

votes on ballot initiatives are commonly understood to be elections, and often occur in concert with candidate elections.

In a recent case affirmed by the Supreme Court, the District Court of the District of Columbia stated that “[i]t is fundamental to the definition of our national political community that foreign citizens do not have a constitutional right to participate in, and thus may be excluded from, activities of democratic self-government.”⁵ The Supreme Court has long held that foreign nationals may be excluded from activities that are part of democratic self-government in the United States.⁶ In fact, the Court has upheld state laws barring foreign citizens from working as police or probation officers, or even as public school teachers.⁷ As the *Bluman* court stressed, “distinguishing citizens from non-citizens... is part of a common international understanding of the meaning of sovereignty and shared concern about foreign influence over elections.”⁸

The initiative process is even more “intimately related” to democratic self-government than candidate elections—and far more so than public employment.⁹ In many states and localities, including Los Angeles, where this matter arose, ballot initiatives allow the voters to directly enact legislation, in effect, serving as “legislators for the day.” In some states, ballot initiatives can even amend state constitutions.¹⁰

Moreover, voting on ballot initiatives is particularly vulnerable to foreign national spending. To a greater degree than in candidate elections, voters must possess a lot of information in order to make an informed decision on a ballot initiative; helpful cues like party identification are generally unavailable. States like California often have multiple initiatives on the same ballot—thus, “[e]ven civically engaged voters are not well informed about every ballot question; their level of knowledge declines as they move from salient initiatives to more obscure ones.”¹¹ Scholars have expressed concern that, in this context, “voters who rely on voting cues provided by campaign communications, such as slate mailers, are susceptible to manipulation by savvy political consultants hired by moneyed interests.”¹²

⁵ *Bluman v. FEC*, 800 F. Supp. 2d 281 (D.D.C. 2011), *aff'd*, 132 S. Ct. 1087 (2012) (Mem.).

⁶ *See id.* at 287-89; *Bernal v. Fainter*, 467 U.S. 216, 220 (1984).

⁷ *Foley v. Connelie*, 435 U.S. 291 (1978) (upholding a law prohibiting foreign nationals from serving as police officers); *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982) (upholding a law prohibiting foreign nationals from working as probation officers); *Ambach v. Norwick*, 441 U.S. 68 (1979) (upholding a law prohibiting foreign nationals from teaching in public schools unless they intend to apply for citizenship).

⁸ *Bluman*, 800 F. Supp. 2d at 292.

⁹ *Bernal v. Fainter*, 467 U.S. 216, 220 (1984) (holding that the government may exclude foreign nationals from serving functions that are “intimately related to the process of self-government.”).

¹⁰ *See, e.g.*, BRUCE CAIN, DEMOCRACY MORE OR LESS: AMERICA’S POLITICAL REFORM QUANDRY 85-87 (2015) (describing different types of ballot initiative processes).

¹¹ Elizabeth Garrett & Daniel A. Smith, *Veiled Political Actors and Campaign Disclosure Laws in Direct Democracy*, 4 ELECTION L.J. 295, 296 (2005); *See also* Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and “Disclosure Plus,”* 50 UCLA L. REV. 1141, 1143 (2003) (“Voters do not know basic facts about ballot measures, seem confused about the issues, and appear unduly influenced by superficial advertising.”).

¹² Craig M. Burnett, Elizabeth Garrett & Mathew D. McCubbins, *The Dilemma of Direct Democracy*, 9 ELECTION L.J. 305, 306 (2010) (*citing* Shanto Iyengar, Daniel H. Lowenstein & Seth Masket, *The Stealth Campaign: Experimental Studies of Slate Mail in California*, 17 J. L. & POL. 295 (2001)).

For these reasons, the Commission should have voted to find that the ban on foreign national contributions applies to spending on local ballot initiatives. This would be the result that best accords with the expectation of our citizens, who do not want to see money from foreign sources interfering with fundamentally *local* decisions. “[T]he right to govern is reserved to citizens,”¹³ and that should be as true with regard to ballot initiatives as it is in all other elections.

4/22/15
Date


Ann M. Ravel
Chair

¹³ *Foley v. Connelie*, 435 U.S. 291, 297 (1978).