regular reports with the FEC. Political parties and candidates running for federal office must register with the FEC when they raise or spend over a threshold amount in connection with a federal election.[90] Third-party campaigners must register as "political committees" (more commonly known as political action committees or "PACS") when their major purpose is to influence federal elections.[91]

Entities required to register with the FEC (FEC-registered groups) must file regular reports with the FEC specifying their contributions and expenditures. These reports are filed electronically at quarterly or monthly intervals, although

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[88] *See* Ciara Torres-Spelliscy, *Has the Tide Turned in Favor of Disclosure? Revealing Money in Politics After* Citizens United *and* Doe v. Reed, 27 GA. ST. U. L. REV. 1057, 1080 (2011); *see also* Michael D. Gilbert, *Campaign Finance Disclosure and the Information Tradeoff*, 98 IOWA L. REV. 1847, 1890 (2013).

[89] Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81.

[90] *Registering as a Candidate*, FED. ELECTION COMMISSION, https://www.fec.gov/help-candidates-and-committees/registering-candidate/ [https://perma.cc/F48Q-6VQ2].

[91] FEC Political Committee Status, 72 Fed. Reg. § 5595, 5596–97 (Feb. 7, 2007) (to be codified at 11 C.F.R. pt. 100).

expenditures on certain types of communications must be reported within twenty-four hours.[92] FEC-registered groups also must include disclaimers on most of their public communications, which are defined by the FEC as any general public political advertising, including broadcasts, newspaper and magazine ads, and internet ads "placed for a fee" on another person's website.[93] Consequently, groups that register with the FEC are by definition subject to extensive transparency rules. Their contributions and expenditures are disclosed in regular public reports, and most of their communications include disclaimers stating who authorized and paid for the communication.[94]

But not all groups that make campaign-related communications are required to register as political parties or committees with the FEC and therefore are not subject to these regular disclosure and disclaimer rules.[95] The most significant of these groups are "social welfare" groups.[96] Social welfare groups are a category defined by the Internal Revenue Service ("IRS", the U.S. federal tax agency) for taxation purposes.[97] They often are referred to by the IRS code provision that defines them: 501(c)(4). Under the applicable statute, to qualify for 501(c)(4) status, an organization must not be organized for profit and must be operated "exclusively" to promote the social welfare.[98] Regulations promulgated under the statute, however, permit social welfare groups to engage in political activity as long such efforts do not constitute their "primary" activity.[99]

This has permitted extensive use of 501(c)(4) status by politically active groups wishing to avoid FEC regulation. Because they are not defined as political committees for purposes of federal campaign law, they are not subject

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[92] 11 C.F.R. § 104.20(b) (2015); *Filing Frequency by Type of Filer*, FED. ELECTION COMMISSION, https://www.fec.gov/help-candidates-and-committees/dates-and-deadlines/filing-frequency-type-filer/ [https://perma.cc/X3JU-5WUT]. The 24-hour reporting requirement applies to expenditures in excess of $10,000 on "electioneering communications" as defined in BCRA. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 201, 116 Stat. 81, 88.

[93] 52 U.S.C. § 30101(22) (Supp. IV 2017); 11 C.F.R. § 100.26 (1996). This provision is discussed in greater detail below.

[94] *Public Communications*, FED. ELECTION COMMISSION, https://www.fec.gov/press/resources-journalists/public-communications [https://perma.cc/X9VY-R5VZ].

[95] *See* 52 U.S.C. § 30101(4) (defining a political committee); *see also id.* § 30120 (requiring political committees to disclose certain funding and authorization sources for certain public communications).

[96] *See* 26 C.F.R. § 1.501(c)(4)(a)(2)(i) (2019) (describing the nature of a "social welfare" organization as one being "primarily engaged in promoting in some way the common good and general welfare of the people").

[97] *See id.* § 1.501(c)(4)(a)(1) (noting a disclosure and disclaimer exemption for civic organizations operating "exclusively for the promotion of social welfare").

[98] *Id.*; ERIKA K. LUNDER & L. PAIGE WHITAKER, CONG. RESEARCH SERV., R40183, 501(C)(4)S AND CAMPAIGN ACTIVITY: ANALYSIS UNDER TAX AND CAMPAIGN FINANCE LAWS 3 (2013).

[99] LUNDER & WHITAKER, *supra* note 98, at 3.

to FECA's regularized disclosure and disclaimer rules.[100] Instead, their political communications are regulated by separate transparency rules developed by the FEC for unregistered groups that nonetheless engage in some election-related communications.[101] Drawing on the distinction made by the Supreme Court in *Buckley*, these groups need only report expenditures for express advocacy and contributions "earmarked" for that advocacy.[102] A communication is express advocacy for these purposes when it includes the *Buckley* magic words or the functional equivalent thereof.[103] A contribution is earmarked when it is designated by the donor as given to fund a particular communication.[104] FEC disclaimer rules developed for these groups track this paradigm, and apply only to those of their public communications that expressly advocate for the election or defeat of a candidate for federal office.[105]

The result of all this is that under FECA, only FEC-registered groups are subject to regular disclosure and disclaimer requirements, while non-FEC registered groups such as 501(c)(4)s can engage in significant political communications while avoiding most disclosure and disclaimer rules. This creates an obvious transparency gap. Entities like social welfare groups can avoid regular FEC regulation and reporting requirements by limiting their election-related advocacy to less than fifty percent of their activity, while also avoiding targeted regulation by avoiding words of express advocacy even in communications intended to influence federal elections.

BCRA attempted to partially close this gap by bringing an additional category of speech into the U.S. disclosure and disclaimer regime. As required by *Buckley*, BCRA uses a bright-line test to define the category of speech being regulated. BCRA defines the communications it regulates—"electioneering communications"—as any "broadcast, cable, or satellite communication" that refers to a clearly identified candidate for federal office, is publicly distributed thirty days before a primary or sixty days before a general election, and is targeted to the relevant electorate.[106] Under BCRA, electioneering communications, like express advocacy and the public communications of FEC-registered groups, must carry disclaimers identifying who is responsible and paying for the communication.[107] Entities who spend $10,000 or more a year

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[100] *See id.*

[101] *Id.* at 11. *See generally* Torres-Spelliscy, *supra* note 88 (discussing the history of campaign finance disclosure law and two exemptions to those disclosure laws).

[102] Buckley v. Valeo, 424 U.S. 1, 12–23, 44 (1976).

[103] This test, which extends slightly beyond the "magic words" test of *Buckley*, was developed by the Supreme Court in 2007, in *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 453 (2007). *Wisconsin Right to Life* imposed a narrowing construction on the definition of electioneering communications, holding that the provision was unconstitutional unless read to apply only to expenditures that could not "reasonably be viewed" as anything other than urging the support or defeat of a candidate for federal office. *Id.* at 474.

[104] 11 C.F.R. § 110.6(b)(1) (2019).

[105] Speechnow.org v. Fed. Election Comm'n, 599 F.3d 686, 697 (D.C. Cir. 2010).

[106] 52 U.S.C. § 30104(f)(3) (Supp. IV 2017).

[107] *Id.* § 30104(f)(1)–(2).

producing or placing electioneering communications also must file a disclosure statement with the FEC identifying the names and addresses of those who have contributed more than $1000 to fund its communications.[108]

The U.S. Supreme Court upheld these transparency provisions in *Citizens United v. FEC*.[109] Decided in 2010, *Citizens United* is better known for striking down a ban on the use of corporate general revenue funds to fund a corporation's independent expenditures.[110] But the case also addressed the constitutionality of disclosure and disclaimer requirements as applied by BCRA to electioneering communications.[111] The case is important for U.S. transparency law, because the core question presented was whether transparency regulations could be applied to political communications that did not constitute express advocacy under *Buckley* and its progeny.[112]

By an 8–1 vote, the Court upheld the transparency requirements.[113] In doing so, it found that disclosure and disclaimer rules, like campaign contributions, are not direct prohibitions on speech and therefore need only be supported by a substantial (rather than compelling) interest.[114] The Court further held that "shedding the light of publicity"[115] on who is financing political speech is such an interest, as is providing the electorate with information sufficient to ensure that voters are fully informed about who is speaking.[116] This type of information, the Court said, "enables the electorate to make informed decisions and give proper weight to different speakers and messages."[117] Importantly, the Court was clear that these transparency requirements can be imposed even when the communication being regulated does not constitute express advocacy and the group speaking is not otherwise regulated by the FEC.[118]

Assuming appropriate exceptions are available to protect the privacy of smaller donors and to allow for as-applied challenges for entities for whom

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[108] Citizens United v. FEC *and the Future of Federal Campaign Finance Reform*, LIBR. CONGRESS, https://www.loc.gov/law/help/citizens-united.php [https://perma.cc/2EV7-MXDU] (last updated Aug. 16, 2019).

[109] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 370–72 (2010).

[110] Discussed *infra* Part IV.C.1.

[111] *Citizens United*, 558 U.S. at 370–72.

[112] *Id.* at 318–19.

[113] *Id.* at 370–72.

[114] *Id.* at 366–67.

[115] McConnell v. Fed. Election Comm'n, 540 U.S. 93, 231 (2003) (quoting Buckley v. Valeo, 424 U.S. 1, 81 (1976)).

[116] *Citizens United*, 558 U.S. at 370–71.

[117] *Id.* at 371. An earlier decision, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995), had cast doubt on this informational interest, as applied to handmade leaflets distributed by an individual at a local meeting. The cost of preparing and distributing the leaflets at issue in *McIntyre* was negligible, and would have fallen well below the applicable reporting thresholds upheld in *Buckley* and subsequent cases. *See McIntyre*, 514 U.S. at 337 (noting that the defendant had "composed and printed [the leaflets] on her home computer and had paid a professional printer to make additional copies").

[118] *Citizens United*, 558 U.S. at 369.

disclosure poses a risk of serious harassment (limitations imposed by the Court in earlier cases),[119] the U.S. Supreme Court has therefore allowed disclosure and disclaimer requirements to attach to a wide array of political communications.[120] This may not continue: the composition of the Supreme Court is changing rapidly, and transparency rules are being challenged across the United States.[121] But at least under existing law, disclosure and disclaimer requirements could be applied to many more online communications than they currently are.

This result has been stymied, however, by BCRA itself and by the FEC. The text of BCRA only applies to "broadcast" communications, and the FEC has interpreted the statute as not applying to other media, including newspapers, magazines, telephones, and the internet.[122] This means the only statutory transparency requirements currently applicable to online communications are the more limited provisions found in FECA, which, as discussed above, only apply to the public communications of FEC-registered groups and the express advocacy of groups not otherwise regulated by the FEC. Neither the FEC nor Congress has as of yet expanded FECA's coverage to include the broader category of electioneering communications as defined in BCRA. This means that online "issue ads" (ads not including words of express advocacy) run by groups not regulated by the FEC as political parties, candidates, or political committees are not subject to any disclosure or disclaimer laws.

Additionally, the FEC also has been slow to extend even the limited disclosure and disclaimer required by FECA to online communications.[123] Instead, it has created a situation in which even ads that would require disclaimers if appearing offline (because they are the public communications of FEC-registered groups or the express advocacy of other groups) are not always required to carry disclaimers when distributed online. The FEC has

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[119] *See* Richard L. Hasen, *Chill Out: A Qualified Defense of Campaign Finance Disclosure Laws in the Internet Age*, 27 J.L. & POL. 557, 560–62 (2012) (describing the Supreme Court's finding that the Constitution required a harassment exception to disclosure requirements).

[120] *See, e.g.*, Indep. Inst. v. Fed. Election Comm'n, 216 F. Supp. 3d 176, 193 (D.D.C. 2016), *aff'd*, 137 S. Ct. 1204 (2017) (summary affirmance upholding the constitutionality of FECA large donor disclosure rules to issue-only—i.e., not express advocacy—electioneering communications paid for by a social welfare group).

[121] *See* Hasen, *supra* note 119, at 561–62 (illustrating what the Supreme Court in its changing composition has recently required to grant an as-applied exception to otherwise permissible disclosure requirements).

[122] BCRA defines "electioneering communications" as any "broadcast, cable and satellite communications." FED. ELECTION COMM'N, ELECTIONEERING COMMUNICATIONS BROCHURE 6 (2005), https://transition.fec.gov/pages/brochures/ec_brochure.pdf [https://perma.cc/S54T-P3WR].

[123] *See* Daniel W. Butrymowicz, Note, *Loophole.com: How the FEC's Failure to Regulate the Internet Undermines Campaign Finance Law*, 109 COLUM. L. REV. 1708, 1709 n.4 (2009) ("Whatever the reason, the FEC has, over the last several years, shown a consistent desire to not regulate the internet.").

accomplished this through a series of regulatory decisions and advisory opinions.[124] One of the first such decisions came in 2002, when the FEC determined that paid text message ads were exempt from an otherwise applicable disclaimer requirement under a "small-items" exception[125] developed for things like campaign buttons and bumper stickers.[126] Two years later, the FEC expanded on this idea by arguing in a lawsuit that it had administrative discretion to categorically exclude *all* digital communications from FECA's disclaimer rules.[127] When that position was rejected in court, the FEC decided that FECA disclaimers would only be required on digital ads "placed for a fee" on the "website" of another.[128] This meant that the requirement did not apply to communications distributed for free online, regardless of the cost of producing the content involved. It also meant the requirement did not extend to non-web-based platforms, such as mobile apps. That requirement was then even further diluted in 2011, when the FEC deadlocked on whether paid ads on Facebook required disclaimers.[129] This non-decision allowed Facebook to host even express advocacy ads without disclaimers until 2017, when the FEC finally issued an opinion stating that paid advertisements on Facebook were required to carry disclaimers when constituting express advocacy or placed by an FEC-registered group.[130]

Only in 2018, in the wake of revelations about the 2016 election, did the FEC slightly shift course and propose two draft regulations designed to expand the transparency of online election-related communications.[131] The drafts are

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[124] Advisory Opinions apply only to the specific circumstances presented. They offer guidance to similarly situated entities, but do not have the certainty of law or promulgated regulations. GARRETT, *supra* note 39.

[125] Fed. Election Comm'n, Advisory Opinion 2002–09 (Aug. 23, 2002).

[126] 11 C.F.R. § 110.11(f)(i) (2019).

[127] *See* Shays v. Fed. Election Comm'n, 337 F. Supp. 2d 28, 104 (D.D.C. 2004) ("For the [FEC] to exercise [such] discretion . . . [it] would require more explicit instruction from Congress.").

[128] Zainab Smith, *Public Hearing on Internet Disclaimers*, FED. ELECTION COMMISSION (July 18, 2018), https://www.fec.gov/updates/public-hearing-internet-disclaimers-2018/ [https://perma.cc/G4W2-ASSE].

[129] *See* Jennifer Valentino-DeVries, *I Approved This Facebook Message—But You Don't Know That*, PROPUBLICA (Feb. 13, 2018), https://www.propublica.org/article/i-approved-this-facebook-message-but-you-dont-know-that [https://perma.cc/MG2Z-WYQN] ("[T]he six-person FEC couldn't muster the four votes needed to issue an opinion, with three commissioners saying only limited disclosure was required and three saying the ads needed no disclosure at all, because it would be 'impracticable' for political ads on Facebook to contain more text than other ads.").

[130] A 2018 study by ProPublica indicated this rule was rarely followed and noncompliance was rarely punished. *See id.* (discovering that fewer than 40 of 300 Facebook ads had the FEC-required disclaimers).

[131] Internet Communication Disclaimers and Definition of ''Public Communication," 83 Fed. Reg. 12,864 (proposed Mar. 26, 2018) (to be codified at 11 C.F.R. pt. 100). The Notice of Proposed Rulemaking requires all commenters to provide their name, city, and state. *Id.* at 12,864. Presumably, the Commission wants to know who is attempting to influence its

substantially similar.[132] Both would expand online disclaimer requirements beyond "websites" to include paid placements on any digital platform, including Facebook, Google, Twitter, Pinterest, and YouTube, and mobile apps; and both would attach disclosure requirements to digital communications required to carry disclaimers.[133]

If adopted, either of these rules would bring more transparency to paid online political communications in the United States. But both drafts are limited in that they only extend to online ads the current disclaimer rules applicable under FECA, not the broader rules enacted in BCRA.[134] So, the new online disclaimer requirements would apply only to the public communications of FEC-registered groups and the express advocacy of other groups, meaning entities like social welfare groups will continue to be able to run even paid online advertisements without disclaimers as long as they avoid words of express advocacy.[135] The drafts are similarly limited on the disclosure side. Both drafts require disclosure of the identity of the entity paying for the ad, but continue the requirement that only earmarked contributions to that entity need be disclosed.[136] So, while FEC-regulated groups would continue to have to disclose virtually all of their contributors,[137] the draft rules would allow other groups to run even paid express advertisements without disclosing their underlying funders unless the funder specifically designates his or her donation as for a particular express ad.

An additional limitation of the draft rules is the continued application of the transparency rules only to online communications "placed for a fee" online.[138] Restricting online transparency rules to paid placements means the only expenses counting toward the threshold—triggering regulation are those paid to the platform hosting the ad. Since online advertising is significantly less expensive than its offline counterparts, this means increasing numbers of even paid placements could fall below the reporting threshold.[139] More significantly,

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decisions, so it can be fully informed about the person or group who is speaking and better evaluate the arguments presented.

[132] The most significant difference between the proposals is their alternative compliance standards for communications where full disclosure is considered impossible or impractical. *Id.* at 12,879.

[133] *Id.* at 12,869.

[134] *See id.* at 12,866.

[135] *Id.*

[136] *Id.*

[137] Political Committees regulated by the FEC must disclose to the FEC the names of all donors contributing more than $200. 52 U.S.C. § 30104(b)(3)(A) (Supp. IV 2017).

[138] Internet Communication Disclaimers and Definition of ''Public Communication," 83 Fed. Reg. at 12,868.

[139] DIGITAL CAMPAIGNING, *supra* note 83, at ¶¶ 1–10, 62–66 (2018); *see also* THE LORD HODGSON OF ASTLEY ABBOTTS CBE, THIRD-PARTY ELECTION CAMPAIGNING—GETTING THE BALANCE RIGHT: REVIEW OF THE OPERATION OF THE THIRD PARTY CAMPAIGNING RULES AT THE 2015 GENERAL ELECTION, 2016, Cm. 9205, at 74 (UK); Brendan Fischer, *Campaign Finance Law in the 21st Century*, *in* CAMPAIGN LEGAL CTR., EXAMINING FOREIGN

it means that extensive costs incurred in producing political communications—like the millions of dollars spent to train and employ workers at the St. Petersburg troll factory[140]—do not count toward the applicable threshold. Other reform proposals being considered in the United States, such as the DISCLOSE Act and the Honest Ads Act, also hew to this more conservative path.[141]

Again, this restrictive approach is not required by current U.S. law. As discussed above, *Citizens United* explicitly upheld the disclaimer requirements BCRA imposed on electioneering communications (broadcast communications that run in relevant time period and clearly identify a candidate for federal office) even when those communications do not constitute express advocacy.[142] BCRA, unlike FECA, also uses cost of production—not cost of placement—as the triggering threshold for its transparency measures.[143] So increasing transparency by extending BCRA's definition of "broadcast communications" to include online communications should be within the constitutional parameters set by the Supreme Court in *Citizens United*. Lower federal court decisions recognize this. A federal district court recently struck down an attempt by the FEC to restrict BCRA's transparency requirements to paid placements and exempt social welfare organizations from BCRA's rules entirely.[144] Additionally, the FEC's earmarking rule, currently used by the FEC to restrict the reach of FECA's disclosure requirements, has been struck down by a district

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INTERFERENCE IN U.S. ELECTIONS 16 (2018). *See generally* 2016 EU REFERENDUM, *supra* note 5.

[140] This "troll factory" refers to the Internet Research Agency in St. Petersburg, an agency who many commentators argue influenced the outcome of the UK-EU referendum. Clare Llewellyn et al., *For Whom the Bell Trolls: Shifting Troll Behaviour in the Twitter Brexit Debate*, 57 J. COMMON MKT. STUD. 1148, 1148 (2019).

[141] The Honest Ads Act expands disclosure and disclaimer rules to capture more online election communications but does not extend transparency rules to unpaid placements. H.R. 4077, 115th Cong. (2017). For a discussion of this history, see Ellen P. Goodman & Lyndsey Wajert, The Honest Ads Act Won't End Social Media Disinformation, But It's a Start 1 (Nov. 3, 2017) (unpublished manuscript), https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3064451_code333377.pdf?abstractid=3064451&mirid=1 [https://perma.cc/H8BM-P6FH]. A separate piece of legislation, the DISCLOSE Act, prohibits domestic corporations with significant foreign control, ownership, or direction from spending money in elections. S. 1585, 115th Cong. § 101 (2017).

[142] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 369–72 (2010).

[143] 11 C.F.R. § 104.20(a)(2) (2015); *How to Report Electioneering Communications*, FED. ELECTION COMMISSION, https://www.fec.gov/help-candidates-and-committees/other-filers/electioneering-communications/ [https://perma.cc/XF69-BYMM]; Smith, *supra* note 128.

[144] Shays v. Fed. Election Comm'n, 337 F. Supp. 2d 28, 128 (D.D.C. 2004). The court held the statute clearly intended the rules to apply to unpaid placements as long as the overall expenditure involved in distributing the advertisement exceeded $10,000. *Id.* at 129. The court also struck down the FEC's categorical exclusion of any electioneering communications placed by IRS regulated entities. *Id.* at 126–27; *see also* Del. Strong Families v. Att'y Gen. of Del., 793 F.3d 304, 308–09 (3d Cir. 2015) ("[I]t is the conduct of an organization, rather than an organization's status with the Internal Revenue Service, that determines whether it makes communications subject to the Act.").

court as inconsistent with FECA itself.[145] These rulings indicate that there is space within existing law to significantly increase the transparency of online communications in the United States.

2. *Transparency in the United Kingdom*

Unlike their U.S. counterparts, legislators in the United Kingdom work relatively free of judicial restraints on their ability to impose transparency rules on election-related communications. They nonetheless have struggled with similar questions of how to define the communications they are regulating, and whether to treat online communications the same or differently than their offline equivalents. As discussed below, both systems also have failed to require as much transparency as would be legally permissible under their respective regulatory systems.

The Political Parties, Elections and Referendum Act 2000 (PPERA) is the most significant primary legislation regulating transparency in U.K. campaigns.[146] As noted above, PPERA limits the campaign expenditures of national political parties and third-party campaigners.[147] It also requires political parties and third-party campaigners to register with the EC,[148] and to file regular disclosure reports itemizing their contributions and expenditures.[149]

Whether a third-party campaigner is required to register with the EC depends on whether the group intends to spend more than a threshold amount on "regulated campaign activity."[150] Regulated campaign activity includes activities that pass the "purpose test."[151] The purpose test defines regulated campaign activity as activity directed toward the public that "can be reasonably regarded as intended to influence voters."[152] Qualifying activities include efforts to influence voters to vote for or against a political party, candidate, or

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[145] *See* Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm'n, 316 F. Supp. 3d 349, 422–23 (D.D.C. 2018) ("In contravention of the broad disclosure that Congress intended when enacting the 1979 FECA Amendments, this regulation falls short . . . .").

[146] *See* Political Parties, Elections and Referendums Act 2000 c. 41 (UK), http://www.legislation.gov.uk/ukpga/2000/41/contents [https://perma.cc/MNB4-S9HC].

[147] *Id.* §§ 41–69.

[148] *Id.* § 28.

[149] *Id.* § 62.

[150] THE ELECTORAL COMM'N, OVERVIEW OF REGULATED NON-PARTY CAMPAIGNING 4 (2017), https://www.electoralcommission.org.uk/sites/default/files/2019-07/UKPGE-2017-Overview-of-non-party-regulated-campaign-activity.pdf [https://perma.cc/2EBC-C4R6] [hereinafter OVERVIEW OF REGULATED NON-PARTY CAMPAIGNING].

[151] *Id.* A 2016 review of the regulation of third-party campaigners in the United Kingdom proposed replacing the purpose test with an actual intent requirement. THE LORD HODGSON OF ASTLEY ABBOTTS, *supra* note 139, at 6. Parliament has not acted on this proposal.

[152] NEIL JOHNSTON & JOHN WOODHOUSE, HOUSE OF COMMONS LIBRARY, EU REFERENDUM AND ALLEGED BREACHES OF ELECTION LAW (EMERGENCY DEBATE), 2018, CBP 8272 (UK).

category of candidate; and that those efforts are aimed at, seen, heard by, or involving the public.[153] If an activity meets this test, costs counting toward the reporting threshold include not just the cost of placing the ad, but all costs involved in its production, publication and distribution.[154]

The Communications Act 2003 also defines campaign-related activity, for the purpose of enforcing its prohibition on the broadcast of political advertising.[155] As noted above, the scope of communications prohibited by the broadcast ban is broad, and includes not just communications from political parties, but any communication intended to influence elections, legislators, or the public on matters of public dispute.[156] This is the most expansive definition of election-related communications in U.K. election law. As such, it offers a useful test of the willingness of British and European courts to tolerate far-reaching regulation of political communication.

It was subject to just such a test in 2008, when a group called Animal Defenders International challenged the broadcast ban under Article 10 of the European Convention on Human Rights.[157] Article 10 protects freedom of expression,[158] and was incorporated into U.K. domestic law through the Human Rights Act 1998.[159] Animal Defenders wanted to broadcast an advertisement on the BBC.[160] The ad featured an image of a girl chained in a cage morphing into a chimpanzee while a voiceover provided information about the similar capabilities of chimpanzees and young children.[161] The objective of the campaign, according to the group, was not to influence elections but to draw public attention to the use of primates for research and recreational purposes.[162] When the BBC refused to air the ad, Animal Defenders sued.[163]

The U.K. Supreme Court (sitting at the time as the Lords of Appeal in the House of Lords)[164] held the ban was not incompatible with Article 10, even as

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[153] OVERVIEW OF REGULATED NON-PARTY CAMPAIGNING, *supra* note 150, at 4–5. In the Brexit referendum, it was defined as activity "intended to, or are otherwise in connection with, promoting or bringing about a particular outcome in the referendum." JOHNSTON & WOODHOUSE, *supra* note 152.

[154] *See* OVERVIEW OF REGULATED NON-PARTY CAMPAIGNING, *supra* note 150, at 10 (noting that spending on social media that meets the purpose test will require accounting of all the described costs).

[155] Communications Act 2003, c. 21, § 321 (UK), http://www.legislation.gov.uk/ukpga/2003/21/contents [https://perma.cc/2RED-WWYZ].

[156] OVERVIEW OF REGULATED NON-PARTY CAMPAIGNING, *supra* note 150, at 4–6 (overviewing the regulations applying to third-party campaigner communications).

[157] R (Animal Defenders International) v. Secretary of State for Culture, Media and Sport [2008] UKHL 15, [1], [2008] 1 AC 1312 (appeal taken from Eng.).

[158] European Convention on Human Rights art. 10, Nov. 4, 1951, 213 U.N.T.S. 222.

[159] Human Rights Act 1998 c. 42, § 10 (UK), http://www.legislation.gov.uk/ukpga/1998/42/contents [https://perma.cc/Z982-MKWZ].

[160] *Animal Defenders International* [2008] UKHL 15, [4].

[161] *Id.* at [50].

[162] *Id.* at [3].

[163] *Id.* at [4].

[164] *Id.* at [46].

applied to Animal Defenders' proposed communication.[165] The court recognized that public scrutiny of different "views, opinions and policies" is essential to the democratic process,[166] but believed that such scrutiny was best achieved by allowing Parliament to enact legislation ensuring a balanced presentation of competing ideas, especially on television.[167] The court did recognize, consistent with European jurisprudence, that Article 10 requires restrictions on expression be proportionate to their goals, and that the expansive definition of "political advertising" in the Communications Act could be considered overly broad.[168] But the difficulty of drawing clear lines in this area, the court said, meant that the court should defer to the considered judgment of Parliament.[169] The European Court of Human Rights agreed, and allowed the broadcast ban to stand.[170]

The key point of *Animal Defenders* for current purposes is that a very expansive definition of political advertising was upheld by both U.K. and European courts, using a deferential standard of review. This means equally expansive disclosure and imprint (disclaimer) laws—which are much less restrictive of political expression than the broadcast ban—would likely face few judicial barriers in the United Kingdom. Despite this, lawmakers in the United Kingdom, like their counterparts in the United States, have not yet expanded their transparency rules to capture the full scope of communications decisions like *Animal Defenders* leave open to them.

In regard to disclosure, U.K. regulators limit the scope of the nation's reporting regime by only requiring political parties and third-party campaigners intending to spend more than a set amount on regulated campaign activities to register with the EC and provide regular reports of their contributions and expenditures.[171] While these registration thresholds are in the same range as their U.S. counterparts, the U.K. disclosure system overall is quite different. Regulated groups in the United Kingdom are only required to disclose the

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[165] *Id.* at [36].

[166] *Animal Defenders International* [2008] UKHL 15, [28]; *see also* Rowbottom, *supra* note 2, at 1–2.

[167] *Animal Defenders International* [2008] UKHL 15, [28].

[168] *See id.* at [6], [31].

[169] *Id.* at [33].

[170] Animal Defenders International v. U.K., App. No. 48876/08, Eur. Ct. H.R. (2013), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-119244%22] [https://perma.cc/4BHN-JLBZ]; *cf.* R (Calver) v. Adjudication Panel for Wales, [2012] EWHC (Admin) 1172, [5], [90] (Wales) (granting claimant's application challenging the dismissal of his claim by the Adjudication Panel for failure to fully consider the claimant's right to free expression under Article 10).

[171] In 2019, the registration thresholds were £20,000 in England and £10,000 in Scotland, Wales and Northern Ireland. THE ELECTORAL COMM'N, UK PARLIAMENTARY GENERAL ELECTION 2019: NON-PARTY CAMPAIGNERS 10 (2019), https://www.electoralcommission.org.uk/sites/default/files/2019-11/Non-party%20campaigner%20UKPGE%202019.pdf [https://perma.cc/TRF9-UQGH] [hereinafter UKPGE GUIDANCE].

identity of donors who donate more than £7500 to the group.[172] This is much higher than the $200 triggering public disclosure in the United States.[173] The timing of the required reporting also is different. Political parties in the United Kingdom must provide regular contribution reports during the run-up to a general election,[174] but they do not need to report expenditures until three or six months after an election (with groups that spend more having longer to report).[175] Registered third-party campaigners, in turn, are only required to report contributions and spending during the regulated period, and third-party campaigning outside the regulated period is not reported at all.[176] Current reporting rules also allow expenditures to be lumped in unhelpful ways, making it difficult to trace online spending through the reports, and the EC has only limited authority to compel third-party campaign groups to disclose the underlying source of the funds they receive.[177]

There also are significant differences between the United States and United Kingdom in regard to imprint (disclaimer) requirements. Imprint rules in the United Kingdom are in several ways more extensive than those found in the United States. Any person or group distributing to the public material meeting the purpose test must include an imprint on the material, whether or not they are required to register with the EC.[178] There is no minimum spending threshold triggering this obligation.[179] Because the purpose test itself is quite broad, this means that imprints are required on more types of communications in the United Kingdom than in the United States. But there is one big exception to this: as of this writing there is *no* imprint requirement applicable to online

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[172] *Donations and Loans*, ELECTORAL COMMISSION, https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/financial-reporting/donations-and-loans [https://perma.cc/PJ27-4JU3] (last updated July 30, 2019).

[173] *See* 52 U.S.C. § 30104(b)(3)(A) (Supp. IV 2017).

[174] THE ELECTORAL COMM'N, OVERVIEW OF DONATIONS TO POLITICAL PARTIES 7, https://www.electoralcommission.org.uk/__data/assets/pdf_file/0014/102263/to-donations-rp.pdf [https://perma.cc/YU28-7L8X] [hereinafter OVERVIEW OF DONATIONS TO POLITICAL PARTIES].

[175] OVERVIEW OF PARTY CAMPAIGN SPENDING, *supra* note 53, at 15; *see also* DIGITAL CAMPAIGNING, *supra* note 83, ¶ 76.

[176] DIGITAL CAMPAIGNING, *supra* note 83, ¶¶ 40–41; UKPGE GUIDANCE, *supra* note 171, at 6. To avoid manipulation of these rules, contributions made outside that time frame must be reported if used to fund expenditures made during it. *See generally* THE ELECTORAL COMM'N, REPORTING DONATIONS AND LOANS: PARTIES WITH ACCOUNTING UNITS, http://www.electoralcommission.org.uk/__data/assets/pdf_file/0016/102283/sp-reporting-with-au-rp.pdf [https://perma.cc/UN88-HB9W] (describing the process by which registered central party treasurers must report certain donations and loans).

[177] *See* DIGITAL CAMPAIGNING, *supra* note 83, at 3 (recommending further itemized reports to increase third-party transparency in digital spending).

[178] THE ELECTORAL COMM'N, FACTSHEET FOR NON-PARTY CAMPAIGNERS: ELECTION MATERIAL AND IMPRINTS—GREAT BRITAIN, https://www.electoralcommission.org.uk/sites/default/files/pdf_file/fs-imprints-npc.pdf [https://perma.cc/B8X7-A932].

[179] *See id.* The test requires that covered material be distributed to the public, which imposes a practical limitation on the breadth of the rule. *Id.*

communications.[180] The U.K. government has agreed to develop rules requiring online imprints, but has not yet done so.[181] As the robust online campaign during the Brexit referendum made clear, this leaves a gaping hole in the United Kingdom's transparency regime.

Scotland experimented with plugging that hole during the 2015 vote on Scottish independence. The parliaments of Scotland, Wales, and Northern Ireland enjoy certain devolved powers, including the ability to regulate local elections.[182] Exercising this power, the Scottish Parliament required any material "wholly or mainly related" to the independence referendum to include an imprint, regardless of whether the material was distributed on or off line.[183] The "wholly or mainly related" test was even broader than the purpose test used in nationwide elections, and there was no threshold spending requirement—any communication meeting the test was required to carry an imprint.[184] This created a sweeping online imprint requirement.

It was only partially successful. In a report submitted to Parliament after the Scottish referendum, the EC noted that the scope of the disclosure requirement meant that a potentially wide amount of online material was captured by the rule, and that this had created confusion among campaigners about what communications were in fact required to carry imprints.[185] In particular, the EC reported receiving questions about whether communications posted on personal Facebook and Twitter accounts were within the scope of the rule, and if so where on these pages the imprints should appear.[186] The EC's response was to advise campaigners that social media accounts "focused primarily on campaigning" needed to carry imprints on their Facebook homepage or Twitter profile, but that

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[180] Michela Palese, *Imprints—Finally Some Action to Update Our Analogue Laws for the Digital Age*, ELECTORAL REFORM SOC'Y (May 7, 2019), https://www.electoral-reform.org.uk/imprints-finally-some-action-to-update-our-analogue-laws-for-the-digital-age/ [https://perma.cc/RXK4-FP9N].

[181] Natasha Lomas, *Digital Campaigning vs Democracy: UK Election Regulator Calls for Urgent Law Changes*, TECHCRUNCH (June 26, 2018), https://techcrunch.com/2018/06/26/digital-campaigning-vs-democracy-uk-election-regulator-calls-for-urgent-law-changes/ [https://perma.cc/T3P6-4CXT] ("A Cabinet Office spokesperson said: 'The government is committed to increasing transparency in digital campaigning, in order to maintain a fair and proportionate democratic process, and we will be consulting on proposals for new imprint requirements on electronic campaigning in due course.'"); *see* PROTECTING THE DEBATE, *supra* note 5, at 33–34 ("[We] will carefully consider [transparency concerns from voters] as we develop the policy for a digital imprint regime.").

[182] *See, e.g.*, Scotland Act 2012 c. 11, § 1 (giving the administration of elections to Scottish Parliament).

[183] THE ELECTORAL COMM'N, SCOTTISH INDEPENDENCE REFERENDUM 110 (Dec. 2014), http://www.electoralcommission.org.uk/__data/assets/pdf_file/0010/179812/Scottish-independence-referendum-report.pdf [https://perma.cc/3J5A-72XP] [hereinafter SCOTTISH INDEPENDENCE REFERENDUM].

[184] PROTECTING THE DEBATE, *supra* note 5, at 34 (noting that "*any* digital material" that met the test required an imprint) (emphasis added).

[185] SCOTTISH INDEPENDENCE REFERENDUM, *supra* note 183, at 110–11.

[186] *Id.* at 110.

individuals or organizations who were "just expressing their views" through their own accounts were not covered by the requirement.[187]

As the EC acknowledged in its post-election report, the distinction between using a social media account to focus primarily on campaigning versus using one to simply express your own views is far from crisp, and will require clarification if online imprint requirements become the norm in U.K. elections.[188] Nonetheless, the Scottish referendum provides a useful first look at a real-world effort to provide greater campaign transparency online.

3. *Transparency Recap*

As evidenced by the number and prominence of proposed reforms in this category, increasing transparency around online communications is an important tool in combatting disinformation and foreign interference in democratic elections. Fortunately, U.S. and U.K. laws regulating transparency are sufficiently similar to allow each country to learn from the other in this area. In both countries, disclaimer and disclosure rules can be triggered either by who you are or what you say. Both countries also require that candidates, political parties, and some third-party campaigners report their income and expenditures to an agency overseeing election activity. Both countries likewise require many political communications to carry disclaimers, but not all election-related communications are included in those requirements, especially when occurring online.

The legal challenges facing each country in this area also are surprisingly similar. Both countries are struggling with how to design online disclaimer and disclosure requirements that balance the regulatory burden imposed by such requirements with the need for public awareness of who is authorizing and paying for online campaigns. The United States can gain valuable insights by in-depth study of the groundbreaking Scottish experiment with online imprints, while the United Kingdom has much to learn from careful consideration of the long path already trod by U.S. courts and legislatures trying to distinguish regulated campaign communications from unregulated political expression. These are not easy issues, and the experiences of the two countries have much to offer each other in evaluating them.

The United States also could learn from the United Kingdom's experience using pay-to-produce rather than a pay-to-place thresholds for online disclosure and disclaimer requirements. Online advertising is significantly less expensive than its offline counterparts, and often is shared organically between users rather than by the initial distributor. Developing regulatory thresholds that capture the actual expenses incurred in implementing these types of campaigns is critical to increasing transparency, but is tricky to do well. The United Kingdom has more

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[187] *Id.*

[188] The report advised against changing the rule immediately because Brexit campaigning had already begun. *Id.* at 111 n.41.

experience than the United States in using this measure, and U.S. lawmakers can benefit from that experience as they consider the appropriate reach of proposed reforms like those found in the DISCLOSE and Honest Ads Acts.

There are other insights to be gleaned as well. In the United States, the reports regularly filed by FEC-registered groups provide more timely and detailed information than those collected by the EC. The U.S. system therefore could provide useful guidance as the United Kingdom considers whether and how to change the timing and nature of its own reporting system to increase its value to voters. The United States, in turn, has much to gain by careful review of the decisions the United Kingdom has made in regard to balancing transparency with the privacy interests of smaller donors. This issue is becoming more important in the United States as disclosure rules come under increased pressure; the United Kingdom experience using a significantly higher public disclosure threshold than that found in the United States may hold valuable lessons for the U.S. reform community.

C. *Source Exclusions*

Unlike transparency rules, source exclusions prohibit some entities from participating in a nation's democratic deliberations at all, even if their participation is fully disclosed. Most countries that regulate money in politics prohibit or restrict the election-related activities of foreign entities in some way,[189] and reform proposals in this category are generally geared toward strengthening those rules. In the United States and United Kingdom, these proposals include increasing and better enforcing restrictions on political expenditures by foreign actors, non-citizens, and subsidiaries of foreign-owned corporations;[190] requiring online platforms to verify the domestic identity of entities purchasing online campaign communications;[191] and tightening prohibitions on foreign contributions to candidates and political parties.[192]

Despite their ubiquity, source exclusions raise a host of problems. To start with, defining "foreign" can be surprisingly problematic, particularly in regard

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[189] *See, e.g.*, Myles Martin, *Foreign Nationals*, FED. ELECTION COMMISSION (June 23, 2017), https://www.fec.gov/updates/foreign-nationals/ [https://perma.cc/TS3V-JPQK] (listing several categories of U.S. election activities from which foreign nationals are prohibited).

[190] *See, e.g.*, *id.* ("[F]oreign nationals are prohibited from . . . [m]aking any contribution or donation of money or other thing of value, or making any expenditure, independent expenditure, or disbursement in connection with any federal, state or local election in the United States . . . .").

[191] *See, e.g.*, *id.* ("[F]oreign nationals are prohibited from . . . [m]aking any disbursement for an electioneering communication . . . .").

[192] *See, e.g.*, *id.* ("[F]oreign nationals are prohibited from . . . [m]aking any contribution or donation to any committee or organization of any national, state, district, or local political party . . . .").

to multi-generational diaspora communities and transnational corporations.[193] It also can be challenging to operationalize source exclusions online, where information readily crosses borders and original sources are easily obscured.[194] Finally, it can be difficult to articulate a legally compelling reason why a voter should be prevented from hearing a properly attributed message just because of the foreign status of the messenger—and not everyone agrees such restrictions are appropriate.[195] Addressing these issues is critical to crafting and defending workable foreign source exclusion rules in both the United States and the United Kingdom.

1. *Source Exclusions in the United States*

Restrictions on foreign involvement in domestic elections have been part of U.S. law since at least 1938, when Congress enacted the Foreign Agents Registration Act (FARA) in response to fears that German nationals were being paid to distribute Nazi propaganda in the United States.[196] The restrictions were tightened in the 1960s, after a Senate investigation revealed that campaign contributions had been channeled to congressional candidates by Filipino sugar industry magnates,[197] and again in the 1990s after reports of Chinese nationals using "soft money" donations to gain access to high-level government officials in the Clinton Administration.[198]

The distinction developed in *Buckley* between campaign contributions and expenditures shapes this legal landscape as well. In regard to contributions,

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[193] *See* Joo-Cheong Tham, *Of Aliens, Money and Politics: Should Foreign Political Donations Be Banned?*, 28 KING'S L.J. 262, 267–68 (2017) (describing countries' different definitions of "foreign" actors as being undergirded by different integrity-preservation concerns).

[194] *See generally* Amol Rajan, *The Constant Influence of Dark Ads*, BBC NEWS (Mar. 11, 2019), https://www.bbc.co.uk/news/entertainment-arts-47524230 [https://perma.cc/U4RN-YJQ5] (describing the inherent difficulty in pinpointing the source of online political advertisements).

[195] *See* CAMPAIGN LEGAL CTR., EXAMINING FOREIGN INTERFERENCE IN U.S. ELECTIONS 41 (Jan. 2018), https://campaignlegal.org/sites/default/files/2018-Report-interactive-pages.pdf [https://perma.cc/QGG2-CWRK]. *See generally* Jeffrey K. Powell, Note, *Prohibitions on Campaign Contributions from Foreign Sources: Questioning Their Justification in a Global Interdependent Economy*, 17 U. PA. J. INT'L L. 957 (1996) (exploring purported justifications for excluding foreign influence on domestic elections).

[196] Foreign Agents Registration Act, Pub. L. No. 75-583, 52 Stat. 631 (1938) (codified as amended at 22 U.S.C. §§ 611–21 (1982)); Zephyr Teachout, *Extraterritorial Electioneering and the Globalization of American Elections*, 27 BERKELEY J. INT'L L. 162, 171 (2009).

[197] Teachout, *supra* note 196, at 172.

[198] H.R. REP. NO. 105-829, at 61 & n.69 (1998). "Soft money" is money used to engage in party-building activities and is regulated separately under FECA. *See* 52 U.S.C. § 30101 (Supp. IV 2017); *see also* FED. ELECTION COMM'N, FAQ ON THE BCRA AND OTHER NEW RULES 3 (Feb. 2005), https://transition.fec.gov/pages/brochures/bcra_brochure.pdf [https://perma.cc/F2T8-6E2C].

candidates and political parties are categorically prohibited from soliciting, accepting, or receiving donations from foreign nationals.[199] It is likewise illegal for a foreign national to directly or indirectly contribute money or other "things of value" to a candidate in any federal, state, or local election.[200] FECA also prohibits knowingly assisting foreign nationals in circumventing the foreign source exclusion ban, while FARA prevents circumvention by prohibiting U.S. agents from making contributions on behalf of their foreign principals.[201] These rules have consistently been upheld under the *Buckley* paradigm subjecting regulations of contributions to a relatively relaxed level of constitutional scrutiny.[202]

Source-based expenditure bans present a more complicated legal question in the United States. The Supreme Court dealt with source-based expenditures bans most recently in *Citizens United*.[203] As discussed above, *Citizens United* upheld the broad disclosure and disclaimer requirements imposed by BCRA on broadcast electioneering communications. But the case is better known for striking down a source-based ban on the use of corporate general revenue funds to fund the independent expenditures of corporations. Prior to *Citizens United*, U.S. law permitted corporations to use these funds to purchase "issue ads" but they were prohibited from using them to purchase express advocacy (under FECA) or electioneering communications deemed the functional equivalent of express advocacy (under BCRA and subsequent court decisions).[204] The Court held in *Citizens United* that this source-based expenditure ban violated the First Amendment.[205]

In doing so, the *Citizens United* Court used sweeping language to condemn source-based regulations of political speech.[206] The government, the Court said, may not "deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration."[207] This strong rhetoric

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[199] 52 U.S.C. § 30121 (Supp. IV 2017).

[200] *Id.*; 11 C.F.R. 110.20(b) (2019). BCRA also includes a sentencing enhancement for campaign finance violations involving foreign contributions specifically from or directed by foreign governments. Ciara Torres-Spelliscy, *Dark Money as a Political Sovereignty Problem*, 28 KING'S L.J. 239, 253 (2017).

[201] *See* 52 U.S.C. § 30121 (Supp. IV 2017); 22 U.S.C. § 614(e) (2012).

[202] In May 2019, the Supreme Court declined to review a Massachusetts law prohibiting such contributions. 1A Auto, Inc. v. Dir. of Office of Campaign & Political Fin., 105 N.E.3d 1175, 1181–82 (Mass. 2018), *cert. denied*, 139 S. Ct. 2613 (2019).

[203] *See generally* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

[204] *See* 52 U.S.C. §§ 30101–30145 (Supp. IV 2017); Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 201, 116 Stat. 81; Buckley v. Valeo, 424 U.S. 1 (1976). This is a narrower definition of BCRA's "electioneering communications" than is applicable to transparency laws. As discussed above in Part I, the Court has made clear that this narrower definition is not constitutionally compelled in regard to transparency requirements.

[205] *Citizens United*, 558 U.S. at 372.

[206] *See* Justin Levitt, *Confronting the Impact of* Citizens United, 29 YALE L. & POL'Y REV. 217, 223 (2010).

[207] *Citizens United*, 558 U.S. at 341.

cast constitutional doubt on all source-based expenditure restrictions, including the foreign-source bans found in both FECA and BCRA.[208] So it was not surprising when the federal district court for the District of Columbia was asked just a year after *Citizens United* was decided to consider whether those bans were also unconstitutional.

The case, *Bluman v. FEC*, involved two foreign nationals legally living in the United States who wanted to make express advocacy expenditures supporting candidates for federal office but were prevented from doing so by BCRA's foreign expenditure ban.[209] Writing for the majority, then-Judge Brett Kavanaugh upheld the law.[210] In doing so, he brought into play a line of Supreme Court decisions, present but not emphasized in *Citizens United*, establishing the constitutional permissibility of excluding foreigners from certain tasks considered central to democratic self-government.[211] The gist of these cases is that excluding foreign nationals from activities "intimately related" to the process of self-government is constitutionally acceptable, even when such distinctions would not be tolerated elsewhere.[212] As the *Bluman* court noted, this doctrine has been used by the Supreme Court to uphold laws excluding foreign nationals from serving as jurors, holding elected office, and voting.[213] The power to exclude foreign nationals from such areas, the *Bluman* court said, is a core component of a nation's right and duty to preserve itself as a political community; to define, in other words, who is and is not a member of a given *polis*.[214]

Drawing on this line of cases, *Bluman* held that the First Amendment did not bar the government from trying to restrict foreign influence over how voters cast their ballots, at least to the extent presented in the case before the court (which was limited to express advocacy).[215] Elections, the court said, are "an integral aspect" of the process of self-governance, and spending money to influence voters is "at least as (and probably far more)"[216] closely related to democratic self-government than other tasks the Supreme Court had applied the doctrine to, such as serving as a probation officer or public school teacher.[217] Nothing in *Citizens United* precluded this result, according to the *Bluman* court,

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[208] *See* Levitt, *supra* note 206, at 222.

[209] *See generally* Bluman v. Fed. Election Comm'n, 800 F. Supp. 2d 281 (D.D.C. 2011).

[210] *Id.* at 292.

[211] *Id.* at 287.

[212] *Id.* (quoting Bernal v. Fainter, 467 U.S. 216, 220 (1984).

[213] *Id.*

[214] *Id.* at 287–88.

[215] *Bluman*, 800 F. Supp. 2d at 292.

[216] *Id.* at 288–89.

[217] *See, e.g.*, *Bernal*, 467 U.S. at 220; Cabell v. Chavez-Salido, 454 U.S. 432, 439 (1981); Ambach v. Norwick, 441 U.S. 68, 73–74 (1979); Foley v. Connelie, 435 U.S. 291, 296 (1978); Sugarman v. Dougall, 413 U.S. 634, 648 (1973). As Ciara Torres-Spelliscy notes, this body of law is grounded in the same concerns that animate the Constitution's Emoluments Clause. *See* Torres-Spelliscy, *supra* note 200, at 251.

and the self-governance line of cases dictated it.[218] Therefore, limiting foreign influence over American democracy was a sufficiently compelling interest to justify the foreign source expenditures ban being challenged.[219]

The Supreme Court summarily affirmed *Bluman*.[220] But there is considerable tension between *Citizens United*, which is deeply skeptical of the legitimacy of source-based bans and reserves to voters the power to critically assess political information, and the rationale of *Bluman*, which emphasizes the power and duty of sovereign states to protect voters from foreign influence even when properly disclosed.[221] This uncertainty caused difficulties almost immediately after *Bluman* was decided when the FEC was presented with a complaint alleging that a foreign national spent $327,000 opposing a California ballot referendum.[222]

The FEC commissioners could not agree whether to act on the complaint.[223] The disagreement turned on whether *Bluman*'s validation of foreign expenditure bans in a candidate election logically extended to a ban on foreign expenditures in a referendum.[224] The legal distinction between candidate elections and referendums dated to before *Citizens United*, when the Supreme Court had held in *First National Bank of Boston v. Bellotti* that corporations could not be prohibited from using general corporate revenue funds to fund expenditures related to a referendum campaign.[225] The *Bellotti* Court's reasoning was that there was no candidate in a referendum campaign who could be "corrupted" by corporate money, and therefore no risk of quid pro quo corruption justifying the restriction.[226]

The FEC commissioners in favor of dismissing the California complaint argued that *Bellotti*, not *Bluman*, governed because the complaint involved a ballot referendum, not a candidate election.[227] The FEC commissioners in favor of advancing it argued that *Bluman*'s language regarding the importance of protecting democratic self-governance established a distinct compelling interest justifying foreign source exclusions that applied with equal force in candidate

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[218] *Bluman*, 800 F. Supp. 2d at 289.

[219] *Id.* at 288.

[220] Bluman v. Fed. Election Comm'n, 565 U.S. 1104, 1104 (2012).

[221] *See* Toni M. Massaro, *Foreign Nationals, Electoral Spending, and the First Amendment*, 34 HARV. J.L. & PUB. POL'Y 663, 663–64 (2011); *see also* Richard L. Hasen, *Cheap Speech and What It Has Done (to American Democracy)*, 16 FIRST AMEND. L. REV. 200, 218–19 (2017).

[222] *See* In the Matter of MindGeek, MUR 6678, 1 (Fed. Election Comm'n 2015), https://eqs.fec.gov/eqsdocsMUR/15044372963.pdf [https://perma.cc/SV2P-U3GY].

[223] *Id.* at 2.

[224] *Id.*

[225] First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 767 (1978).

[226] *Id.* at 790.

[227] *MindGeek*, MUR 6678, at 1–2; Statement of Reasons of Chair Ann M. Ravel at 2, In the Matter of MindGeek, MUR 6678 (Fed. Election Comm'n 2015); Statement of Reasons of Commissioner Ellen L. Weintraub at 1, In the Matter of MindGeek, MUR 6678 (Fed. Election Comm'n 2015).

and referendum campaigns.[228] *Bluman*, those commissioners argued, had carved out a "no-go" zone for foreign participation in American politics that applied regardless of the nature of the underlying vote.[229] Because the commissions deadlocked over this issue, the FEC took no action on the complaint.[230]

The dispute over the California complaint reveals an important and unresolved issue in U.S. law regarding foreign source exclusion bans. Since *Buckley*, opponents of campaign finance regulation have argued that the only constitutionally acceptable justification supporting such regulations is the interest in preventing quid pro quo corruption or the appearance thereof.[231] Except for a brief deviation in 1990, the Supreme Court has generally seemed to agree.[232] The unresolved issue is whether that limitation also applies to foreign source bans. The commissioners' disagreement in the California case pushes this point. If the only constitutionally acceptable reason to permit foreign source bans is to prevent the appearance or actuality of quid pro quo corruption, then such a ban could not be constitutionally applied to a referendum campaign where there is no candidate to corrupt. If, on the other hand, the *Bluman* rationale about protecting voters from foreign influence is a constitutionally acceptable justification distinct from concerns about quid pro quo candidate corruption, then it should apply with equal force to both candidate and referendum campaigns. As the dispute between the FEC commissioners in the California case demonstrates, the lack of clarity on this point leaves unclear both the scope and justification of U.S. foreign source exclusion laws.[233]

2. *Source Exclusions in the United Kingdom*

The law governing source exclusions in the United Kingdom is similar to that in the United States. Once again, the relevant primary legislation is PPERA. When PPERA was enacted, there was significant concern about foreign donations made in the 1990s to British political parties, particularly Prime Minister John Major's Conservative Party, which had been criticized for

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[228] Statement of Reasons of Commissioner Ellen L. Weintraub at 3–4, In the Matter of MindGeek, MUR 6678 (Fed. Election Comm'n 2015).

[229] *Id.* at 3.

[230] *MindGeek*, MUR 6678 at 2.

[231] *See* Hasen, *supra* note 49, at 38, 40 (citing Fed. Election Comm'n v. Nat'l Conservative Political Action Comm. (NCPAC), 470 U.S. 480 (1985)); Buckley v. Valeo, 424 U.S. 1, 25 (1976).

[232] *See* Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 669 (1990). *Citizens United* rejected other justifications for limiting expenditures, but accepted a wider array of reasons supporting disclosure and disclaimer rules. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 318, 369 (2010).

[233] L. PAIGE WHITAKER, CONG. RESEARCH SERV., R45320, CAMPAIGN FINANCE LAW: AN ANALYSIS OF KEY ISSUES, RECENT DEVELOPMENTS, AND CONSTITUTIONAL CONSIDERATIONS FOR LEGISLATION 24–25 (2018).

accepting donations tied to Serbia, Cyprus, and Russia.[234] The Labour Party leveraged those concerns in the 1997 general election by including a foreign source ban in its election manifesto.[235] When Labour won, the new government asked the Neill Committee to include the ban in its study of political party funding reforms. The PPERA, as noted above, was the end result of the Neill Committee's work.[236]

Under PPERA, contributions to political parties and registered third-party campaigners can only be accepted from "permissible donors."[237] Permissible donors include individuals registered on a U.K. electoral register, U.K.-registered political parties, U.K.-registered business organizations, and subsidiaries of foreign corporations registered and doing business in the United Kingdom.[238] British citizens living abroad are permissible donors, as are non-citizen residents legally living in the United Kingdom.[239] Political parties and registered third parties are statutorily responsible for verifying that the donations they accept are from permissible donors, and they are legally obligated to return donations that cannot be verified.[240] Additionally, only entities who are themselves permissible donors can register as third-party campaigners.[241] Because they cannot register as third-party campaigners, foreign entities also therefore cannot legally engage in regulated campaign spending exceeding the registration threshold.[242]

In recommending these rules, the Neill Committee, like the court in *Bluman*, relied on concepts of national self-governance and the democratic process.[243] British political parties, the Committee reasoned, are chosen by and responsible to British citizens, and their actions should not be influenced by outsiders with no "genuine stake" in the country.[244] Therefore, only those who live, work, or

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[234] *See* NEILL REPORT, *supra* note 2, at 235–36; *see also* Navraj Singh Ghaleigh, *Expenditure, Donations and Public Funding under the United Kingdom's* Political Parties, Elections and Referendums Act 2000*—And Beyond?*, *in* 2006 PARTY FUNDING AND CAMPAIGN FINANCING IN INTERNATIONAL PERSPECTIVE 39 (KD Ewing & Samuel Issacharoff eds., 2006).

[235] COMM. FOR PRIVILEGES, FIRST REPORT, 1998–99, HL, at app. 4(5) (UK), https://publications.parliament.uk/pa/ld199899/ldselect/ldprivi/106i/106i13.htm [https://perma.cc/8PQ2-4TTJ].

[236] *See* HOUSE OF COMMONS, THE POLITICAL PARTIES, ELECTIONS AND REFERENDUMS BILL – DONATIONS, 1999–2000, HC, at 3.

[237] Political Parties, Elections and Referendums Act 2000, c. 41, § 54 (UK), http://www.legislation.gov.uk/ukpga/2000/41/contents [https://perma.cc/MNB4-S9HC].

[238] *Id.*

[239] *See id.*

[240] *See id.* § 56. These permissible donor rules also apply to individual candidates and registered third-party campaigners. *See id.* §§ 22–24.

[241] *Id.* § 56.

[242] *Id.*

[243] *See* NEILL REPORT, *supra* note 2, at 68.

[244] *Id.* Worldwide, foreign donation bans are one of the most common campaign financing restrictions. *See Is There a Ban on Donations from Foreign Interests to Political*

do business in the United Kingdom should be "entitled to support financially the operation of the political process."[245] But the Neill Committee had to grapple with some sensitive issues in deciding how to implement this idea in the United Kingdom. It struggled with two questions in particular, both of which would become relevant years later in the Brexit campaign: how to define "foreign" in a country comprised of distinct nations with large diaspora populations and varying levels of devolved power, and how to prevent foreign corporations from channeling outside funds through subsidiaries registered in the United Kingdom.[246]

Defining "foreign" in the United Kingdom context was the Neill Committee's first challenge. If everyone who was not a U.K. citizen and resident was considered an impermissible donor, the Scottish National Party and Plaid Cymru (the Scottish and Welsh independence parties) would be disproportionately—and in their view unfairly—disadvantaged.[247] Under such a ban, their candidates would face Labour and Conservative Party opponents who could be funded by English money while being unable to raise competing funds from their own supporters abroad.[248] These parties historically had been supported financially by their expatriates, and they considered those expats to be no differently situated than English nationals who donated money to pro-union candidates standing for election in Scotland or Wales.[249] The relationship of Northern Ireland to the Republic of Ireland raised additional problems, both in terms of who would be considered "foreign" for purposes of donating to political parties in Northern Ireland, and whether those donations should be publicly disclosed in a still-volatile political environment.[250]

These concerns led the Neill Committee to recommend a nuanced approach to foreign source bans. It decided against creating general exceptions for foreign supporters of national independence parties, but partially appeased the concerns of those parties by including U.K. citizens living abroad as permissible donors.[251] The Neill Committee went further in regard to Northern Ireland, concluding that both pragmatic concerns and the 1998 Good Friday Agreement warranted allowing Irish citizens and companies doing the business in the Republic of Ireland to be treated as not foreign for purposes of donations to Northern Irish political parties.[252] The Committee also recommended that

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Parties?, INT'L IDEA, https://www.idea.int/data-tools/question-view/527 [https://perma.cc/Z44H-QXE4].

[245] NEILL REPORT, *supra* note 2, at 70.

[246] *Id.* at 64, 67–68.

[247] *Id.* at 70.

[248] *Id.*

[249] Graeme Orr, *Is My Foreign Yours? The Concept of Foreignness in the Comparative Regulation of Political Finance*, 55 J. REPRESENTATIVE DEMOCRACY 179, 193 nn.28–29 (2019).

[250] NEILL REPORT, *supra* note 2, at 48–49.

[251] *Id.* at 72.

[252] *See id.* at 76 (The Good Friday Agreement recognized the right of all people on the Irish island to identify themselves as Irish, British, or both.).

political donations in Northern Ireland be given a short-term exemption from otherwise applicable public disclosure rules.[253] These recommendations were accepted by the government and adopted in PPERA,[254] with the additional caveat that Northern Irish political parties were prohibited from making donations to parties and other regulated entities in the greater United Kingdom to avoid circumvention of the foreign source ban outside of Northern Ireland.[255]

Corporate money presented a second challenge to the Neill Committee. Unlike the United States, the United Kingdom has never had a generally applicable ban on corporate contributions or expenditures. The Committee struggled with whether or not U.K.-registered subsidiaries of foreign companies should be considered permissible donors.[256] Because such subsidiaries were presumed to be doing business in the United Kingdom, they were directly affected by U.K. law and arguably part of the U.K. political community.[257] But because they were subsidiaries of foreign corporations, they also were possible conduits of foreign money promoting foreign interests.[258] Partnerships comprised of international members and limited liability companies presented variations of the same problem.[259]

The Neill Committee adopted a compromise approach here as well, recommending that U.K.-registered subsidiaries be included as permissible donors but that they be required to demonstrate that they had sufficient U.K.-based business activity to independently fund their U.K. donations.[260] The legislation ultimately accepted the Committee's recommendation that subsidiaries of foreign corporations must be both registered and doing business in the United Kingdom to qualify as permissible donors, but did not require such entities to demonstrate that their U.K. donations could be supported by revenue generated within the country.[261]

Under PPERA, U.K. law bans foreign contributions but defines "foreignness" in ways designed to be sensitive to the history and circumstances

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[253] *See id.* at 61.

[254] THE ELECTORAL COMM'N, POLITICAL DONATIONS IN NORTHERN IRELAND, FREQUENTLY ASKED QUESTIONS 4 (2007), https://www.electoralcommission.org.uk/sites/default/files/electoral_commission_pdf_file/FAQs-NIdonations_27546-20278__N__.pdf [https://perma.cc/N4WN-SMAD].

[255] *See id.*

[256] British election law does not regulate corporate contributions differently than other contributions, but British corporate law requires such contributions to be disclosed to and authorized by shareholders. Ciara Torres-Spelliscy & Kathy Fogel, *Shareholder Authorized Corporate Political Spending in the United Kingdom*, 46 U.S.F. L. REV. 525, 526 (2011).

[257] *See* NEILL REPORT, *supra* note 2, at 68.

[258] *Id.* at 74.

[259] *Id.* at 73.

[260] *Id.*

[261] *See* 2016 EU REFERENDUM, *supra* note 5, at 101; *see also* DIGITAL CAMPAIGNING, *supra* note 83, ¶¶ 94–97.

of the United Kingdom's constitutive parts.[262] For enforcement purposes, the law puts the burden on parties, candidates, and registered third-party campaigners to verify that they only accept donations from permissible donors, and requires that they return funds whose origins cannot be ascertained.[263] It also prohibits foreign entities from registering as third-party campaigners, thereby rendering it illegal for such entities to spend above the triggering threshold on any regulated campaign activities, which includes most activity intended to influence voters during an election period.[264]

Despite this relatively nuanced approach, the issues that troubled the Neill Committee reappeared during the Brexit referendum. In fact, the largest scandal to emerge from the Brexit campaign involved fears that foreign money had been channeled to several pro-Leave campaign groups through a web of interconnected corporations.[265] The concerns centered on U.K. businessman Arron Banks and an entity he created called Leave.EU.[266] Leave.EU registered with the EC as a third-party campaigner and reported receiving millions of pounds of donations from Banks.[267] It then used these funds to finance not only its own campaign, but also to make large donations to five separately registered pro-Leave groups.[268]

When these transactions became public, concerns were raised about whether Banks, whose business ventures appeared from public records to have limited cash flow and high debt loads, had actually been the source of these funds.[269] In response, the EC opened an investigation.[270] The investigation revealed that Leave.EU had operated its campaign through a separate entity, Better for the Country Limited (BFTC), and that BFTC had received £6 million in funding to pay Leave.EU's referendum expenses and an additional £2 million to use for other referendum spending in the form of donations to other registered campaign groups.[271] BFTC reported that this entire amount—£8 million—was received from Banks in the form of donations or loans from him or his U.K.-based insurance companies.[272] BFTC was incorporated by Banks in the United

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[262] Political Parties, Elections and Referendums Act 2000, c. 41, § 54 (UK), http://www.legislation.gov.uk/ukpga/2000/41/contents [https://perma.cc/MNB4-S9HC].

[263] *Id.* §§ 54–56.

[264] *Id.* § 88.

[265] This included the use of anti-migrant images that appear to have been faked. *Revealed: How Leave.EU Faked Migrant Footage*, CHANNEL 4 NEWS (Apr. 16, 2019), https://www.channel4.com/news/revealed-how-leave-eu-faked-migrant-footage [https://perma.cc/NY67-XA4W].

[266] *Investigation into Payments*, *supra* note 5.

[267] *Id.*

[268] *Id.*

[269] *Id.*

[270] *Id.*

[271] *Id.*

[272] *Investigation into Payments*, *supra* note 5.

Kingdom in May 2015, and it was not improper or illegal for Leave.EU to run its referendum campaign through BFTC.[273]

What the EC was concerned about was the involvement of Rock Holdings Limited, another Banks entity incorporated in the Isle of Man.[274] Rock Holdings is not registered or doing business in the United Kingdom, and is not a permissible donor under U.K. law.[275] So money or loans supplied by Rock Holdings could potentially violate the U.K. foreign source ban. The EC's post-Brexit report to Parliament itemized these concerns.[276] The EC reported that it believed there were reasonable grounds to suspect that Rock Holdings was a party to the donations and loans made by Banks to BFTC and used to fund Leave.EU and, through it, other pro-Leave campaigners.[277] The report also stated that the EC had reason to believe that Banks knew this, that he intentionally used prohibited foreign sources to fund campaign activities, and that he concealed the true source of those funds in violation of U.K. law.[278] The EC referred the matter to the National Crime Agency,[279] which subsequently cleared Banks and Rock Holdings of criminal wrongdoing.[280] The EC in response has recommended additional election law changes to close what it sees as a loophole in the United Kingdom's foreign source funding ban.[281]

The Banks matter is not the only foreign funding scandal to emerge from Brexit. There also was concern during the referendum that the non-disclosure

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[273] *Id.*

[274] *Id.*

[275] *Id.* The Isle of Man is a British Overseas Territory, but is not part of the United Kingdom and does not have EU membership through its affiliation with Britain. Isle of Man entities are not permissible donors under PPERA and were not made so by the amendments regarding the Brexit referendum. THE ELECTORAL COMM'N, DONATIONS AND LOANS: GUIDANCE FOR REGULATED DONEES IN GREAT BRITAIN 26 (rev. Jan 2010), https://www.electoralcommission.org.uk/__data/assets/electoral_commission_pdf_file/0019/13708/026-regulated-donees-guidance-final.pdf [https://perma.cc/99FJ-D9KT].

[276] *Investigation into Payments*, *supra* note 5.

[277] *Id.*

[278] *Arron Banks, Better for the Country and Others Referred to the National Crime Agency for Multiple Suspected Offences*, ELECTORAL COMMISSION, https://www.electoralcommission.org.uk/i-am-a/journalist/electoral-commission-media-centre/party-and-election-finance-to-keep/arron-banks,-better-for-the-country-and-others-referred-to-the-national-crime-agency-for-multiple-suspected-offences [https://perma.cc/L86F-S3R2] (last updated Oct. 11, 2019).

[279] DCMS REPORT, *supra* note 5, at 74–75. Banks denies these allegations. *Brexit: Arron Banks Challenged over Leave.EU Funds*, BBC NEWS (Nov. 4, 2018), https://www.bbc.com/news/uk-politics-46089236 [https://perma.cc/96L3-9AHB].

[280] *Public Statement on NCA Investigation into Suspected EU Referendum Offences*, NAT'L CRIME AGENCY (Sept. 24, 2019), https://nationalcrimeagency.gov.uk/news/public-statement-on-nca-investigation-into-suspected-eu-referendum-offences [https://perma.cc/J34R-VAXB].

[281] *Statement Following the National Crime Agency's Announcement*, ELECTORAL COMMISSION (Sept. 24, 2019), https://www.electoralcommission.org.uk/statement-following-national-crime-agencys-announcement [https://perma.cc/SX8V-D34Z].

provision of PPERA in relation to contributions made to political parties in Northern Ireland was used to shield the source of funds used to purchase anti-EU advertising throughout the United Kingdom.[282] These concerns involved an entity called the Constitutional Research Counsel (CRC), an unincorporated organization based in Scotland.[283] During the Brexit referendum, the CRC gave £435,000 to the Northern Ireland Democratic Unionist Party (DUP).[284] The DUP is the dominant party in Northern Ireland's devolved parliament, and the only Northern Irish party to sit in the Westminster Parliament.[285]

The CRC's £435,000 donation to the DUP was the largest ever made in Northern Ireland.[286] But because at the time of the Brexit campaign PPERA prohibited public disclosure of political donations in Northern Ireland, the underlying funding sources of CRC itself were not publicly disclosed.[287] Disclosure reports made by the DUP to the EC showed that much of this money was used to fund anti-EU messaging throughout the United Kingdom, including a full-page newspaper ad in London and targeted Facebook ads arranged by Aggregate IQ (a Canadian data firm linked to Cambridge Analytica and also implicated in the allegedly improper use of Facebook user data).[288]

Restrictions on public disclosure of Northern Ireland political party funding have been lifted since the Brexit vote, but the EC remains prohibited by law from providing information about donations that were legally confidential at the time they were made.[289] The EC's Chief Commissioner told a Parliamentary committee that the EC had verified that the donors listed on the DUP election reports were permissible, but was prohibited by law from elaborating further.[290] This lack of public disclosure about the CRC's underlying funding has spurred continuing suspicions about the propriety of these transactions.[291]

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[282] DCMS REPORT, *supra* note 5, at 64–65.

[283] *Id.* at 64.

[284] *Id.* at 64–65.

[285] Sinn Féin, the Irish republican political party, successfully elects Westminster MPs from constituency districts in Northern Ireland, but the party's MPs abstain from taking their seats in protest over Britain's continuing claims of sovereignty over Northern Ireland. Paul Maskey, Editorial, *I'm a Sinn Féin MP. This Is Why I Won't Go to Westminster, Even over Brexit*, GUARDIAN (Mar. 6, 2018), https://www.theguardian.com/commentisfree/2018/mar/06/sinn-fein-mp-british-parliament-irish-republicans-brexit [https://perma.cc/6D5V-TT6T].

[286] DCMS REPORT, *supra* note 5, at 64–65.

[287] *See id.*

[288] *Id.* at 45–48; *see also* INFO. COMM'R'S OFFICE, *supra* note 5, at 49–50.

[289] DCMS REPORT, *supra* note 5, at 65.

[290] *Conclusion of Assessments into Allegations Regarding Certain EU Referendum Campaigners*, ELECTORAL COMMISSION (Aug. 3, 2018), https://www.electoralcommission.org.uk/i-am-a/journalist/electoral-commission-media-centre/referendums-to-keep/conclusion-of-assessments-into-allegations-regarding-certain-eu-referendum-campaigners [https://perma.cc/39Q5-52HM] [hereinafter *Assessment Conclusions*].

[291] *See id.*

The Brexit campaign revealed additional gaps in the United Kingdom's foreign source exclusion laws. As noted above, PPERA requires any third-party campaigner intending to spend over the threshold amount on regulated activities to register with the EC.[292] Impermissible donors, including foreign entities, cannot legally register and therefore cannot legally engage in spending over the threshold amount.[293] But it appears there is no provision in U.K. law preventing foreign actors from spending *under* the registration threshold. Consequently, in the Brexit referendum, foreign actors could spend up to £10,000 on election activity without running afoul of the law.[294] A similar issue exists on the donation side: foreign entities are not permissible donors, but "donations" are defined as contributions of £500 or more.[295] Since contributions under £500 are not "donations," they also are not governed by the permissible donor requirements.[296]

These gaps mean that much Brexit-related content promoted on social media by foreign actors did not violate U.K. law. While foreign-funded Facebook activity seems to have played less of a role in the Brexit referendum than in the United States presidential election, reviews conducted after the referendum indicate that Russian entities did purchase some Brexit-related advertisements, and data released by Twitter shows accounts affiliated with the St. Petersburg operation promoted Brexit tweets.[297] But as long as the cost of these communications was under the third-party campaigner registration threshold of £10,000, these expenditures would have been legally permissible.[298]

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[292] Political Parties, Elections and Referendums Act 2000, c. 41, § 88 (UK), http://www.legislation.gov.uk/ukpga/2000/41/contents [https://perma.cc/MNB4-S9HC].

[293] *See id.*

[294] 2016 EU REFERENDUM, *supra* note 5, at 99. The applicable threshold in a U.K. general election is £20,000. *Campaign Spending*, ELECTORAL COMMISSION, https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/financial-reporting/campaign-spending [https://perma.cc/Q8V7-GA33] (last updated Nov. 1, 2019); *see also* DAMIAN TAMBINI ET AL., LONDON SCH. OF ECON. & POL. SCI., MEDIA POLICY BRIEF 19: THE NEW POLITICAL CAMPAIGNING 7 (Mar. 2017), http://eprints.lse.ac.uk/71945/7/LSE%20MPP%20Policy%20Brief%2019%20-%20The%20new%20political%20campaigning_final.pdf [https://perma.cc/M5UR-8HBK]; Peter Geoghegan, *Revealed: The Dirty Secrets of the DUP's 'Dark Money' Brexit Donor*, OPENDEMOCRACY (Jan. 5, 2019), https://www.opendemocracy.net/en/dark-money-investigations/revealed-dirty-secrets-of-dup-s-dark-money-brexit-donor/ [https://perma.cc/8APP-5MKQ].

[295] OVERVIEW OF DONATIONS TO POLITICAL PARTIES, *supra* note 174, at 3.

[296] DIGITAL CAMPAIGNING, *supra* note 83, ¶ 86.

[297] Llewellyn et al., *supra* note 140, at 1148–49; *see also* DCMS REPORT, *supra* note 5, at 76.

[298] *See* DCMS REPORT, *supra* note 5, at 93; *see also* Geoghegan, *supra* note 294. More recently, anti-EU political parties in the United Kingdom have been accused of taking advantage of this gap on the contribution side, by accepting foreign sourced donations under the £500 threshold. Rajeev Syal, *Brexit Party at High Risk of Accepting Illegal Funds, Says Watchdog*, GUARDIAN (June 12, 2019), https://www.theguardian.com/politics/2019/jun/

Another problem in the U.K. regulatory scheme became apparent only after the Brexit referendum, as Parliament struggled to approve a plan operationalizing the United Kingdom's exit from the European Union. Because PPERA's third-party campaigner expenditure rules only apply during the regulated period leading up to an election and only cover communications intended to influence voters, paid advertisements placed outside that period purportedly targeting elected officials are effectively unregulated.[299] What this meant during the Brexit negotiations was that in early 2019, as the U.K. Government tried to obtain approval of its exit plan, hundreds of thousands of pounds worth of social media ads placed on Facebook and other platforms pushing for a "no-deal" exit were not covered by U.K. disclosure or disclaimer laws.[300] Transparency measures voluntarily adopted by Facebook show that a group called "Britain's Future" purchased the ads, but because the ads were placed outside of a regulated election period and purportedly targeted ministers rather than voters (by telling them to "vote no" on the deal), the British people were completely in the dark about who was funding the online campaign.[301]

The United Kingdom, like the United States, is considering various ways to address these issues. The prohibition on public disclosure of political contributions in Northern Ireland has already been lifted, and the EC has asked the Government to allow it to retroactively disclose what it knows about Brexit referendum funding in Northern Ireland.[302] The U.K. Information Commissioner, as well as the EC, has recommended that the Banks/Rock Holdings situation be addressed by adopting the Neill Committee's original proposal of requiring U.K.-based subsidiaries of foreign corporations to demonstrate that their U.K. businesses generate sufficient revenue to cover their political spending.[303] There also are proposals to improve the ability of political parties, candidates, and third-party campaigners to verify the source of the funds they receive,[304] to tighten rules regarding the flow of money between Northern Ireland and the rest of the United Kingdom, and to close the gaps created by the

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12/nigel-farage-brexit-party-at-high-risk-of-accepting-illegal-donations-watchdog [https://perma.cc/2H9N-C9TK].

[299] *See* Isobel White, *Regulation of Candidates' Campaign Expenditure: The Long and the Short of It . . .*, HOUSE COMMONS LIBR. (Jan. 14, 2015), https://commonslibrary.parliament.uk/parliament-and-elections/elections-elections/regulation-of-candidates-campaign-expenditure-the-long-and-the-short-of-it/ [https://perma.cc/3XEC-W2R3].

[300] *See* Jim Waterson, *Inquiry Launched into Data Use From No-Deal Brexit Ads on Facebook*, GUARDIAN (Apr. 4, 2019), https://www.theguardian.com/politics/2019/apr/04/inquiry-launched-into-data-use-from-no-deal-brexit-ads-on-facebook [https://perma.cc/A4BA-G7RX].

[301] Rajan, *supra* note 194.

[302] *Assessment Conclusions*, *supra* note 290.

[303] DIGITAL CAMPAIGNING, *supra* note 83, ¶¶ 93–97.

[304] *See, e.g.*, *GOV.UK Verify Overview*, GOV'T DIGITAL SERV., https://www.gov.uk/government/publications/introducing-govuk-verify/introducing-govuk-verify [https://perma.cc/6CLT-NK5W] (last updated Sept. 2, 2019); DIGITAL CAMPAIGNING, *supra* note 83, ¶¶ 98–102.

wording of the third-party campaigner registration threshold and foreign donation ban. The EC also has recommended studying whether and how the regulated period should be adjusted, to better capture the nature of today's ongoing online influence campaigns.

3. *Foreign Source Exclusion Recap*

Once again, there is much in these reform proposals warranting comparative consideration, and very little that is barred by current U.S. constitutional law. Legislators in the United States are struggling with the same question as their U.K. counterparts regarding how to define foreignness in regard to subsidiaries of foreign held corporations.[305] The Neill Committee's careful and comprehensive consideration of the underlying justifications for foreign source bans, and its nuanced application of that justification when defining the relevant political communities in Northern Ireland, Scotland, and Wales, surely will be of value to U.S. advocates as cases like *Bluman* wind their way to the Supreme Court. The Northern Ireland experience also offers a useful comparison as U.S. courts work to define the appropriate scope of the abuse and harassment exceptions to U.S. disclosure laws. Finally, the FEC, which has struggled with the broader question of how to justify a foreign source ban in referendums (when there is no candidate to "corrupt") would benefit from the rich discussion of this issue engaged in by the Neill Committee and continuing today as the United Kingdom modifies its rules for non-candidate referendums and perpetual campaigns.[306]

The United Kingdom, in turn, could learn from the extensive experience the United States has had with a regulatory system not restricted to a defined pre-election period.[307] The U.S. system has grappled for decades with the problems associated with balancing this type of ongoing regulation with the need to maintain both donor privacy and space for robust political speech.[308] Lawmakers in the United States have done this in the shadow of the Supreme Court's First Amendment jurisprudence, but the same normative challenges exist regardless of that judicial overlay.[309] The United Kingdom could benefit from this experience when contemplating whether and how to extend its own regulatory regime.

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[305] *See* DISCLOSE Act of 2017, S. 1585, 115th Cong. § 101(a)(3) (2017) (using an unwieldy definition to articulate foreignness). The FEC determined that domestic subsidiaries of foreign corporations can engage in some election-related activities but cannot do so using funds from foreign nationals. Martin, *supra* note 189. Foreign nationals also may not participate in the decision-making process regarding any such activities. *Id.*

[306] *See supra* Part IV.B.3.

[307] *See supra* Part III.A.

[308] *Id.*

[309] *Id.*

D. *Content Exclusions*

Unlike source exclusions, content exclusions restrict communications on the basis of what they say.[310] They are the most controversial type of regulation, and invariably generate accusations of censorship, particularly in the United States.[311] This also is the class in the taxonomy in which U.S. and U.K. laws are the most distinct. But it oversimplifies both U.S. and U.K. law to believe that the two systems are so different that there is no fruitful ground, even here, for comparative study. As shown below, despite its frequent insistence to the contrary, U.S. First Amendment law tolerates content-based regulation in many contexts, and recent content-based reform proposals in the United Kingdom are far less far-reaching than they can sound (to American ears) on first impression.

1. *Content Exclusions in the United States*

It is black letter law that the First Amendment requires strict scrutiny of regulations distinguishing speech on the basis of its content.[312] Little else is clear about this area, however, including the basic question of how to determine whether a law is or is not content-based.[313] There also are numerous exceptions to the strict scrutiny rule, and sometimes even content-based regulations subjected to strict scrutiny survive and are upheld as constitutional.[314]

These legal nuances take several forms. First, there are several content-based types of speech, such as perjury and fraud, that are considered categorically outside the protection of the First Amendment.[315] Regulation and even prohibitions of these categories of speech are constitutionally acceptable as long as they are viewpoint neutral.[316] Second, even constitutionally protected speech can be regulated in some situations if the regulation advances a substantial interest unrelated to the suppression of speech, such as prohibiting the use of profanity in governmental buildings or prohibiting harassment in public workplaces.[317] Third, speech can be regulated on the basis of its content if it presents a clear, serious, and imminent danger to people or property—the classic example of which is falsely crying "fire" in a crowded theater.[318]

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[310] Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226–27 (2015).

[311] *Id.* at 2226 ("Content-based laws—those that target speech based on its communicative content—are presumptively un-constitutional . . . .").

[312] *Id.*

[313] *See, e.g.*, *id.* at 2227 ("Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.").

[314] *See* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 444 n.86 (1996).

[315] R.A.V. v. City of St. Paul, 505 U.S. 377, 382–84 (1992).

[316] *See id.*

[317] *See* United States v. O'Brien, 391 U.S. 367, 382 (1968).

[318] Schenck v. United States, 249 U.S. 47, 52 (1919).

Additionally, in exceptional cases, even viewpoint-based regulations can survive strict scrutiny review and be upheld as constitutional, as long as the regulation is sufficiently narrowly drawn to advance a compelling interest, such as criminalizing "true threats" against the life of the President.[319]

Each of these doctrines is complex and contested; the important point for current purposes is to illustrate that despite its frequently absolutist rhetoric, U.S. constitutional law permits content-based restrictions for a variety of reasons under a variety of doctrines. These doctrines have been applied even in the realm of political communications.[320] The clearest example of this is the long-standing acceptance of state laws banning campaigning in or near polling stations.[321] All fifty U.S. states have such laws, many of which have been in place for more than 100 years.[322] Although its reasoning has varied, the Supreme Court has consistently upheld these laws as long as they are reasonable, viewpoint neutral, and not overly broad.[323]

Efforts to regulate campaign speech on the basis that it is misleading or untruthful have had more mixed success. The Supreme Court's most recent decision in this area, *United States v. Alvarez*, involved the Stolen Valor Act, a federal statute that penalized falsely claiming to hold certain types of military honors.[324] In a split decision, a plurality of justices struck down the law.[325] In doing so, they refused to accept the government's argument that false speech, like perjury and other existing content-based exclusions, is categorically unprotected by the First Amendment.[326] The plurality also refused to apply a reduced standard of review just because the speech being regulated was verifiably false.[327] Instead, the plurality held that laws punishing false statements will be subject to strict scrutiny unless there is an additional "legally cognizable harm" associated with the false statement justifying less rigorous review.[328] The plurality opinion gave several examples of laws that fulfill this criteria, including perjury laws (which protect the integrity of the courts), laws prohibiting misrepresenting yourself as a representative of the government (which protect the integrity of governmental processes), and anti-fraud laws (which protect against consumer and financial harms).[329]

Alvarez is a mixed bag for content-based election law reform proposals. The plurality was plainly skeptical of applying anything less than strict judicial

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319 Watts v. United States, 394 U.S. 705, 707–08 (1969).
320 Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1883 (2018).
321 *See id.*
322 *Id.*
323 *Compare id.*, *with* Burson v. Freeman, 504 U.S. 191, 197–98 (1992).
324 United States v. Alvarez, 567 U.S. 709, 713 (2012).
325 *Id.* at 730.
326 *Id.* at 719–20.
327 *Id.* at 716.
328 *Id.* at 719.
329 *Id.* at 720.

scrutiny to new types of content-based regulations of speech.[330] The Justices—including the dissenting Justices—expressed particular concern that content-based rules in the political realm risk chilling protected political speech.[331] Nonetheless, the plurality's recognition that preventing fraud, misrepresentation, and the integrity of governmental processes are cognizable harms justifying less rigorous judicial scrutiny may leave open a path for a carefully crafted false statement rule even in the electoral realm.[332]

An earlier Supreme Court case, *Brown v. Hartlage*, shows one possible approach.[333] In *Hartlage*, the Court considered a Kentucky law that punished a candidate (Brown) for promising to take a smaller salary than entitled to if elected.[334] Brown apparently made the statement without realizing that state law prohibited him from taking a salary reduction.[335] Brown won the election, and the losing candidate claimed Brown's statement violated the state Corrupt Practices Act, which among other things penalized candidates for state office from making false or misleading statements.[336] The state courts sided with Brown's opponent, and nullified the election.[337] Brown appealed to the U.S. Supreme Court, arguing that applying the Corrupt Practices Act to his situation violated the First Amendment.[338] The Supreme Court agreed with Kentucky that protecting the integrity of elections was a compelling interest and that "demonstrable falsehoods," even in the context of political campaigns, do not have the same protection as truthful statements.[339] Nonetheless, the Court invalidated the application of the law to Brown's statement because there had been no showing that it had been made in bad faith, with knowledge that it was false, or with "reckless disregard" of its truth.[340]

This language borrows heavily from U.S. defamation law. Defamation law has had a constitutional component in the United States since 1965 when the Supreme Court held in *New York Times v. Sullivan* that defamation law could not be used to punish minor, unintentional untruths about public officials.[341] Instead, the *Sullivan* Court said, the First Amendment protects even defamatory statements about public officials as long as the statements are not made with "actual malice."[342] As echoed by the Court in *Hartlage*,[343] "actual malice" is

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330 *See Alvarez*, 567 U.S. at 719–20.
331 *Id.* at 750–51 (Alito, J., dissenting).
332 *Id.* at 720.
333 Brown v. Hartlage, 456 U.S. 45, 46–47 (1982).
334 *Id.*
335 *Id.* at 48.
336 *Id.* at 49. The argument was that the statement was misleading because the salary was set by law and the winning candidate could not change it. *Id.* at 50.
337 *Id.* at 50–51.
338 *Id.* at 52.
339 *Brown*, 456 U.S. at 52, 60.
340 *Id.* at 61–62.
341 N.Y. Times v. Sullivan, 376 U.S. 254, 279–80 (1964).
342 *Id.* at 279–80.
343 *See Brown*, 456 U.S. at 61.

defined as making false statements of material fact with either actual knowledge or reckless disregard of the statement's truth or falsity.[344] Speakers are thereby constitutionally protected from liability for unintentional or even negligent errors, minor untruths, and non-factual statements such as satire, opinion, and hyperbole.[345] This doctrine does not protect intentional lies.[346] Indeed, it does just the opposite: an intentional lie about a verifiable material fact is precisely what can be punished under *Sullivan*.[347]

States have relied on this distinction when defending state laws regulating untrue statements in election campaigns. The federal appellate courts, however, appear—at least at first blush—to be unconvinced. The Eighth[348] and Sixth[349] Circuit courts of appeals have struck down prosecutions under false speech laws in Minnesota and Ohio, respectively. In each case, state courts had interpreted the state statutes as applying only to speech meeting the *Sullivan* standard, but the federal courts nonetheless held that the First Amendment barred the state prosecution.[350]

But these decisions are less determinative than they appear, for two reasons. First, in each case, the underlying statement involved was not obviously verifiable as true or false. In Ohio, the underlying statement accused a member of Congress of voting for "taxpayer-funded abortion" by supporting the Affordable Care Act—a complex statute that expanded reproductive health care generally but did not specifically appropriate federal funds for abortion care.[351] The Minnesota case was more complicated, but the court seemed skeptical that the underlying statements giving rise to the complaint had been demonstrably false.[352] Neither case, therefore, presented a crisp opportunity for a court to evaluate the core question of whether a narrowly drawn statute applied only to false statements of verifiable fact would pass First Amendment scrutiny.

Second, even while striking down the statutes in front of them the courts in both cases *affirmed* that states are not powerless to regulate all false or

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[344] *Sullivan*, 376 U.S. at 280. The doctrine was later extended to public figures, including limited purpose "public figures." Gertz v. Robert Welch, Inc., 418 U.S. 323, 335–36 (1974); Rosenblatt v. Baer, 383 U.S. 75, 85 (1966).

[345] *See Sullivan*, 376 U.S. at 279–80.

[346] *See id.* at 283.

[347] *Id.*

[348] 281 Care Comm. v. Arneson, 638 F.3d 621, 636 (8th Cir. 2011).

[349] Susan B. Anthony List v. Driehaus, 814 F.3d 466, 476 (6th Cir. 2016).

[350] *See id.* at 472–76; *281 Care Comm.*, 638 F.3d at 636. In the United States, a state supreme court has authority to determine the meaning of a state law, but federal courts determine whether the statute so interpreted violates federal statutory or constitutional law. *See, e.g.*, N.Y. Times v. Sullivan, 376 U.S. 254, 264–66 (1964) (finding Alabama defamation law unconstitutional); s*ee also State Courts vs. Federal Courts*, JUDICIAL LEARNING CTR., https://judiciallearningcenter.org/state-courts-vs-federal-courts/ [https://perma.cc/4GPG-NQUG].

[351] *Susan B. Anthony List*, 814 F.3d at 470.

[352] The Eighth Circuit opinion put the word "false" in quotations when discussing the statements underlying the earlier proceeding. *See 281 Care Comm.*, 638 F.3d at 626.

misleading statements in the political realm. The Eighth Circuit unequivocally rejected any such interpretation of its decision, stating "[w]e do not, of course, hold today that a state may never regulate false speech in this context."[353] The Sixth Circuit likewise emphasized that the plaintiff was not asserting (and it was not affirming) a constitutional "right to lie" in election campaigns.[354] Instead, both courts held only that false campaign statements are not categorically unprotected by the First Amendment—a relatively unremarkable holding, echoed by the Supreme Court in *Alvarez*.[355] Additionally, both courts readily acknowledged that preserving the integrity of democratic elections is a compelling governmental interest, even though the states had failed to sufficiently narrow the reach of the statutes in the cases presented.[356]

These cases leave open the possibility that a carefully drawn and applied regulation of false or misleading campaign speech could be upheld, even if subjected to heighted review. Which is not to say it would be: laws restricting political speech rarely survive judicial review in the United States, and a deep skepticism of any governmental process adjudicating the truth or falsity of political statements undergirds all of these opinions. But a carefully crafted law advancing a well-defined interest in protecting the integrity of elections could address some of the worst abuses in the U.S. system.

There are examples of what such a law might look like. In striking down the Ohio law, the Sixth Circuit provided a detailed critique of why the Ohio statute was overly broad, and what a more narrowly tailored statute would look like.[357] Election law scholar Richard Hasen has argued that a statute regulating only intentionally false statements involving easily verifiable factual statements (such as intentionally misstating the date of the election) could be sufficiently narrowly tailored to advance the compelling interest in protecting the right to vote.[358] Targeting actual "fake news"—completely made up stories designed for commercial rather than political purposes—is another possible approach, as is

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[353] *Id.* at 636.

[354] *See Susan B. Anthony List*, 814 F.3d at 473.

[355] *Id.* at 473; *see 281 Care Comm.*, 638 F.3d at 636; United States v. Alvarez, 567 U.S. 709, 722 (2012).

[356] *281 Care Comm.*, 638 F.3d at 636; *Susan B. Anthony List*, 814 F.3d at 473–74. The Sixth Circuit in particular emphasized the importance of "protecting 'voters from confusion and undue influence,' and 'ensuring that an individual's right to vote is not undermined by fraud.'" *Id.* at 473 (quoting Burson v. Freeman, 504 U.S 191, 199 (1992)).

[357] *Susan B. Anthony List*, 814 F.3d at 474. Specifically, the court found the Ohio law was insufficiently narrowly tailored in four ways: (1) it could take up to six months to resolve a complaint, which undercut arguments that the law protected election integrity; (2) anyone could initiate a complaint, and there was no screening for frivolous complaints, meaning the process could be weaponized by competing campaigns; (3) the law applied to non-material statements; (4) the law applied to "commercial intermediaries" such as billboard companies who were messengers rather than speakers. *Id.* at 474–76.

[358] Richard L. Hasen, *A Constitutional Right to Lie in Campaigns and Elections?*, 74 MONT. L. REV. 53, 57 (2013); *see also* William P. Marshall, *False Campaign Speech and the First Amendment*, 153 U. PA. L. REV. 285, 287 (2004).

limiting a false statement law to micro-targeted online advertising not seen beyond its target audience and therefore less amenable to more narrowly tailored counter-speech remedies.[359] Designing and enacting any such rule would be challenging, but nothing in current U.S. law takes it completely off the constitutional table.

2. *Content Exclusions in the United Kingdom*

Content-based exclusions do not face the same judicial scrutiny in the United Kingdom as in the United States, but even in the United Kingdom such laws do face some judicial skepticism. Courts in the United Kingdom have imposed reasonableness and proportionality restraints on speech regulations enforcing primary legislation, and Article 10 of the European Convention on Human Rights creates a judicially protected freedom of expression right applicable in the United Kingdom through the Human Rights Act 1998.[360] More generally, U.K. courts, like their U.S. counterparts, recognize the special importance in a democracy of free and robust discussion of political issues, and are sensitive to that when evaluating content-based regulations of political speech.[361]

Nonetheless, it is plainly true that U.K. lawmakers have more leeway to regulate false or misleading campaign speech than do their U.S. counterparts. The RPA prohibits the use of fraud or "undue influence" in political campaigns, and U.K. courts have permitted prosecution under those provisions for things like distributing an election flyer falsely claiming to have been created by a rival party, and making false statements that a candidate has withdrawn from an election.[362] But the most extensive judicial treatment of content-based restrictions on political speech in the United Kingdom has come under

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[359] *See Susan B. Anthony List*, 814 F.3d at 474 (holding that laws may not "pass constitutional muster because they are not narrowly tailored in their (1) timing, (2) lack of a screening process for frivolous complaints, (3) application to non-material statements, (4) application to commercial intermediaries, and (5) over-inclusiveness and under-inclusiveness").

[360] Human Rights Act 1998, c. 42, § 1.3, sch. 1 (UK), http://www.legislation.gov.uk/ukpga/1998/42/contents [https://perma.cc/Q33Z-NQ5R]. Under the HRA, a declaration of incompatibility does not invalidate primary legislation, nor does such a declaration affect the parties' obligation to comply with it. *Id.* § 4. Instead, it triggers a review process through which the Government may amend the legislation. *Id.* The declaration itself entails no legal obligation on the Government or Parliament to make any such amendments. *Id.*

[361] *See* Campbell v. MGN Ltd [2004] UKHL 22, [2004] 2 AC 457 [148] (opinion of Baroness Hale); Reynolds v. Times Newspapers Ltd [2001] 2 AC 127 (HL) 200 (appeal taken from Eng.) (UK); Heesom v. Public Services Ombudsman for Wales [2014] EWHC (Admin) 1504 [34] (Wales); *see also* Sunday Times v. United Kingdom, 2 Eur. Ct. H.R. 245, 33 (1979).

[362] *See generally* PROTECTING THE DEBATE, *supra* note 5 (recommending sanctions for the electoral offence of intimidation); *see also* R v. Rowe *ex parte* Mainwaring [1992] 1 WLR 1059, 1059 n.1.

Section 106 of the RPA.[363] Section 106 prohibits any person from attempting to influence an election by making or publishing "false statement[s] of fact" in relation to a candidate's "personal" character.[364] Candidates who violate this provision are subject to civil fines and can be barred from standing for elective office.[365] Courts also have the authority to set aside elections tainted by violations of the statute.[366]

Prosecutions under Section 106 have been few, but they have been sustained by U.K. courts.[367] The decision in *Watkins v. Woolas* is illustrative.[368] In *Woolas*, the Parliamentary Election Court considered whether to set aside an election result on the grounds that the winning candidate violated Section 106.[369] The underlying allegation involved three statements made by the winning candidate (Woolas) about his opponent (Watkins): that Watkins had failed to condemn the actions of violent Muslim extremists, had actively solicited the support of such extremists, and had reneged on a promise to live in the constituency district in which he was standing.[370]

The court determined that all three statements, in context, were intentionally false statements of fact.[371] It further found that Woolas had no reasonable grounds for believing they were true and that he did not in fact believe them to be so.[372] The court then found the first two statements were made with intentional dishonesty.[373] Finally, the court held that the first two statements were about Watkins's personal character (which are covered by Section 106), rather than his political behavior or opinions (which are not).[374] The court

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[363] Representation of the People Act 1983, c. 2, § 106(1) (UK), http://www.legislation.gov.uk/ukpga/1983/2/data.pdf [https://perma.cc/MD3J-RXSE].

[364] *Id.*

[365] Jacob Rowbottom, *Lies, Manipulation and Elections—Controlling False Campaign Statements*, 32 OXFORD J. LEGAL STUD. 507, 508 (2012).

[366] Representation of the People Act § 159(1) (UK), http://www.legislation.gov.uk/ukpga/1983/2/data.pdf [https://perma.cc/MD3J-RXSE].

[367] Rowbottom, *supra* note 365, at 509 n.10.

[368] *See* Watkins v. Woolas [2010] EWHC (QB) [208].

[369] *Id.* at [1]–[6]. *Woolas* was heard by the U.K. Parliamentary Election Court, a court constituted under U.K. law for the purpose of hearing certain election disputes. Woolas v. Parliamentary Election Court, [2010] EWHC (Admin) 3169, [2011] 2 WLR 1362, 1363–64 (Eng.). Decisions of the court are appealable only as to errors of law. *Id.*

[370] Watkins v. Woolas [2010] EWHC (QB) 2702 [19]–[23].

[371] *Id.* at [207]. The statements were made in leaflets and said that "extremist Muslim activists" had targeted Woolas with violence. *Id.* at [64]. They included photographs of Watkins next to photographs of demonstrators holding placards calling for the beheading of people who insult Islam. *Id.* A second leaflet stated that "one extremist website" had created a competition for the most "imaginative ways to kill [Phil Woolas]" and that Watkins had not condemned the website or the group that created it. *Id.* at [96]–[97].

[372] *Id.* at [207].

[373] *Id.* at [195], [203].

[374] *Id.* at [82], [94]–[95].

therefore determined that the first two statements had violated Section 106 and that the election should be set aside.[375]

Woolas appealed, arguing that applying Section 106 to his statements violated the freedom of expression protected by Article 10 of the European Convention on Human Rights.[376] The U.K. appellate court disagreed.[377] Citing an earlier case (*Bowman v. United Kingdom*[378]), the court agreed with Woolas that free elections and freedom of expression are the "bedrock" of democracy, and that Article 10 required judges to carefully review laws restricting a candidate's speech during an election period.[379] But, the court went on, free and fair elections also require protecting the right of the electorate to make its choices based on the candidates' competing positions and policy arguments, not on false statements about a candidate's personal character.[380] Section 106, with its limited focus on exactly that, was therefore a proportionate limitation on the freedom of expression protected by Article 10.[381]

The U.K. courts' more permissive approach to content-based regulations of political speech has been tested elsewhere as well. *R (ProLife Alliance) v. British Broadcasting Corporation* involved the BBC's refusal to show a broadcast submitted by the Pro Life Alliance, a U.K. political party.[382] As a political party registered under PPERA, the ProLife Alliance was entitled to make a broadcast on the BBC during the election period.[383] But the ad it submitted included what the court described as "prolonged and graphic images of . . . mangled and mutilated" aborted fetuses.[384] The BBC refused to broadcast the ad, citing its statutory power and duty to maintain standards of taste, decency, and non-offensiveness in its programing.[385]

The ProLife Alliance sued, arguing that the BBC's refusal to broadcast the ad because of its content violated Article 10.[386] The case reached the U.K. Supreme Court, which upheld the BBC's decision.[387] Lord Nicholls' lead opinion acknowledged that Article 10 required that the content-based restrictions imposed by the BBC be justified, particularly when used to censor

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[375] *Id.* at [207]–[208].

[376] Woolas v. Parliamentary Election Court [2010] EWHC (Admin) 3169, [2011] 2 WLR 1362, 1362 (Eng.).

[377] *Id.* at 1363–64.

[378] Bowman v. United Kingdom, 26 Eur. Ct. H.R. 1 (1998).

[379] *Woolas* [2010] EWHC 3169 [89].

[380] *Id.* at 1391.

[381] *Id.* at [91].

[382] R (ProLife Alliance) v. British Broadcasting Corporation [2003] UKHL 23, [2], [2004] 1 AC 185 (appeal taken from Eng.).

[383] *Id.* at [4]–[9].

[384] *Id.* at [3].

[385] Broadcasting Act 1996, c. 55, § 108(1) (UK), http://www.legislation.gov.uk/ukpga/1996/55/contents [https://perma.cc/9TG8-FJSW]; *ProLife Alliance* [2003] UKHL 23, [2].

[386] *ProLife Alliance* [2003] UKHL 23, [2].

[387] *Id.*

the broadcast of a political party during an election campaign.[388] But, Lord Nicholls went on, nothing in U.K. law or Article 10 jurisprudence entitled political parties to an exemption from a generally applicable prohibition on the broadcast of offensive material.[389] A concurring opinion by Lord Hoffman elaborated on this point, noting that the primary right protected by Article 10 in the context of a generally applicable prohibition is a right to not be denied access to the airways on "discriminatory, arbitrary or unreasonable" grounds.[390] Because the BBC's decision was based in preexisting and non-discriminatory standards, it was lawful under the ECHR's Article 10 jurisprudence.[391]

The upshot of these cases is that while U.K. courts, like their U.S. counterparts, recognize the importance in a democracy of robust discussion of political issues, and consequently engage in more searching review of content-based restrictions involving political speech,[392] they also are more accepting of restrictions designed to protect democratic discourse from false, misleading, or offensive campaigning.

Reform proposals in the United Kingdom calling for content-based prohibitions on false or harmful election communications draw on this leniency. Many of these proposals came together in an April 2019 report, the "Online Harms White Paper," presented to Parliament by the Home Department working in conjunction with the Digital, Culture, Media & Sport Committee.[393] The report identifies four kinds of online harms: online harassment and bullying, terroristic propaganda and recruitment, political disinformation, and gang and criminal glorification.[394] The core proposal in the report is that Parliament should impose a statutory duty of care on large social media and digital data companies requiring them to adopt risk-based and proportionate policies addressing the most egregious online harms immediately, while gradually developing better practices in regard to lesser harms.[395] The law would not require companies to engage in any particular specified acts.[396] Instead, the legal obligation imposed would require companies to create, follow, and enforce

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[388] *Id.* at [6]–[8].

[389] *Id.* at [10].

[390] *Id.* at [62].

[391] *Id.* at 185. In a dissenting speech, Lord Scott disagreed. *Id.* at [83]–[99]. Lord Scott would have required the BBC directors to conduct a proportionality review before rejecting the broadcast, and argued that the interest of preserving public decency and avoiding offense was insufficient to justify restricting the speech of a political party and therefore incompatible with Article 10. *Id.*

[392] *See* Campbell v. MGN Ltd [2004] UKHL 22, [2004] 2 AC 457 [148] (appeal taken from Eng.).

[393] HM GOV'T, ONLINE HARMS WHITE PAPER (Apr. 2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/793360/Online_Harms_White_Paper.pdf [https://perma.cc/FQ5X-UMSD].

[394] *Id.* at 5.

[395] *Id.* at 7–8.

[396] *See id.* at 7.

practices sufficient to meet the statutory duty of care.[397] An independent regulator would oversee compliance, generate public reports regarding company practices, and impose fines and liability on non-compliant companies.[398]

Despite its rather ambitious scope, many of the recommendations in the report are relatively benign.[399] In several areas, the report's most important contribution is to highlight existing regulatory gaps allowing activity to go unpunished online even when it would be regulated or prohibited under current law if occurring offline.[400] For example, as discussed above, the RPA already prohibits fraud and undue influence in elections, and penalizes candidates for making false statements of fact about the character of their opponents.[401] Campaign statements in the United Kingdom also are subject to criminal and civil laws restricting copyright, libel, contempt and obscenity, and similar existing prohibitions against the incitement of racial or religious hatred.[402] Yet as the "Online Harms" report highlights, these generally applicable rules are rarely enforced online. Several of the suggestions in the report aim merely to close that gap.

In regard to digital disinformation, the report goes further and suggests that the rapid spread of online disinformation designed to mislead voters or undermine democratic processes may call for new regulatory controls.[403] It grounds this observation in the "unprecedented effectiveness" of online actors to use false information online to manipulate public opinion through automation, anonymity, and fraud.[404] Even here, though, the report notes that a precedent already exists in British law for regulating covert efforts to manipulate public opinion, and proposes that those same principles guide any new approach to online regulation.[405]

The "Online Harms" report concludes by making several relatively modest recommendations about how social media companies could meet any statutory duty of care imposed by future legislation.[406] It suggests they adopt terms of service prohibiting users from misrepresenting their identity on social media for the purpose of disseminating or amplifying disinformation, use automated AI techniques to find and remove fake news items, develop systems to evaluate the trustworthiness of content providers, make more reliable content more visible to users, and require users to be notified when they are interacting with

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397 *Id.*

398 *Id.* at 59.

399 *See* HM GOV'T, *supra* note 393, at 5–10.

400 *See id.*

401 Representation of the People Act 1983 c. 2, § 106 (UK), http://www.legislation.gov.uk/ukpga/1983/2/contents [https://perma.cc/MD3J-RXSE].

402 *See id.*

403 HM GOV'T, *supra* note 393, at 24.

404 *Id.*

405 *Id.* The report points to the obligation of television regulators under the Broadcasting Act 1990 to ensure broadcasts do not include subliminal messages designed to influence individuals without them being aware. *Id.*

406 *Id.* at 70–71.

automated accounts or looking at paid content.[407] None of these suggestions are legally extraordinary, and all deserve at least some comparative consideration.

3. *Content Exclusions Recap*

The law regulating content-based exclusions is meaningfully different in the United States and United Kingdom, and these differences are highly relevant to the reform proposals under consideration in each country. Regulators in the United Kingdom have much more flexibility than their U.S. counterparts in devising content-based strategies to deal with online electioneering and foreign interference. But this does not mean that there is no value in comparative study, even here. Courts in the United States have done a great deal of thinking about the value and risks of content-based regulation of political speech, and U.K. regulators would surely benefit from careful consideration of this jurisprudence. The U.S. experience here is extensive, and valuable even to those who disagree with the ultimate conclusions reached.

At least some recommendations in the "Online Harms" report also should have value to U.S. reformers, especially those that resonate within U.S. consumer protection, fraud, and defamation law. Paying attention to how these suggestions are operationalized in the United Kingdom may stimulate new thinking about how they could be implemented within existing U.S. law. Even recommendations unlikely to be constitutional in the United States if imposed on social media companies by law may nonetheless provide case studies for social media companies looking for ways to better manage their online space. Facebook, for example, already is experimenting with providing information about the reliability of content providers,[408] and Twitter has taken some steps toward eliminating imposter accounts and bot-nets.[409] Thus, while the legal environment around content-based regulations is very different in the United States and United Kingdom, the two countries nonetheless have things to learn from each even here.

V. CONCLUSION

The 2016 elections in the United States and United Kingdom revealed how challenging it is in both nations to effectively regulate online and foreign election interference under current law. Despite the urgent need to remedy this, widespread assumptions about America's "First Amendment Exceptionalism"

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[407] *Id.*

[408] Jessica Guynn, *Facebook Is Judging How Trustworthy You Are: What You Need to Know*, USA TODAY (Aug. 21, 2018), https://www.usatoday.com/story/tech/news /2018/08/21/facebook-trust-reputation-score/1052839002/ [https://perma.cc/SK2T-XFBE].

[409] Alyssa Newcomb, *Twitter Is Purging Millions of Fake Accounts—and Investors Are Spooked*, NBC NEWS (July 9, 2018), https://www.nbcnews.com/tech/tech-news/twitter-purging-millions-fake-accounts-investors-are-spooked-n889941 [https://perma.cc/R3ZC-WGUY].

have left regulators, lawmakers, and reform advocates in both countries relatively uninterested in each other's efforts. This Article hopes to change that. Evaluating the reform proposals being considered in each nation through a common taxonomy enables us to see more clearly where differences between the legal systems of the two nations do and do not pose system-specific challenges to different types of reform proposals, and to direct future comparative efforts accordingly.

As the above analysis shows, there are several areas where further comparative study would be valuable. In regard to public education, few legal barriers hinder reforms in either country, and advocates in the United States and United Kingdom should freely share and learn from each other's efforts. In regard to increased transparency, the United States can learn from the United Kingdom's experience with lower disclosure thresholds for individual donors and its wider experience with pay-to-produce rather than pay-to-place thresholds for transparency rules. The United States also could benefit from Scotland's experience in actually implementing a comprehensive online imprint requirement. The United Kingdom, in turn, can learn from the decades of experience the United States has in trying to fairly and effectively distinguish regulated campaigning from unregulated political speech. The United Kingdom also may benefit from studying the successes and failures of the more detailed and ongoing reporting requirements common in the U.S. system.

Similar opportunities for constructive comparison exist in regard to foreign source and content exclusions. Both nations are struggling with the definition of "foreign" when defining a political community. There will be much to be learned here as each country continues exploring the parameters of and justifications for their respective foreign source bans. The United States also could learn from the United Kingdom's longer history of regulating corporate campaign spending, including the spending of domestic subsidiaries of foreign-held entities. Even in regard to content exclusions, where the basic law of the two nations is the most different, there are areas where comparative study would be valuable. Courts in the United Kingdom have done quite a bit of thinking about how false statements of verifiable facts interfere with the right of voters to make informed decisions based on accurate information. The United States could learn from this when considering whether and how to craft narrow laws penalizing egregious misrepresentation and fraud in the electoral realm. The United Kingdom, in turn, may benefit from the extensive judicial and scholarly literature in the United States documenting the risks of being too eager to adopt broad prohibitions in this area.

The United States and the United Kingdom share a long tradition of insightful comparative scholarship. While there are real and meaningful differences between the legal regulation of campaign communications in the United States and the United Kingdom, those differences present few barriers to many of the most significant types of reform proposals being considered in each country, so that tradition can and should continue through additional comparative work in this critical area.